JUDGMENT
Number 29/PUU-XIV/2016
FOR THE SAKE OF JUSTICE BASED ON THE ONE AND ONLY GOD
THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Adjudicating the constitutional case at the first and final instance, handed its decision in the case of Review on the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia against the Constitution of the Republic of Indonesia of 1945, petitioned by:

1. Name : **Irwansyah Siregar**
   Occupation : Entrepreneur
   Citizenship : Indonesia
   Address : Jalan Rinjani I, RT/RW 009/003, Jembatan Kecil, Singaran Pati, Bengkulu

   Being **the Petitioner** I;

2. Name : **Dein Nuryadi**
   Occupation : Entrepreneur
   Citizenship : Indonesia
   Address : Jalan Kinibalu, RT/RW 001/001, Padang Jati, Ratu Samban, Bengkulu

   Being **the Petitioner** II;

In this matter based on a Special Power of Attorney dated 29 February 2016, have granted a power to Sunggul Hamonangan Sirait, S.H, M.H., Ignatius Supriyadi, S.H., and Hertanto, S.H, Advocates with the office of SHS Law Office, having its domicile in Apartemen Kalibata City S/05/CF, Jalan Kalibata Raya, Number 1, Village (*Kelurahan/Desa*) Rawajati, Sub-regency (*Kecamatan*) Pancoran, Jakarta 12750, in this matter either jointly or severally acting for and on behalf of the authorizers;
Hereinafter referred to as **the Petitioners;**

[1.2] Reading the petition of the Petitioners;
Hearing the testimony of the Petitioners;
Hearing and reading the testimony of the President;
Reading the testimony of the People's Representative Council (*Dewan Perwakilan Rakyat*);
Hearing and reading the expert testimony of the Petitioners and the President;
Examining the evidences of the Petitioners;
Reading the conclusion of the Petitioners;

2. STATE OF THE CASE

[2.1] Considering whereas the Petitioners have filed a petition by the petition dated 3 March 2015 received at the Office of the Clerk of the Constitutional Court (hereinafter referred to as the Office of the Clerk of the Court) on the date 3 March 2016 based on the Deed of Receipt of Dossier of the

Case Number 34/PAN.MK/2016 and registered in the Book of Registry of Constitutional Cases on the date 21 March 2016 under the Number 29/PUU-XIV/2016, which has been corrected and received at the Office of the Clerk of the Court on the date 8 April 2016, describing the following matters:

I. THE CONSTITUTIONAL COURT IS AUTHORIZED TO EXAMINE, ADJUDICATE AND TO DECIDE ON THIS PETITION

1. Whereas the Petitioners petitioned to the Constitutional Court (the "**Court**") to conduct a judicial review on the material content of Article 35 letter c along with its Elucidation in the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (the "**Law regarding the State Attorney**") against Article 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of the Republic of Indonesia of 1945 (the "**Constitution of 1945**").
2. Whereas Article 24C section (1) of the Constitution of 1945 grants to the Court the authority *to adjudicate at the first and final instance the decision of which is final among others to review a Law against the Constitution*. That basic authority was then set out further in Article 10 section (1) letter a of the Law Number: 24 of 2003 regarding the Constitutional Court as has been amended by the Law Number 8 of 2011 regarding the Amendment to the Law Number 24 of 2003 regarding the Constitutional Court (the "**Law on the Constitutional Court**"), and Article 29 section (1) letter a of the Law Number 48 of 2009 regarding Judicial Powers (the "**Law regarding the Judiciary**").
3. Whereas due to the petition of the Petitioners being a review on Article 35 letter c along with its Elucidation in the Law regarding the State Attorney against Article 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945, then according to the law the petition of the Petitioners as such (*a quo*) has been petitioned in accordance with the applicable laws and regulations, and therefore the Court has the authority to examine, to adjudicate and to decide on the petition of the Petitioners.

II. THE PETITIONERS POSSES LEGAL STANDING TO FILE THIS PETITION

4. Whereas based on the provision of Article 51 section (1) of the Law regarding the Constitutional Court along with its Elucidation, there are two conditions to be complied with by a petitioner in order to file a petition to review a Law against the Constitution of 1945 (*legal standing*), namely (i) the fulfillment of the qualification to act as a petitioner, and (ii) there are constitutional rights and/or authorities of a petitioner that have been harmed by the applicability of a Law.

   With regard to the parameter of a constitutional loss, the Court has granted its understanding and qualification, namely it has to comply with 5 (five) conditions as described in the Decision Number 006/PUU-III/2005 and Number 011/PUU-V/2007, as follow:

   a. there are constitutional rights and/or authorities of the Petitioner granted by the Constitution of 1945;
   b. whereas those constitutional rights and/or authorities of the Petitioner are assumed by the Petitioner to have been harmed by a Law to be reviewed;
   c. whereas the loss of constitutional rights and/or authorities of the Petitioner as referred to have a specific (special) nature and is actual or at least bears the potential which according to good reasoning can be ascertained that it will occur;
   d. there is a causal relationship (Dutch: *causal verband*) between such loss and the applicability of a Law, against which a review is petitioned;
   e. there is the possibility that by the granting of the petition, the loss of constitutional rights and/or authorities as postulated will not or will no longer occur.

5. Whereas the Petitioners are private persons Indonesian citizens whose constitutional rights as regulated in Article 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945 have been harmed or at least bear the potential to be harmed by the applicability of Article 35 letter c along with its Elucidation in the Law regarding the State Attorney.

   The Petitioners are a part of the victims of an incidence of criminal torture occurring on the date 18 February 2004 and is alleged to have been conducted by a Police having the name Novel who at the time had the rank of First Inspector of the Police (*Inspektur Polisi Tingkat Satu*, Iptu), whereby as a consequence of the mentioned torture, the Petitioner I suffers physical disability (he walks limp) due to a bullet projectile shot by the Defendant Novel nesting in the foot of the Petitioner I, while the other victim Mulyan Johani alias Aan even passed away. The mentioned torture (by shooting) conducted by the Defendant Novel was in the frame of interrogating the Petitioners and the other suspects accused of an act of theft of swallows (*walet* birds) nests, whereby the judiciary process against the supposition of theft of swallow nests against the Petitioners and the other suspects had been conducted and the Petitioners have even done their term of punishment.

   The case of torture alleged to have been committed by the Defendant Novel was just submitted by the Public Attorney to the District Court of Bengkulu for prosecution around the date 29 January 2016. Nevertheless, it appeared that following the appointment of the date of trial, the Public Attorney revoked its Indictment for correction/perfection reason. Rather than correcting/perfecting the Indictment, the Public Attorney instead issued a Decree of Discontinuation of Prosecution Number B-03/N.7.10/E.p.1/02/2016, dated 22 February 2016 (the "**SKP2**") to discontinue the prosecution in the case with the reason of lack of evidence and expiry, as indicated by some mass media. It is indeed beyond reason if the case is said to lack evidence as the case has been submitted to the court and the letter of indictment was there, which means that it was in ready condition for prosecution and the evidences were complete, and at the time the case was not or had not yet expired. The SKP2 issued by the Head of the State Attorney of Bengkulu was based on the approval of the Attorney General through the Deputy Attorney General Criminal Acts of the Attorney General's Office in its letter dated 19 February 2016 Number R-056/E.2/Tpp.2/02/2016.

   A Prejudiciary legal effort against the SKP2 as such (*a quo*) was made to the District Court of Bengkulu on the date 1 March 2016 as registered in the Case Number 02/PID.PRA/2016/PN.Bgl., and on the date 31 March 2016, the District Court of Bengkulu issued its judgment which in essence declared the SKP2 invalid. Responding to such Prejudiciary judgment, the Attorney General opened the opportunity to conduct of waiver of a case for the sake of public interest (Dutch: *seponering*) based on Article 35 letter c of the Law regarding the State Attorney as indicated by some media, among others the news in
   (i) Kompas.com dated 1 April 2016 bearing the title ***"Kejaksaan Agung Buka Kemungkinan Deponir Kasus Novel Baswedan"*** (*The Attorney General Opens the Possibility to Waive* (Dutch: *deponeren, seponeren*) *the Case of Novel Baswedan*) under the link: http://nasional.kompas.com/read/2016/04/01/05100021/Public Attorney.Agung.Buka.Kemungkinan.Deponir.Kasus.Novel.Baswedan,
   (ii) Tempo.co dated 1 April 2016 bearing the title "***Kejaksaan Agung Kaji Peluang Deponering Kasus Novel Baswedan"*** **(***The Attorney General Reviews the Possibility to Waive the Case of Novel Baswedan*) under the link https://m.tempo.co/read/news/2016/04/01/063758775/jaksa-agung-kaji-peluang-deponering-case-novel-baswedan, and (iii) Antaranews.com dated 1 April 2016 bearing the title "***Kejaksaan Agung kaji deponering Novel Baswedan***" (**(***The Attorney General Reviews the Waiver* (*Dutch: deponering, seponering*) *of the Case of Novel Baswedan*)), under the link

http://www.antaranews.com/berita/552991/jaksa-agung-kaji-deponering-novel-baswedan.

6. Whereas based on Article 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945, the Petitioners have the constitutional right in the form of (i) *the right to live and to defend life*, (ii) *recognition, assurance, protection, and equitable legal certainty and equal treatment before the law*, (iii) *the right of recognition as a person before the law*, and (iv) *be free from treatment of discriminative nature based on whatsoever and be entitled obtain protection against treatment of discriminative nature*. The mentioned constitutional rights of the Petitioners have been harmed or at least bear the strong potential to be harmed by the applicability of the provision of Article 35 letter c of the Law regarding the State Attorney, as the applicability of Article 35 letter c of the Law regarding the State Attorney obviously runs against the constitutional rights of the Petitioners guaranteed by the Constitution of 1945 as such (*a quo*), as based on the mentioned article the Attorney General may waive the case of the Defendant Novel for the sake of public interest. The loss of the Petitioners is apparent indeed and is actual or at least bears the potential which according to good reasoning can be ascertained that it will occur, namely the emergence of injustice and discriminative treatment against the Petitioners, and eliminates the protection guarantee as well as legal certainty and equal treatment before the law. The more, the act to waive (Dutch: *deponeren, seponeren*) a case of torture (by shooting) will obviously just ignore the right to live and to defend life which are basic rights of the Petitioners and the other suspects as determined in Article 28A of the Constitution of 1945, as if the Petitioners and the other suspects were deemed not deserving the guaranty of the right to live and to defend their life, so that they may be tortured (shot) and therefore the perpetrator cannot be prosecuted. Therefore, it clearly appears that the loss or the potential constitutional loss emerge as the consequence (*causal verband*) of the applicability of the provision of Article 35 letter c along with its Elucidation in the Law regarding the State Attorney.

7. Whereas based on the above mentioned matters, according to the law the Petitioners have complied with the condition in order to file a petition to review a Law against the Constitution of 1945 as determined in Article 51 section (1) of the Law regarding the Constitutional Court and the Decision of the Court Number 006/PUU-III/2005 and Number 011/PUU-V/2007, and therefore the Petitioners have the Legal Standing to file this Case.

III. THE CONSTITUTIONAL ARGUMENT THAT THE ARTICLE, SECTION AND THE ELUCIDATION TO THE LAW NUMBER 16 OF 2004 AS PETITIONED FOR REVIEW ARE CONTRARY TO THE CONSTITUTION OF 1945

8. Whereas there is no article specially mentioning the existence of the institution/agency of the State Attorney in the Constitution of 1945, yet the basis of the existence of the institution of the State Attorney rests with the provision of Article 24 section (3) of the Constitution of 1945 which reads: "*Other agencies which functions relating with the judicial powers are regulated in laws*". The Law regulating judicial powers, determines that the public attorney is one of the agencies which functions relate with the judicial powers, beside the Police, the advocates and self-supporting public institutions (vide Article 38 along with its Elucidation in the Law regarding the Judiciary). The function of the Public Attorney in its relation to the judicial powers among others is to execute powers of the state in the field of prosecution to uphold criminal law. The Public Attorney is only one institution granted the authority to conduct the prosecution of criminal cases in accordance with the Code of Criminal Procedure Law (*Kitab Undang-Undang Hukum Acara Pidana*, the "**KUHAP**") so that the prosecution authority is the monopoly of the Public Attorney as Public Prosecutor (vide Article 13 up to

Article 15 of the KUHAP). That said, there is no other agency authorized to execute the mentioned authority. Therefore, this prosecution authority is rather known as *dominus litis* (from Latin: master of the suit) in the hands of the Public Attorney.

According to the KUHAP, the Public Attorney being the monopoly holder of the prosecution authority (*dominus litis*) is obliged to submit a case to a District Court with the request to soonest adjudicate the case along with the letter of indictment, if the Public Attorney/Public Prosecutor opines that from the result of the investigation a prosecution can be conducted, in the sense that there are not reasons to discontinue the prosecution due to lack of evidence, it is not a criminal case, or be closed for the sake of the Law (for instance: expiry) (vide Article 143 in conjunction with Article 140 of the KUHAP). To the extent there is no reason for discontinuation of prosecution, the Public Attorney is obliged to submit a case for prosecution before a judge. The principle of legality is known in this context.

9. Whereas the provision of Article 24 section (3) of the Constitution of 1945, the Law regarding the Judiciary and the KUHAP becomes the basis for the formation of the Law regarding the State Attorney. Besides, the making of the Law regarding the State Attorney also considers that "*The Unitary State of the Republic of Indonesia is a state based on law resting on Pancasila and the Constitution of the Republic of Indonesia of 1945, therefore to uphold the law and justice is one of the absolute conditions to achieve the national objective*". That said, the Law regarding the State Attorney is made in the frame of conducting the enforcement of the Law and justice as representation of the State based on Law. The State of the Republic of Indonesia is a state based on law, it is not merely a state based on power, as which is also affirmed in The General Elucidation of the Constitution of 1945, which reads: "*Indonesia is a state based on law* (Dutch: *rechtsstaat*), *it is not based merely on power* (Dutch: *machtstaat*)".

10. Whereas in the Law regarding the State Attorney, the Public Attorney is referred to as a functional official granted the authority by the Law to act as public prosecutor and executor of those court rulings having obtained permanent force of law and the other authorities based on the Law. Being the public prosecutor, the Public Attorney conducts the prosecution function, whereby that prosecution function is one of the public duty and the authority possessed by the Public Attorney/the State Attorney in the field of crime as regulated in Article 30 section (1) letter a of the Law regarding the State Attorney. The other public duties and authorities in the field of crime are among others to execute judge determinations and court rulings already having the permanent force of law. Besides, the State Attorney has the public duty and authority in the other fields as determined in Article 30 up to Article 34 of the Law regarding the State Attorney.
11. Whereas other than regulating the public duty and authority of the State Attorney (Public Attorney), the Law regarding the State Attorney regulates also especially the duty and the authority of the Attorney General as mentioned in Article 35 up to Article 37 of the Law regarding the State Attorney. Among the duties and special authorities granted to the Attorney General is the authority to "*waive a case for the sake of public interest"* as set out in Article 35 letter c along with its Elucidation, which reads: the authority to "*waive a case for the sake of public interest"* as set out in Article 35 letter c along with its Elucidation, which reads as follows:

    " the Attorney General possess the duty and the authority :
    c. To waive a case for the sake of public interest "
    its Elucidation:
    "*Referred to with 'public interest' is the interest of the nation and the State and/or the interest of the public at large.*

    To waive a case as mentioned in this provision is to implement the opportunity principle,

which can only be conducted by the Attorney General after having paid regard to suggestion and opinion from the power agencies of the state having relationship with the matter."

12. Whereas the authority to "*waive a case for the sake of public interest*" (hereinafter referred to as *seponering*) as such (*a quo*) is granted only to the Attorney General, and not to Public Attorneys/the State Attorneys in general, being the implementation of the opportunity principle, so that only the Attorney General has the authority to conduct *seponering*. That authority to conduct *seponering* is a deviation from the duty and authority of the Public Attorney/the State Attorney as government official/institution executing the powers of the state in the field of prosecution. In other words, the opportunity principle is a deviation from the legality principle.

13. Whereas based on the legality principle and/or in accordance with the provision of Article 143 in conjunction with Article 140 of the KUHAP, to the extent there is no reason for discontinuation of a prosecution, the Public Attorney is obliged to submit a case for prosecution before a judge so that the enforcement of the Law and justice can be conducted in accordance with objective of the making of the KUHAP, as set out in the part of *Consideration Clause letter* (*a*) *and* (*c*) of the KUHAP, which reads as follows:
    (a) "Whereas the State of the Republic of Indonesia is a state based on law, based on Pancasila and the Constitution of 1945 which highly uphold basic human rights and which guarantees all citizens equality before the law and in government and shall uphold the law and government with no exception."

    (b) "Whereas the development of the national law as such in the field criminal procedure law in order for the society to appreciate its rights and obligations and to increase cultivation of attitude of the executors of the Law enforcement in accordance with their respective function and authority towards upholding the law, justice and protection of human dignity and prestige, order and legal certainty for the sake of performing a state based on law in accordance with the Constitution of 1945."

14. Whereas therefore, it is apparent that the enforcement of criminal law is conducted by highly upholding basic human rights and guaranteeing all citizens equality before the law in the frame of enforcing law and justice as aspired in a state based on law. Therefore, each enforcement of the Law is conducted without discriminating people or discriminatively. The special authority granted to the Attorney General to conduct *seponering* as implementation of the opportunity principle has obviously destroyed or runs against or breached basic human rights which are guaranteed and protected by the Constitution of 1945.

15. Whereas the basic human rights which are guaranteed and regulated by the Constitution of 1945 being violated/ran against by the *seponering* authority as determined in Article 35 letter c of the Law regarding the State Attorney are as follow:

    - Article 28D section (1): "*Each person is entitled to recognition, assurance, protection, and equitable legal certainty and equal treatment before the law*."
    - Article 28I section (1): "*The right to live, the right not to be tortured, the right of freedom of thought and conscience, the right to embrace a religion, the right not to be enslaved, the right of recognition as a person before the law, and the right not to be prosecuted based on a retroactive law are basic human rights which cannot reduced in whatever situation*.
    - "Article 28I section (2): "*Each person is free from treatment of discriminative*

nature based on whatsoever and be entitled to obtain protection against such treatment of discriminative nature. "

16. Whereas the *seponering* authority in Article 35 letter c of the Law regarding the State Attorney obviously disrespects the right to *recognition, assurance, protection, and equitable legal certainty and equal treatment before the law* (*equality before the law*) as determined in Article 28D section (1) of the Constitution of 1945. Due to the different treatment before the law, violations against *the right of recognition as a person before the law in accordance with Article 28I section* (*1*) *of the Constitution of 1945 will then emerge*, in the sense that *the rights of a person before the law of a victim of a criminal act, whose case has been waived, becomes unrecognized, as the interest and the person of the victim are ignored and as if the victim has not the quality as a person before the law to be treated equally*. Besides, the *seponering* authority as such (*a quo*) becomes also a real form of a discriminative nature, as in the name of public interest, someone who commits a criminal act can escape his/her prosecution or against whom the law enforcement has been waived so that such people are treated preferentially before the law, while the interest of the victim becomes indeed sacrificed or ignored, while each person shall be free from discriminative treatment based on whatsoever and be entitled to obtain protection of discriminative treatment as determined in Article 28I section (2) of the Constitution of 1945. In context of the case/case experienced by the Petitioners, the use of the *seponering* authority will run against the provision of Article 28A of the Constitution of 1945 which guarantees the right to live and to defend life because if the act of torture which causes death and/or physical disability (violated the right to live and to defend life) can be forgiven or even justified so that the incidence may be waived. Certainly that will become a bad precedent for the enforcement of the Law and justice.

17. Whereas indeed, in the Constitution of 1945 there is no single article which grants the authority or can be used as the basis to justify the implementation of the opportunity principle to uphold criminal law in Indonesia, as basically the enforcement of criminal law in Indonesia adheres to the legality principle. Even if a juridical basis is to be found in the Constitution of 1945, then the basis would only refer to the general elucidation of the Constitution of 1945 stating that "*The principal thought which covers spiritual atmosphere of the Constitution of 1945, materializing the aspiration of the Law* (Dutch: *Rechtsidee*) *which controls the Constitution of the state, the written law (the Constitution) as well as the unwritten law*". That said, the basis for legitimation/justification of the opportunity principle is sought in the unwritten law. That unwritten law which grants the basis to implement the opportunity principle refers to the legacy of Dutch Colonization. In the Work Report of the Team for Analysis and Evaluation of the Law regarding the Implementation of the Opportunity Principle in the Criminal Procedure Law of the Budget of 2006, who worked based on the Decree of the Minister of the Law and Human Rights Number G1-11.PR.09.03 of 2006 regarding the Formation of the Team for Analysis and Evaluation of the Law of the Budget of 2006 dated 16 January 2006 in Jakarta, with Prof. Dr. (Jur) H. Andi Hamzah as its Chairperson. [http://www.tu.bphn.go.id/substantif/Data/ISI%20KEGIATAN%20TAHUN%202006/1aePRINCIPLE%20OPURTINITAS.pdf] ("***Laporan Hasil Kerja Tim Analisis dan Evaluasi*" (Work Report of the Team for Analysis and Evaluation**)) page 30, mentioned that "*Before the provision of the Law regarding the State Attorney of 1961 came into force, the opportunity principle has already been embraced in practice. In this matter Lemaire stated that nowadays the opportunity principle is used to be*

deemed as a principle which came into force in this country (Dutch India), although as an unwritten law which came into force. Therefore, during the colonial age there were no laws or ordinance regulating the opportunity principle, although it has already come into force in the Netherlands", while before the era of the Dutch Colonization, the Work Report of the Team for Analysis and Evaluation on page 37 conveyed that "*In various writings, the opportunity principle was not known in writing during the time before the era of the Dutch occupation. As the government in Indonesia at the time was still in the form of a kingdom, then it can be said that the king always possessed the right of opportunity, bearing in mind that their powers as a king or Sultan*".

18. Whereas from the view of the mentioned Work Report of the Team for Analysis and Evaluation, a conclusion can be drawn that the opportunity principle existed or has its origins from the imbalanced power between the State (in this matter the Colonialists and/or the Kingdom) with its society. In the life during Colonization and/or the Kingdom, there was no social contract between the State and the people, there was no assurance for human rights, as there was no sovereignty of the law, as power was sovereign, not the law. Therefore, the opportunity principle became a reflection of very dominant power, so that it was indeed not in line and in harmony with the aspiration of the Law fought for in the Constitution of 1945, whereby the State is based on law, not on power [vide Article 1 section (3) and the general elucidation to the Constitution of 1945].

19. Whereas not all countries in the world adhere to the opportunity principle. As it is explained in the Work Report of the Team for Analysis and Evaluation, some examples of countries which apply the legality principle (the obligation to prosecute) are Germany, Italy, Austria, Spain and Portugal (vide page 48). Furthermore it is mentioned that "*In Italy, a Public Attorney may not waive a case, if there is sufficient evidence. Nevertheless the Italian Public Attorney has a lot of means to loosen to implement the legality principle. For example he/she can behave otherwise in assessing the honesty of a witness, in considering the evidences, and in implementing the burden of substantiation. Not as usual, he/she can also immediately conclude the incompleteness of the evidence burdening the defendant, as the mentioned defendant does not obstruct the examination or he/she may prosecute a suspect who commits some criminal acts with one indictment only or with a lighter indictment only rather than with a burdening indictment. In determining whether a case of a defendant who is not detained will be sent to an investigating magistrate, the Italian Public Attorney "may let his/her case to become stale and finally keep the case in his/her "archive" after by buying time he/she obtains a court approval to discontinue the investigation*" (*vide* page 49). That means, countries adhering to the legality principle do not at all open the opportunity to implement the opportunity principle. Even if in practice no prosecution is conducted, that matter is not based on *seponering* but rather due to another reason for not conducting the prosecution, among others due to lack of evidence or expiry as per the provision of Article 140 section (2) of the KUHAP.
Still based on the Work Report of the Team for Analysis and Evaluation (page 46), in the Netherlands the opportunity principle is even the authority of the Public Attorney/Public Prosecutor, it is not only the authority of the Attorney General, whereby the Public Attorney/Public Prosecutor can use power to discontinue the prosecution although there is sufficient evidence to produce sentencing if according to his/her estimate the prosecution will only harm public interest, the government, or a private person. The mentioned practice is known as "discontinuation of the prosecution

or a waiver of a case due to reason of policy. Other than the Netherlands, countries which apply the opportunity principle among others are France, Norway, Sweden, Israel, South Korea and Japan (vide page 45 of the Work Report of the Team for Analysis and Evaluation). While in countries adhering to the Anglo-American law system, according to the Work Report of the Team for Analysis and Evaluation on page 50, there is no class of ideas related to the available two principles in the mentioned contradictory prosecution (the *legality* principle as well as the *opportunity* principle).

20. Whereas in Indonesia, if viewed from the basic provisions contained in the Constitution of 1945, it can be said that the Constitution of the Republic of Indonesia actually does not recognize the opportunity principle, so that the *seponering* authority which implements the opportunity principle as mentioned in Article 35 letter c of the Law regarding the State Attorney, is sourced only from unwritten law, it is not sourced from the Articles in the Constitution of 1945. That is very different from the legality principle as reflected from and very clearly set out in the articles of the Constitution of 1945 as well as its Elucidation as described above, bearing in mind that all citizens are equal in law and are obliged to uphold the law with no exception [vide Article 27 section (1) of the Constitution of 1945]. Even related to this the opportunity principle, Bismar Siregar has stated that the opportunity principle conflicts gravely with the Pancasila principle, being Indonesia's philosophy of law, the first principle of the One and Only God leads to the obligation to uphold the law without discrimination, as illustrated in *Al Quran* the verse of Annisa: 135 [vide page 96, *Hukum Acara Pidana (Criminal Procedure Law)*, Bismar Siregar, Jakarta: Binacipta].

21. Whereas the State, in this matter the Government, is fully responsible for the protection, assurance, the enforcement and fulfillment of basic human rights as mandated in Article 28I section (4) of the Constitution of 1945. The government shall guarantee and protect the right of each person to obtain equal treatment before the law, and be free from discriminative treatment. Therefore, the Government shall not by whatsoever means instead conduct discrimination and discriminating people before the law. The *seponering* authority in Article 35 letter c of the Law regarding the State Attorney granted to the Attorney General has become real evidence that there is disavowal against the responsibility of the Government to grant protection, assurance, enforcement and fulfillment of the right to obtain equal treatment before the law and be free from discriminative treatment as mandated in the Constitution of 1945. The State and in this matter the Government cannot seize, reduce or ignore basic human rights as such (*a quo*). Therefore, it is apparent that the content of Article 35 letter c of the Law regarding the State Attorney along with its Elucidation is in conflict with the Constitution of 1945 and therefore shall be declared to not possess binding force of law.

22. Whereas the Petitioners really hope that Article 35 letter c of the Law regarding the State Attorney along with its elucidation be declared in conflict with the Constitution of 1945 and has no legal binding force (*petitum primair*), yet if the Court opines otherwise, whereby the opportunity principle as manifested in the *seponering* authority as regulated in Article 35 letter c of the Law regarding the State Attorney is still deemed needed to uphold criminal law in Indonesia, then the Petitioners have petitioned that very strict limitations be applied to the validity of the mentioned article so that the article does not violate or conflicts with the basic human rights guaranteed by the Constitution of 1945.

23. Whereas from the Elucidation to Article 35 letter c of the Law regarding the State Attorney, an understanding is gained that (i) "*public interest*" is interpreted as "*the interest of the nation and the State and/or the interest of the public at large*", and "*seponering can be conducted only by the Attorney General after having paid regard to the suggestion and opinion from the power institutions of the State having relationship with the matter.*" The phrase "*the interest of the nation and the State and/or the interest of the public at large*" is not further explained in the Elucidation to Article 35 letter c of the Law regarding the State Attorney, so that it is very apparent that the mentioned meaning is given in a broad sense by the holder of the *seponering* authority and is very prone for interpretation in accordance with the interest of the authority holders. The authority holder, in this matter the Attorney General, is the party having authority to determine whether or not public interest will become the basis of waiving a case. Nevertheless, if related to the opportunity principle, then "the interest of the nation and the State and the public at large" should be understood as such that greater benefit to be gained for the nation and the State and/or public at large would be guaranteed if *seponering* which implements the opportunity principle be taken rather than conducting prosecution before a judge. However, although it can be understood that there is greater benefit from *seponering* if compared with conducting prosecution, yet once again, it will be the Attorney General who can assess whether or not there is greater benefit for the nation and the State and/or public at large.

24. Whereas the obligation to firstly pay regard to the suggestion and opinion from the power agencies of the state having relationship with matter to be subject to *seponering* does not at all limit and also substantially cannot be used as a benchmark or starting point to prevent the use of the *seponering* authority if it is fair to suspect that the *seponering* authority would only be used as an entrance or facility to waive a case for the sake of public interest, while logically there is no public interest as such. This occurs as the suggestion and opinion from the power agencies of the state as such (*a quo*) are not at all binding and the Attorney General just need to pay regard thereto without following them. That said, the authority to conduct *seponering* becomes indeed an absolute discretion of the Attorney General. Besides, there is no determination in the Elucidation to Article 35 letter c of the Law regarding the State Attorney, as to which are those power institutions of the State. Therefore, the *seponering* authority of the Attorney General has become more extensive as the Attorney General is also the party who can determine which power agencies of the state could be asked for suggestion and opinion.

25. Whereas due to the absence of a clear measure or limitation regarding understanding "the interest of the nation and the State and/or the interest of the public at large" and the not binding nature of the suggestion and opinion of the power agencies of the state when asked by the Attorney General, then *seponering* becomes merely the authority of the Attorney General which cannot be controlled nor be limited, while the *seponering* authority, as normatively mentioned above, it obviously conflicts with the Constitution of 1945. Therefore, *seponering* to implement the opportunity principle being the authority of the Attorney General is gravely prone to abuse. Related to this matter, J.M. van Bemmelen has reminded that losses attached to the implementation of the mentioned opportunity principle shall be recognized, for instance that such right can be implemented arbitrarily, advantageous to other people, may in general tend to abuse [vide the Work Report of the Team for Analysis and Evaluation, page 95 – 96].

26. Whereas therefore, a strict limitation or condition is needed to implement the opportunity principle in *seponering* bearing in mind that *seponering* has become a real form of disavowal or violation against basic human rights as guaranteed, protected, recognized and which shall be upheld by state. Bearing in mind that basic human rights risk to become reduced in *seponering*, it is quite reasonable according to the law if *seponering* can be used by the Attorney General only following approval of the People's Representative Council (*Dewan Perwakilan Rakyat*) of the Republic of Indonesia (DPR-RI). This is conducted not without reason and it is based on law.

27. Whereas the DPR-RI is an institution representing the people and is elected through general election as mentioned in Article 19 section (1) of the Constitution of 1945. Based on the provision of Article 20A of the Constitution of 1945, the DPR-RI has the functions of legislation, budgeting and supervision, whereby further provisions regarding the rights of the DPR-RI are regulated in laws. Article 69 of the Law Number 17 of 2014 regarding the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*), the People's Representative Council (*Dewan Perwakilan Rakyat*), the Regional Representative Council (*Dewan Perwakilan Daerah*), and the Regional People's Representative Council (*Dewan Perwakilan Rakyat Daerah*) (the "**Law regarding MPR-DPR**"), regulates that the functions of legislation, budgeting and supervision are conducted by the DPR-RI in the frame of representation of the people. The function of supervision is implemented through the supervision over the implementation of the Law, the State Budget of Revenues and Expenditures (*Anggaran Pendapatan dan Belanja Negara*, APBN) and the policy of the government, and in performing its function the DPR-RI is entitled to render recommendation to state or government officials, whereby such recommendation shall be followed-up by state or government officials [vide Article 72 in conjunction with Article 74 of the Law regarding MPR-DPR]. Therefore, the DPR-RI as representation of the people and in conducting its supervision it may become a balancer (checks and balances) to the policy or the interest of the Government in order that such interest or policy of the Government be carried out clean and authoritatively. Therefore, it is quite reasonable if the use of the *seponering* authority be made dependent on the approval of the DPR-RI. It is proper if the opportunity principle in *seponering* as a deviation from the legality principle to uphold criminal law and to become reduction or even violation against basic human rights as guaranteed by the Constitution of 1945, can just be implemented following the prior approval of the DPR-RI representing of the will or interest of the people. In such matter, it will no longer be a problem, whether there is really a reason for the sake of public interest (the interest of the nation and the State and/or public at large) in the *seponering* plan, or deliberately trumped-up, as the DPR-RI will determine or assess whether or not there is public interest in *seponering* by granting or not granting its approval, so that the basic human rights guaranteed by the Constitution of 1945 remain safe-guarded, or even if reduced through *seponering*, that matter has obtained legitimation or justification from the people represented in the DPR-RI.

28. Whereas therefore, if according to the Court, the validity of *seponering* is assumed not conflicting with the Constitution of 1945, then at least the validity of *seponering* be limited or be subjected to strict constitutional conditions vis-à-vis the Elucidation to Article 35 letter c of the Law regarding the State Attorney, exactly against the phrase "*after having paid regard to suggestion and opinion from the power institutions of the State having relationship with the matter*", and therefore the phrase in the Elucidation to Article 35 letter c of the Law regarding the State Attorney as such (*a quo*) shall be declared in conflict with the Constitution of 1945 and has no legal binding force to the

extent it is not understood as "*after obtaining the written approval of the People's Representative Council of the Republic of Indonesia.*" This is the *subsidiary petitum* petitioned by the Petitioners.

29. Whereas if the Court opines otherwise on the constitutional condition as mentioned by the *subsidiary petitum*, the Petitioners petitioned that at least the Court can accept the more *subsidiary petitum* petitioned by the Petitioners, namely the sentence "*To waive a case as mentioned in this provision is to implement the opportunity principle, which can only be conducted by the Attorney General after having paid regard to the suggestion and opinion from the power agencies of the state having relationship with the matter*" in the Elucidation to Article 35 letter c of the Law regarding the State Attorney be declared in conflict with the Constitution of 1945 and has no legal binding force to the extent it is not understood as "*To waive a case as mentioned in this provision, the Attorney General shall pay regard to and follow the suggestion and opinion of the majority of the power agencies of the state namely the People's Representative Council of the Republic of Indonesia, the Supreme Court, and the Police* (*Kepolisian*) *of the State of the Republic of Indonesia.*" The obligation to pay regard and to follow the suggestion and opinion of the power institutions of the State should at least become a limitation against the authority of the Attorney General to conduct *seponering*. The mentioning of the power agencies of the state namely the DPR-RI, the Supreme Court, and the State Police of the Republic of Indonesia is intended to render legal certainty so that the power agency of the State requested to render suggestion and opinion cannot be determined by the Attorney General at his/her own liberty. The suggestion and opinion of the majority of the three power agencies of the state as such (*a quo*) should become the basis for the Attorney General for to execute or not to execute the *seponering* authority.

IV. PETITION OF INJUNCTION ((INTERIM DECISION))

30. Whereas the (potential) loss of the constitutional rights and/or authorities experienced by the Petitioners as described above, should according to the law not be left to occur, but shall be stopped so that violations against equitable legal certainty and equal treatment before the law can be avoided, therefore it is reasonable if in this petition the Petitioners petitioned to the Court to hand-down an Injunction (interim decision) in the form of the postponement of the applicability of Article 35 letter c of the Law regarding the State Attorney up to a final and binding judgment on this petition.

31. Whereas although the Injunction (interim decision) is clearly regulated in the dispute regarding Authority Among State Institutions as mentioned in Article 63 of the Law regarding the Constitutional Court and is also better known in the Dispute on General Elections of Regional Heads as implemented by the Court by resting on the provision of Article 86 of the Law regarding the Constitutional Court, yet it appeared that the Court has once issued an Injunction in the review of a Law against the Constitution as set out in the Decision Number 133/PUU-VII/2009 dated 29 October 2009, whereby in the mentioned judgment the Court postponed the validity of the reviewed article by its award:
"Before rendering its Final Judgment, to declare the postponement of the implementation of the applicability of Article 32 section (*1*) *letter c and Article 32 section* (*3*) *of the Law Number 30 of 2002 regarding the Commission for the Eradication of Criminal Corruption Offense, namely the discharge of the Leader of the Commission for the Eradication of Corruption who has become a defendant due to the conduct of an act of felony, until there is final judgment of the Court against the subject of the petition as such* (*a quo*)*;".*

32. Whereas the basis or reason used by the Court in granting or rendering the mentioned Injunction is in essence as follows:

[3.12] *Considering whereas based on Article 58 of the Law regarding the Constitutional Court* which reads: *"the Law to be reviewed by the Constitutional Court remains to come into force, before there is a judgment declaring that the mentioned law conflicts with the Constitution of the Republic of Indonesia of 1945".From the provision of Article 58 of the Law regarding the Constitutional Court prima facie* (from Latin: at first sight), *the Court is not authorized to rule the discontinuation, although temporarily, a legal proceeding being in progress, yet, in the petition to review a law against the Constitution of 1945, the Court can regulate the implementation of its authority, namely in the form of an act of temporary discontinuation of the examination of a petition to review a law against the Constitution of 1945 or to postpone its judgment on the mentioned petition if the petition relates to the formation of laws which is alleged to be related with a criminal act as regulated in Article 16 of the Regulation of the Constitutional Court Number 06/PMK/2005 regarding Guidance of Procedure in Review Cases on Laws.*

Whereas the Court has continuously followed the development of legal awareness and sense of justice growing in the society which are the base for the Court not to keep quiet or let occur violations against the constitutional rights of citizens. Therefore, although in the Law regarding the Constitutional Court no injunction is known in a review case of a law, along with the development of legal awareness, the need in practice and demand of the sense of justice of the public and in the frame of granting protection and equitable legal certainty, the Court deems it necessary to render its injunction in the case as such (a quo) by basing on the aspect of justice, balance, prudence, clarity in objective, and adhered interpretation and has come into force regarding the authority of the Court to render an injunction.

[3.13] *Considering whereas in the case as such (a quo), regardless whether the Article petitioned for review would later be declared contrary or not with the Constitution of 1945, the Court opines that there is sufficient potential for the occurrence of violations against equitable legal certainty, equal treatment before the law [vide Article 27 section (1) and Article 28D section (1) of the Constitution of 1945], and freedom from threats of fear for to conduct or omit to conduct something which is basic right [vide Article 28G section (1)], so that the Court shall play a big role in confirming and rendering sense of justice in the case as such (a quo) through injunction which will be contained fully in the award of this judgment.*

Whereas a legal proceeding being faced by the Petitioners is a criminal law process which also uses a criminal law instrument which is not the scope of authority of the Court. Therefore, the Court is not authorized to render an assessment against a legal proceeding being in progress so that the Court is not authorized to order the State Police of the Republic of Indonesia as well as the Attorney General's Office of the Republic of Indonesia to temporarily discontinue a criminal law process of the Petitioners being in progress. Therefore, the Court cannot grant the injunction to the extent relating to the discontinuation of the criminal process in the Police and the office of the State Attorney.

Whereas in practice the examination of review of law cases, there is the frequent need of injunction for certain cases with the objective to protect a party whose constitutional right is seriously threatened while the examination against the subject of the petition is underway.

Whereas the Court opines that an injunction needs to be implemented if with the mentioned judgment no legal confusion will arise on the one hand, while on the other hand will instead strengthen legal protection.

[3.14] *Considering whereas the relevance and significance for the issuance of an injunction in a review case of a law against the Constitution is to prevent the occurrence of violation against basic human rights if a norm of law is implemented while the examination against the subject of the petition is underway while the constitutional right of the Petitioner that has been harmed cannot be remedied in the final judgment. In a case as such* (*a quo*) *an injunction is needed to prevent the sufficient potential of possibility of constitutional loss of the Petitioners if they become defendants due to their* (*permanent*) *dismissal by the President while the relevant legal base or Article of the laws are being examined in a review against the Constitution of 1945 in the Court.*

33. Whereas in line with the consideration of the Court in the Injunction, in this petition, the constitutional right of the Petitioners is seriously threatened, bearing in mind that the District Court of Bengkulu has granted the petition for prejudiciary by declaring the SKP2 invalid, so that an Injunction is needed in the form of postponement of the applicability of the provision of Article 35 letter c of the Law regarding the State Attorney to prevent the occurrence of violation against human rights, in this matter the basic rights of the Petitioners, namely the right to obtain assurance of legal certainty and equal treatment before the law and be free from discriminative treatment as set out in Article 28D section (1) and Article 28I section (2) of the Constitution of 1945, while the examination of this petition is underway.

34. Whereas the threat of violation against the constitutional right of the Petitioners is the more strengthened by the possibility for the Attorney General to issue a decree to waive a case for the sake of public interest (*seponering*) after there is a prejudiciary judgment Number 02/PID.PRA/2016/PN.Bgl. as such (*a quo*), as indicated in some media among others:

a. Media : Kompas.com
   Date : 1 April 2016
   Title : *Jaksa Agung Buka Kemungkinan Deponir Kasus Novel Baswedan* (The Attorney General Opens the Possibility to Deposit the Case of Novel Baswedan)
   Link : http://national.kompas.com/read/2016/04/01/05100021/Public Attorney.Agung.Buka.Kemungkinan.Deponir.Kasus.Novel.Baswedan
   Quote : *The Attorney General HM Prasetyo said, he does not close the possibility that he will take the act to waive a case or deposit* (*Dutch: deponeren, seponeren*) *a case which trapped an investigator of the Commission for the Eradication of Corruption Novel Baswedan.*
   That is to face the granting of prejudiciary lawsuit on the Decree of Discontinuation of a Prosecution (*SKP2*) *in the case of Novel.*

b. Media : Tempo.co
   Date : 1 April 2016
   Title : *Jaksa Agung Kaji Peluang Deponering Kasus Novel Baswedan (The Attorney General Reviews the Chance to Deposit the Case of Novel Baswedan)*
   Link : https://m.tempo.co/read/news/2016/04/01/063758775/jaksa-agung-kaji-peluang-deponering-case-novel-baswedan
   Quote : *The Attorney General Muhammad Prasetyo stated that he will review the prejudiciary judgment on the issuance of the Decree of Discontinuation of a Prosecution* (*SKP2*) *in the case of an investigator of the Commission for the*

Eradication of Corruption, Novel Baswedan. Prasetyo will pay regard to the public interest in the matter of the opportunity to waive a case.
"Yes, we will see whether there is or there is no public interest therein. If there is, then why not," he said in his office, Thursday, 31 March 2016.

c. Media : Viva.co.id
Date : 1 April 2016
Title : *Jaksa Agung Pertimbangkan Deponering Kasus Novel (The Attorney General Considers to Deposit the Case of Novel)*
Link : http://national.news.viva.co.id/news/read/755234-jaksa-agung-pertimbangkan-deponering-case-novel
Quote : *"Yes we have the authority* (*to deposit; Dutch: deponeren, seponeren*). *But we should first review the judgment. The handling of a case cannot be generalized. We will see how it looks like. The State Attorney has such authority. If there is sufficient reason, then why not? We all wish that all matters be settled in good order," said he.*

d. Media : Antaranews.com
Date : 1 April 2016
Title : *Jaksa Agung kaji deponering Novel Baswedan (The Attorney General reviews the waiver* (*Dutch: deponering, seponering*) *of Novel Baswedan)*
Link : http://www.antaranews.com/berita/552991/jaksa-agung-kaji-deponering-novel-baswedan
Quote : *The Attorney General HM Prasetyo reviews the waiver of the case of Novel Baswedan post the District Court of Bengkulu having declared invalid a Decree of Discontinuation of a Prosecution (SKP2) of the mentioned KPK investigator.*

e. Media : Harianterbit.com
Date : 2 April 2016
Title : *Jaksa Agung Kaji Deponering Kasus Novel (The Attorney General Reviews the Waiver of the Case of Novel)*
Link : http://national.harianterbit.com/national/2016/04/02/59374/0/25/Public Attorney-Agung-Kaji-Deponering-Kasus-Novel
Quote : *The Attorney General HM Prasetyo reviews the deponering* (*waive a case*) the *case of Novel Baswedan post the District Court* (*PN*) *Bengkulu having declared invalid a Decree of Discontinuation of prosecution* (*SKP2*) *of the mentioned KPK investigator.*

35. Whereas other than that, reflecting from the case of Chandra M. Hamzah and Bibit Samad Rianto, whereby at the time the Attorney General issued a Decree to Waive a Case for the Sake of Public Interest namely (i) Number TAP 001/A/JA/01/2011 on behalf of the Defendant Chandra M. Hamzah, and (ii) Number TAP 002/A/JA/01/2011 on behalf of the Defendant Bibit Samad Rijanto following the previous discontinuation of the above mentioned case be declared invalid by court in a prejudiciary judgment, then the Petitioners a concerned that the Attorney General will use its authority to conduct *seponering* against the case of torture alleged to have been committed by the Defendant Novel, is quite reasonable and legally based.

36. Whereas the more the SKP2 which has been declared invalid by the District Court of Bengkulu, appeared to have been issued by the Head of the State Attorney of Bengkulu basing on the approval of the Attorney General through the Deputy Attorney General of General Criminal Acts, the Attorney General's Office in its letter dated 19 February 2016 Number R-056/E.2/Tpp.2/02/2016. That said, the issuance of the SKP2 by the Head of the State Attorney of Bengkulu is not made merely based on the authority possessed by the Head of the State Attorney of Bengkulu as mentioned in the KUHAP, but rather thanks to the influence or approval of the Attorney General. Therefore, the role of the Attorney General is very dominant in the issuance of the mentioned SKP2 so that the worry of the Petitioners about the possibility that the Attorney General will conduct *seponering* is indeed logical.

37. Whereas based on the above mentioned descriptions, it is indeed apparent that there is an urgent situation and the constitutional right of the Petitioners is very much under threat, so that an injunction is needed for the postponement of the applicability of the mentioned Article 35 letter c of the Law regarding the State Attorney, to prevent that violation will occur against the constitutional rights of the Petitioners which are guaranteed by the Constitution of 1945.

V. PETITUM

Based on all the above mentioned description, it is valid and legally based, if the Petitioners petitioned to the Court to render its decision as follow:

TO ADJUDICATE

A. IN THE PROVISION

1. To grant the petition for injunction of the Petitioners as a whole;
2. Before rendering its Final Judgment, to declare the postponement of the implementation of the applicability of Article 35 letter c of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia Number 4401), namely the duty and authority of the Attorney General to waive a case for the sake of public interest, until there is a final judgment of the Court against the subject of the petition as such (*a quo*);

B. IN THE CASE SUBJECT

1. To grant the petition of the Petitioners as a whole;
2. **Primary*:***
   a. To declare Article 35 letter c along with its Elucidation to the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia Number 4401) conflicts with the Constitution of the State of the Republic of Indonesia of 1945;
   b. To declare Article 35 letter c along with its Elucidation to the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia Number 4401) has no binding force of law;

Subsidiary*:*

a. To declare whereas the phrase "*after having paid regard to the suggestion and opinion of the power institutions of the State having relationship with the matter*" in the Elucidation to Article 35 letter c of the Law Number 16 of 2004 regarding the State Attorney of the Republic

of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia Number 4401) conflicts with the Constitution of the Republic of Indonesia of 1945 to the extent not to be understood "*after obtaining the approval in writing* of the *People's Representative Council of the Republic of Indonesia*";

b. To declare whereas the phrase "*after having paid regard to the suggestion and opinion from the power agencies of the state having relationship with the matter*" in the Elucidation to Article 35 letter c of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia Number 4401) has no legal binding force to the extent not to be understood "*after obtaining the approval in writing* of the *People's Representative Council of the Republic of Indonesia*";

More Subsidiary:

a. To declare the sentence "*To waive a case as mentioned in this provision is to implement the opportunity principle, which can only be conducted by the Attorney General after having paid regard to the suggestion and opinion of the power institutions of the State having relationship with the matter*" in the Elucidation to Article 35 letter c of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia Number 4401) conflicts with the Constitution of the Republic of Indonesia of 1945 to the extent not to be understood "*To waive a case as mentioned in this provision, the Attorney General shall pay regard to and follow the suggestion and opinion of the majority of the power institutions of the State namely the People's Representative Council of the Republic of Indonesia, the Supreme Court, and the Police of the State of the Republic of Indonesia*".

b. To declare the sentence "*To waive a case as mentioned in this provision is to implement the opportunity principle, which can only be conducted by the Attorney General after having paid regard to the suggestion and opinion from the power agencies of the state having relationship with the matter*" in the Elucidation to Article 35 letter c of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia Number 4401) has no legal binding force to the extent not to be understood "*To waive a case as mentioned in this provision, the Attorney General shall pay regard to and follow the suggestion and opinion of the majority of the power institutions of the State namely the People's Representative Council of the Republic of Indonesia, the Supreme Court, and the Police of the State of the Republic of Indonesia*".

3. To order the loading of the content of this judgment of the Constitutional Court in the State Gazette of the Republic of Indonesia.

Or:

If the honorable Tribunal of the Constitutional Justices deems it necessary and appropriate, we petition that the case as such (*a quo*) can be decided *ex aequo et bono* (Latin: according to the right and good).

[2.2] Considering whereas to substantiate their postulates, the Petitioners have filed instruments of evidence in the form of letters/writings marked as evidence P-1 up to evidence P-31, validated in the trial dated 12 April 2016, as follows:

1. Evidence P-1 Photocopy of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia
2. Evidence P-2 Photocopy of the Constitution of the Republic of Indonesia of 1945
3. Evidence P-3 Photocopy of Resident Identity Card Number 1771090204780001, on behalf

		of IRWANSYAH SIREGAR, born in Kisaran dated 2 April 1978, embracing the religion of Islam, occupation Entrepreneur, Citizenship Indonesia (WNI) having his address in Jalan Rinjani I RT/RW 009/003, Jembatan Kecil, Singaran Pati, Bengkulu.
4.	Evidence P-4	Photocopy of Resident Identity Card Number 1771070607820001, on behalf of DEDI NURYADI, born in Bengkulu dated 6 July 1982, embracing the religion of Islam, occupation Entrepreneur, Citizenship Indonesia (WNI) having his address in Jl. Kinibalu RT/RW 001/001, Padang Jati, Ratu Samban, Bengkulu.
5.	Evidence P-5	Photocopy of the Prejudiciary Decision of the District Court of South Jakarta Number 37/Pid.Prap/2015/PN.Jkt.Sel dated 9 June 2015, downloaded from www.judgment.mahkamahagung.go.id.
6.	Evidence P-6	News Detiknews.com dated 1 May 2015 bearing the title "Polri: Dalam Pra Rekonstruksi, Novel Tembak 4 Orang di Bagian Kaki dan 1 Tewas" (The Police: In the Pre-Reconstruction, Novel Shot 4 People on the Foot and 1 Dead) under the link: http://news.detik.com/berita/2903593/polri-dalam-pra-rekonstruksi-novel-tembak-4-orang-di-bagian-kaki-dan-1-tewas
7.	Evidence P-7	News Republika.co.id dated 29 January 2016 bearing the title "Berkas Novel Dilimpahkan ke PN Bengkulu" (Dossier of Novel Submitted to the District Court of Bengkulu) under the link: http://national.republika.co.id/berita/national/*law*/16/01/29/o1q3tj219-berkas-novel-bestowed-ke-pn-bengkulu
8.	Evidence P-8	News MetroTVNews.com dated 30 January 2016 bearing the title "Kasus Novel Dilimpahkan, KPK akan Siapkan Penasehat Hukum" (The Case of Novel Submitted, the Commission to Eradicate Corruption, Komisi Pemberantasan Korupsi (KPK) will Prepare Legal Counsel) under the link http://news.metrotvnews.com/read/2016/01/30/477075/case-novel-bestowed-kpk-akan-siapkan-penasehat-*law*
9.	Evidence P-9	News TRIBUNJATENG.COM dated 3 February 2016 bearing the title: "Kejaksaan Tarik Surat Dakwaan Novel Baswedan" (The State Attorney Withdraws the Indictment of Novel Baswedan) under the link http://jateng.tribunnews.com/2016/02/03/the office of the State Attorney-tarik-letters-dakwaan-novel-baswedan
10.	Evidence P-10	News MetroTVNews.com dated 3 February 2016 bearing the title: "KPK Pastikan Kejaksaan Tarik Surat Dakwaan Novel Baswedan" (KPK Ascertains that the State Attorney will Withdraw the Indictment of Novel Baswedan) under the link http://news.metrotvnews.com/read/2016/02/03/479181/kpk-pastikan-the office of the State Attorney-tarik-letters-dakwaan-novel-baswedan
11.	Evidence P-11	News rimanews.com dated 12 February 2016 bearing the title "DPR Tolak Deponering Kasus Novel Baswedan, Jaksa Agung "Mikir-Mikir" (The DPR Rejects the Waiver of the Case of Novel Baswedan, the Attorney General "Thinks it Over") under the link http://national.rimanews.com/*law*/read/20160212/261196/DPR-Tolak-Deponering-Kasus-Novel-Baswedan-Public Attorney-Agung-Mikir-Mikir-
12.	Evidence P-12	News Tempo.co dated 22 February 2016 bearing the title "Kejaksaan Agung Hentikan Kasus Novel Baswedan" (The Attorney General's Office Discontinues the Case of Novel Baswedan) under the link http://m.tempo.co/read/news/2016/02/22/078747023/the State Attorney-Agung-Hentikan-Kasus-Novel-Baswedan

13. Evidence P-13 News rimanews.com dated 22 February 2016 bearing the title: "Kejagung Resmi Hentikan Kasus Novel Baswedan" (The Attorney General's Office Officially Discontinues the Case of Novel Baswedan) under the link http://national.rimanews.com/*law*/read/20160222/263288/Kejagung-Resmi-Hentikan-Kasus-Novel-Baswedan
14. Evidence P-14 News Tempo.co dated 22 February 2016 bearing the title "Hentikan Kasus, Jaksa Ragu Novel Baswedan Aniaya Korban" (Discontinuing the Case, the Public Attorney Doubts Novel Baswedan Tortured the Victim) under the link http://m.tempo.co/read/news/2016/02/22/063747031/Hentikan-Kasus-Public Attorney-Ragu-Novel-Baswedan-Aniaya-Victim
15. Evidence P-15 Photocopy of the Prejudiciary Case petitioned by the PETITIONER I to the District Court of Bengkulu on the date 1 March 2016 as registered in Number 02/PID.PRA/ 2016/PN.Bgl.
16. Evidence P-16 News CNNIndonesia.com dated 11 February 2016 bearing the title "DPR Tolak Deponering Abraham Samad-Bambang Widjojanto" (The DPR Rejects the Waiver of Abraham Samad-Bambang Widjojanto) under the link http://www.cnnindonesia.com/politik/20160211191059-32-110438/dpr-tolak-deponering-abraham-samad-bambang-widjojanto/
17. Evidence P-17 News DetikNews.com dated 11 February 2016 bearing the title: "Jaksa Agung Kirim Surat Deponeering Untuk Kasus BW dan Samad, Komisi III DPR Gelar Rapat" (The Attorney General Sent Letter to Deposit for the Case of BW and Samad, the Commission III DPR Summoned a Meeting) under the link http://news.detik.com/berita/3139813/jaksa-agung-kirim-letters-deponeering-for-case-bw-dan-samad-komisi-iii-dpr-gelar-rapat
18. Evidence P-18 News MetroTVNews.com dated 24 February 2016 bearing the title "Pekan Ini, Deponering Samad-Bambang Diputuskan" (This Week, the Waiver of Samad-Bambang be Decided) under the link: http://news.metrotvnews.com/read/2016/02/24/489464/pekan-ini-deponering-samad-bambang-diputuskan
19. Evidence P-19 Photocopy of a Thesis bearing the Title "Tinjauan Teoritis, Historis, Yuridis Dan Praktis Terhadap Wewenang Jaksa Agung Dalam Mengesampingkan Perkara Demi Kepentingan General" Karya Arin Karniasari, Program Pascasarjana Fakultas Hukum Universitas Indonesia" (A Theoretical, Historical, Juridical And Practical Review Against the Authority of the Attorney General to Waive a Case in the Interest of the Public" By Arin Karniasari, Post Doctorate Program, Faculty of Law, University of Indonesia), especially page 93 up to 97, downloaded from link: http://www.digilib.ui.ac.id/opac/themes/libri2/detail.jsp?id=20315934&lokasi=lokal
20. Evidence P-20 News Republika.co.id dated 14 July 2010 bearing the title "Jaksa Sampaikan Alasan Baru Terbitkan SKPP Bibit-Chandra" (Public Attorney Conveys New Reason to Issue Decree to Discontinue Investigation (*Surat Keputusan Penghentian Penyidikan*, SKPP) Bibit-Chandra) (" link: http://national.republika.co.id/berita/breaking-news/*law*/10/07/14/124648-jaksa-sampaikan-alasan-baru-terbitkan-skpp-bibit-chandra
21. Evidence P-21 News Hukumonline.com dated 08 October 2010 bearing the title "MA Kandaskan PK Praperadilan atas SKPP Bibit-Chandra" (The Supreme Court Dismissed the Prejudiciary Repeated Review on the SKPP Bibit-Chandra) under the link: http://www.*law*online.com/berita/baca/lt4caf124762588/ma-kandaskan-pk-

prejudiciary-atas-skpp-bibitchandra

22. Evidence P-22 News BBC.com dated 29 Oktiber 2010 bearing the title "Kejaksaan keluarkan deponeering Bibit-Chandra" (The State Attorney Issued Deposit of Bibit-Chandra) under the link: http://www.bbc.com/indonesia/berita_indonesia/2010/10/101029_deponeering.shtml

23. Evidence P-23 News NewsSatu.com dated 08 February 2014 bearing the title "Jaksa Agung: Deponeering Bibit-Chandra Bersifat Final" (The Attorney General: the Waiver of Bibit-Chandra is Final) under the link: http://www.beritasatu.com/*law*/165190-jaksa-agung-deponeering-bibitchandra-bersifat-final.html

24. Evidence P-24 News detiknews.com dated 04 February 2016 bearing the title "Jokowi Minta Kasus Novel Baswedan, Abraham Samad dan BW Segera Diselesaikan" (Jokowi Asked the Case of Novel Baswedan, Abraham Samad and BW be Settled Immediately) under the link http://news.detik.com/berita/3135079/jokowi-minta-case-novel-baswedan-abraham-samad-dan-bw-segera-diselesaikan

25. Evidence P-25 News detiknews.com dated 23 February 2016 bearing the title "Selain Novel, Presiden Jokowi Juga Minta Kasus AS dan BW Diselesaikan" (Other than Novel, the President Jokowi Also Asked the Case of AS and BW be Settled)", under the link http://news.detik.com/berita/3149433/selain-novel-presiden-jokowi-juga-minta-case-as-dan-bw-diselesaikan

26. Evidence P-26 News in DETIK.COM dated 22 February 2016 bearing the title "Kejagung Stop Kasus Novel, Tim Pengacara: Apresiasi kepada Jaksa Agung dan Jajaran" (The Attorney General's Office Stops the Case of Novel, the Legal Team: Appreciates the Attorney General and His Ranks), containing a photograph of a Decree of Discontinuation of a Prosecution Number B-03/N.7.10/ E.p.1/02/2016, dated 22 February 2016 (SKP2), issued by the Head of the State Attorney of Bengkulu, under the link http://news.detik.com/berita/3148162/kejagung-stop-case-novel-tim-pengacara-apresiasi-kepada-jaksa-agung-dan-jajaran

27. Evidence P-27 News in KOMPAS.COM dated 1 April 2016 bearing the title "Jaksa Agung Buka Kemungkinan Deponir Kasus Novel Baswedan" (The Attorney General Opens the Possibility to Deposit the Case of Novel Baswedan), under the link http://national.kompas.com/read/2016/04/01/05100021/Public Attorney.Agung.Buka.Kemungkinan.Deponir.Kasus.Novel.Baswedan.

28. Evidence P-28 News in TEMPO.CO dated 1 April 2016 bearing the title "Jaksa Agung Kaji Peluang Deponering Kasus Novel Baswedan" (The Attorney General Reviews the Possibility to Deposit the Case of Novel Baswedan), under the link https://m.tempo.co/read/news/2016/04/01/063758775/jaksa-agung-kaji-peluang-deponering-case-novel-baswedan.

29. Evidence P-29 News in VIVA.CO.ID dated 1 April 2016 with judul "Jaksa Agung Pertimbangkan Deponering Kasus Novel" (The Attorney General Considers the Waiver of the Case of Novel", under the link http://national.news.viva.co.id/news/read/755234-jaksa-agung-pertimbangkan-deponering-case-novel.

30. Evidence P-30 News in ANTARANEWS.COM dated 1 April 2016 with judul "Jaksa Agung kaji deponering Novel Baswedan" (The Attorney General Reviews

		the Waiver of Novel Baswedan), under the link http://www.antaranews.com/berita/552991/jaksa-agung-kaji-deponering-novel-baswedan.
31.	Evidence P-31	News HARIANTERBIT.COM dated 2 April 2016 bearing the title "Jaksa Agung Kaji Deponering Kasus Novel" (The Attorney General Reviews the Waiver of the Case of Novel), under the link http://national.harianterbit.com/national/2016/04/02/59374/0/25/Public Attorney-Agung-Kaji-Deponering-Kasus-Novel.

Besides, the Petitioners also brought forward two experts whose testimony were heard under oath in the trial dated 10 May 2016 and dated 24 May 2016, who explained as follows:

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

In the capacity as a Criminal Law expert, the expert expressed views related to his expertise in this trial to review a Law. Bearing in mind Article 35 letter c in of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (Law No. 16 of 2004) which constitutionality is under review and is related to a problem in Criminal Procedure Law, such belongs to the field of his expertise. The expert will focus only on the main subject of this testimony, namely the matter of the duty and authority of the Attorney General "to waive a case for the sake of public interest", although here and there linking it with other matters as regulated in the KUHAP, namely the prosecution and its discontinuation.

The elucidation in this regard is divided into two parts, namely ***firstly*** the problem of **meaning** of the phrase **"to waive a case for the sake of public interest"** in Article 35 letter c in the Law Number 16 of 2004, related to the elucidation of the mentioned article, and ***secondly*** regarding the **function of "the authority of the Attorney General to waive a case for the sake of public interest**", in its relation to the criminal judiciary system comprehensively.

The meaning of the phrase **"to waive a case for the sake of public interest"**

At a glimpse the phrase "to waive a case for the sake of public interest" being the authority of the Attorney General as mentioned in Article 35 letter c in the Law Number 16 of 2004, is no problem as it possesses sufficiently strong fundamental theory. Mentioned in this matter is the provision of the interpretation of the opportunity principle in the prosecution of a criminal case (Dutch: *opportuniteitsbeginsel*). In this matter people said: "the prosecutor is authorized to prosecute or not prosecute a criminal case, conditional or not conditional". On the other hand the prosecution is based on the legality principle, which instead has placed the prosecution as "an obligation" rather than "an authority".

Understanding the mentioned phrase "being the authority of the Attorney General", namely "to waive a case for the sake of public interest", as mentioned in Article 35 letter c in the Law Number 16 of 2004, it is improper to confront it with the legality principle of prosecution *versus* the opportunity principle of prosecution. Both principles possess justification in the theoretical realm and have their own philosophical basis. Surely the use of the second principle has its own pros- and cons in a legal system. In my opinion, the second principle is not in a position that conflicts each other. It is rather contemplative, whereby both are recognized in Indonesia's criminal judiciary system.

According to the Expert, rendering the authority to the Attorney General "to waive a case for the sake of public interest", as determined in Article 35 letter c in the Law Number 16 of 2004, on the one hand is the autonomy of the Law makers. Nevertheless, the problem is: whether the formulation given by the Law makers to accommodate the granting of the mentioned authority guarantees legal certainty, unbiased and due process and fair procedure and placing each person equal before the law. In this perspective the subject matter related to the petition for material review of Article 35 letter c in the

Law Number 16 of 2004 is rather focused on its constitutional interpretation, being in harmony with the principles of enforcement of a state based on law as mandated by the Constitution.

Without adequate interpretation, a potential constitutional loss to the Petitioner (principal) may really occur, like also the previous use of the authority under Article 35 letter c in the Law Number 16 of 2004 by the Attorney General, which many people have deemed it politically, as a form of evasion of the law and is indeed used to protect certain individuals from legal proceeding. For instance, related to the use of this authority by the Attorney General against a case supposing corruption against Bibit Samad Riyanto (TAP 001/A/JA/01/2011) and Chandra M. Hamzah (TAP 002/A/JA/01/2011). This has been deemed to be political, as it was conducted by the government of President Susilo Bambang Yudoyono under pressure of a part of the public and as a boomerang effect to the politics of the government in intervening a legal proceeding by forming the so-called "Team Eight". It has been deemed to be an evasion of the law as this authority was used by the Attorney General following a Decree of Discontinuation of a Prosecution against a case that was declared invalid by the District Court of South Jakarta, which was also strengthened by the Supreme Court. It has been deemed to have been used to protect the interest of certain individuals, as the basic reason of its waiver had no relation to the case material, but the individual (at the time an (off duty) Commissioner with the Commission for the Eradication of Corruption). In this matter the use of the provision granting the *seponering* authority was deemed not merely conducted for the sake of public interest, in the sense for the sake of "the interest of the nation and the State and/or the interest of the public at large", as mandated in the elucidation the article. Without a constitutional interpretation, this provision can also be used by the Attorney General subjectively, by ignoring objective factors of the case, and certainly on the other hand hurting the interest of the other party (the rapporteur or the victim as well as the public at large).

In my opinion, the main subject of the matter lies instead in the meaning of the provision which allows a case to be waived by the Attorney General, *firstly*, whether it be understood merely as a decision based on an assessment of the Attorney General *per se*, or instead be understood in the *second* meaning, namely that it is conducted by the Attorney General in the frame of "serving" public interest, namely "the interest of the nation and the state and/or the interest of the public at large".

If the Law makers intend to render the authority to waive this case merely based on a subjective assessment of the Attorney General, then the Law makers do not need to render a definition regarding what is referred to with "public interest", as mentioned in the elucidation the mentioned provision. Just let the Attorney General render his meaning *per se* regarding what he means with the phrase "for the sake of public interest" in this matter. Besides, if it is indeed so, the Law makers also do not need not at all to render an elucidation that the use of that authority by the Attorney General is subject to "after having paid regard to the suggestion and opinion power agencies of the state having relationship with the matter". Therefore, it is bright and clear that the authority of the Attorney General to waive a case herein is not in the first sense. In other words, the *seponering* authority is not discretional (an authority not dependent on the authority of other officials/institutions). Nevertheless, that matter truly indicates that the Attorney General being the highest power holder in the field of prosecution of criminal cases has the authority to waive a case "for the sake of" public interest, namely when the other state institutions declare that its institutional interest will be disturbed if a criminal process on a case be proceeded, or it would indeed be not in line with the interest of the public at large, if the case be proceeded.

According to the Expert, if the authority of the Attorney General as mentioned in Article 35 letter c in the Law Number 16 of 2004 is understood in the first sense, or he/she waives a case merely based on his/her assessment *per se*, then it would be more proper if that matter be formulated as "for" public interest rather than "for the sake of" public interest. The word "for", in the Grand Dictionary of the Indonesian Language (*Kamus Besar Bahasa Indonesia*) among others means "objective" or

"intention". In this matter a waiver of a case being conducted with the objective or is intended for public interest. The authority is inherent with the Attorney General *per se* which is authorized to render an interpretation as to what is referred to as public interest in this matter, or whether a situation has reached a certain intensity.

Different from the Article 35 letter c in the Law Number 35 of 2004, which uses the word "for the sake of" before the term "public interest", and limits the meaning of "public interest" as "the interest of the nation and the state and/or the interest of the public at large" and determines "its procedure" that the decision making as such is made "after" having paid regard to the suggestion and opinion of the power agencies of the state having relationship with the matter. In this regard, the public "interest" is something which is "beyond" the Attorney General. That said, the Attorney General only "serves" public interest and is not a "representation of" public interest *per se*. Therefore, public interest is actually the interest of the state institutions or at least public interest is the interest of the public at large as expressed by those state institutions.

Based on the above reason, different from that what has been postulated by the Petitioner, in my opinion as a Criminal Law expert, the phrase "for the sake of public interest" as mentioned in Article 35 letter c in the Law Number 16 of 2004 is constitutional to the extent be understood (conditionally constitutional) as "the interest of the state institutions and/or the interest of the public at large as expressed by the state institutions".

The function of "the authority of the Attorney General to waive a case for the sake of public interest"

The use of the authority to waive a case for the sake of public interest by the Attorney General as mentioned in Article 35 letter c in the Law Number 16 of 2004 is certainly not done as a "reprisal" or "follow-up" when a case which prosecution has been discontinued by the Public Attorney/Public Prosecutor, but a District Court being authorized to execute its horizontal control declares the act as invalid. In such a situation it is the same like saying, that the court obliges the case to be examined in a court trial and does not at all bar the possibility for the Attorney General to use its authority "to discontinue prosecution" by waiving a case based on Article 35 letter c in the Law Number 16 of 2004.

Basically the authority to discontinue prosecution, as mentioned in Article 140 section (2) letter a of the KUHAP runs parallel with and is not hierarchical to the authority to waive a case for the sake of public interest, as mentioned in Article 35 letter c in the Law Number 16 of 2004. The difference lies only in the problem of the official so authorized and its reason. The discontinuation of a prosecution is the authority of each Public Attorney/Public Prosecutor, while a waiver of a case for the sake of public interest is only the authority of the Attorney General. Meanwhile, the discontinuation of a prosecution conducted "for the sake of the interest *law*", due to lack of sufficient evidence, or the incidence appears not to be a criminal act or the case is closed for the sake of the Law (*ne bis in idem*, a deceased defendant, unfit to stand trial, expiry etc.). While a waiver of a case is conducted "for the sake of public interest", namely the interest of state institutions and/or the interest of the public at large as expressed by the state institutions.

In a construction as such, the phrase "for the sake of law" (being the reason of discontinuation of a prosecution) and the phrase "for the sake of public interest" (being the reason to waive a case), cannot exist in one identical case. The idea to waive a case cannot exist only after a stipulation of discontinuation of a prosecution is declared invalid by court, or the other way around. They have their respective places in the Criminal Procedure Law. Therefore, if a waiver of a case is conducted following the discontinuation of a prosecution as declared invalid by a court, that matter is surely not a waiver of a case as mandated in Article 35 letter c in the Law Number 16 of 2004.

The Attorney General can waive a case indeed because the prosecution of a case cannot be discontinued by reasons of law as determined limitatively in Article 140 section (2) letter a of the

KUHAP. In this regard the interest of law to prosecute a crime is “defeated” by the public interest. In line with this matter is a doctrine in Criminal Law stating: an act cannot be said to be against the law, if such act is done to serve a higher interest. In other words, to comply with criminal law norms is less important if compared with the fulfillment of an obligation according to a higher norm. In this context the law is made for the society and it is not the other way around, such as the society is made for the law. Therefore, there is no use to process a criminal case when it confronts or is not in line with the interest of the nation and the state and/or the interest of the public at large.

Based on the above, interpreting Article 35 letter c in the Law Number 16 of 2004 regardless of its elucidation is an unconstitutionally legal construction. The Elucidation to Article 35 letter c in the Law Number 16 of 2004 shall be placed as a substance of that norm. In this regard “for the sake of public interest” is merely the interest of state institutions and/or the interest of the public at large as expressed by the state institutions”. Therefore, the problem related to a waiver of a case as sensed by a part of the public is misplaced, it is not merely a domain to implement the norm or a deviation from implementing that norm, but instead it departs from an incomplete norming, obscure or at least placing a substantive norm and norm procedure in elucidation, which should only clarify rather than forming a separate norm.

Based on the above, in my opinion as a Criminal Law expert, the elucidation to Article 35 letter c in the Law Number 16 of 2004 shall be raised to become a norm on its own right, so that the phrase “for the sake of public interest” as mentioned in Article 35 letter c in the Law Number 16 of 2004 has no binding force as law, save if understood as “the interest of state institutions and/or the interest of the public at large as expressed by the state institutions”.

2. Prof. Dr. I Gde Pantja Astawa, S.H., M.H.

As we jointly know, the Petitioner in the case as such (*a quo*) has filed a petition therefor that the provision of Article 35 letter C along with its Elucidation to the Law Number 16 of 2004 regarding the State Attorney (Law regarding the State Attorney) be declared in conflict with the provision of Article 28 A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945.

In order to know whether the petition as such (*a quo*) is substantiated or not, the core of the above problem shall be placed proportionally into the frame of the State based on Law – the legality principle – the opportunity principle, and *Seponering* as one link, nor can they be separated one from the other. Discussing the State based on Law cannot be separated, it is even inherent with the legality principle being one main pillar of the State based on Law (in the concept of *Rechtsstaat* as well as Rule of Law), while the opportunity principle (as one form of deviation or exception from the legality principle) is the basis of conducting an act (of law) of *Seponering*. On that basis, below are the principal thoughts regarding the State based on Law – the legality principle, the opportunity principle, and *Seponering* as follows:

- **The State based on Law and the Legality principle**

  The legality principle (Dutch: *legaliteitsbeginsel*) is one of the main principles turned into the basis of any governance and statecraft in any state based on law particularly for countries based on law in the Continental system. Initially, the legality principle is known in tax collection by the state. In England there is a renown saying; *"No taxation without representation"*, **there is no *tax without* (*approval of*) *the parliament***, or in America there is a saying; *"Taxation without representation is robbery"*, ***tax without* (*approval of*) *the parliament is robbery***. This means that tax collection may only be conducted following the existence of laws regulating tax collection and determination. This principle is also named the power of the Law (Dutch: *de heerschappij van de wet*)."

The term legality principle is also known in Criminal Law: *nullum delictum nulla poena sine praevia lege poenali* (there is no punishment without the Law). Later on, the legality principle is used in the field of State Administrative Law with the meaning: *"Dat het bestuur aan de wet is onderworpen"* (from Dutch: That the government abides by the Law) or *"Het legaliteitsbeginsel houdt in dat alle* (*algemene*) *de burgers bindende bepalingen op de wet moeten berusten"* (from Dutch: The legality principle determines that all provisions binding the citizens shall be based on the Law). The legality principle is a principle of a state based on law frequently formulated with the saying: *"Het beginsel van wetmatigheid van bestuur"* namely the principle of lawfulness of the government.

H.D. Stout, quoting the opinion of Verhey, expressed that *het beginsel van wetmatigheid van bestuur* (rom Dutch: the principle of lawfulness of government) contains three aspects, namely the negative aspect (Dutch: *het negatieve aspect*), the formal-positive aspect (Dutch: *het formeel-positieve aspect*), and the material-positive aspect (Dutch: *het materieel-positieve aspect*). The negative aspect determines that government acts may not conflict with laws. A government act is invalid if it conflicts with higher laws and regulations. The formal-positive aspect determines that the government has only certain authorities to the extent that it is granted or based on Laws. The material-positive aspect determines that Laws contains general rules binding on acts of the government. This means that authority shall possess the basis of laws and also that the norm content of authority is determined by Laws".

Historically, the principle of government based on the Law originates from thoughts on law in the 19th century, along with the existence of the classical state based on law or a state based on liberal law (Dutch: *de liberale rechtsstaatsidee*) and dominated by the development of legalistic-positivistic law, particularly influenced by the school of legism, which regards the law only as those written in the Laws. It is assumed that there is no law or it is not law beyond the Laws. Therefore, the Laws were made the main principle of the organization of statecraft and government. In other words, the legality principle in the idea of a state based on liberal law possesses a central position or is the foundation of a state based on law (Dutch: *als een fundament van de rechtsstaat*).

Normatively, the principle that any act of the government shall be based on the laws and regulations or be based on this authority is indeed embraced in each state based on law, yet in practice the implementation of this principle differs from one state to the other. There is a country strictly holding on this principle, yet there are also countries which are not so strict in its implementation. That said, the implementation of that practice can be ignored for matters or acts of government which are not so fundamental.

The legality principle is closely linked with the idea of democracy and the idea of the state based on law (Dutch: *het democratish ideaal en het rechtsstaatsideaal*). The idea of democracy demands that each form of laws and various decisions obtain the approval of the representatives of the people and as much as possible pay regard to the interest the people. In other words, as mentioned by Rousseau,[4o] *"Vormde de wet de belichaming van de rationele, algemene wil* (French: *la raison humaine manifestee par la volonte generale*)*"* (the Law is personification of human common sense, aspiration of the society), which implementation shall be seen in the procedure of the formation of the Laws that involves or obtains the approval of the people through their representatives in the parliament.

The idea of a state based on law demands that the performance of state and government matters shall be based on the Laws and render assurance to the basic rights of the people. The legality principle becomes the legitimation basis of government acts and protection guaranty

of rights of the people. According to Sjachran Basah, the legality principle is the effort to manifest the harmonious integral duet between the sovereignty doctrine of the law and sovereignty doctrine of the people based on the monodualistic principle as pillars, having a constitutive nature.
According to Indroharto, the implementation of the legality principle will support the applicability of ***legal certainty*** and ***equal treatment***. Equal treatment occurs as each person being in a situation as determined in the provision of the Laws is entitled and obliged to act as what is determined in the Laws, while legal certainty will occur as a regulation can make all acts to be conducted by the government can be predicted or be estimated in advance with regard to applicable regulations, then in principle one can see or expect what to be conducted by the relevant government apparatus. Therefore, the public can adjust with the situation. Besides, according to H.D. Stout, *"Het legaliteitsbeginsel beoogt de rechtspositie van de burger jegens de overheid te waarborgen"*[43] (The legality principle is intended to grant legal position of the citizens against the government). The government can only conduct an act of law if it has the legality or based it on the Laws which is the embodiment of the aspiration of citizens. In a democratic state based on law, government acts shall obtain legitimation from the people as formally set out in the Laws.

Governance which is based on legality principle, means that it is based on the Laws (written law), is in practice inadequate, let alone in a society which is very dynamic. This is caused by the written law that always contain weaknesses. Although the legality principle contains weaknesses, the principle remains a main principle in any state based on law.

As it has been mentioned above, the legality principle is the basis of any performance of statecraft and government. In other words, any performance of statecraft and government shall possess legitimacy, namely the authority granted by the Laws. Therefore, the substance of the legality principle is authority, namely the capability to conduct certain acts of law.

- **The Opportunity Principle and *Seponering* in Indonesia**

In the context of Indonesia, the description regarding the State based on Law and the legality principle obtains its justification in the provision of Article 1 section (3) of the Constitution of 1945 stating that, "*the State of Indonesia is a State based on Law*". As a state based on law, the legality principle becomes the basis of any act of governance or government, which means that any act of governance as well as government shall possess legitimacy, namely the ***authority*** granted by the Laws.

In relation to the enforcement of Criminal Law in Indonesia, the State Attorney is the only institution granted the authority (attributively) to conduct the prosecution of criminal cases, so that the prosecution authority (***dominus litis***) is the monopoly of the Public Attorney as public prosecutor (vide Article 13 up to Article 15 of the Law Number 8 of 1981 regarding the Code of Criminal Procedure Law/**the KUHAP**). Other than in the KUHAP, the Law Number 16 of 2004 regarding the State Attorney also mentioned that the Public Attorney is a functional official granted the authority attributively by the Laws to act as ***public prosecutor*** and executor of court rulings having obtained permanent force of law and other authorities based on the Laws. Being the public prosecutor, the Public Attorney performs the prosecution function which is one its public duty and authority of the Public Attorney or the State Attorney in the field of crime as regulated in the provision of Article 30 section (1) letter a of the Law Number 16 of 2004 regarding the State Attorney. The other public duties and authorities in the criminal field, are among others the execution of judge determinations and court rulings already having the permanent force of law. Besides, the State Attorney has also the public duty and authority in other fields as determined in the provision of Article 30 up to Article 34 of the Law

regarding the State Attorney. As the monopoly holder of the prosecution authority, the Public Attorney shall submit criminal cases (along with the letter of indictment) to the court for immediate adjudication, if the Public Attorney/Public Prosecutor opines that from the result of the investigation a prosecution can be conducted, in the sense that there is no reason for discontinuing the prosecution due to lack of evidence, it is not a criminal case or it is closed for the sake of law – due to expiry, for instance: (vide Article 143 in conjunction with Article 140 of the KUHAP). To the extent there is no reason to discontinue prosecution, then the Public Attorney shall submit a criminal case for prosecution before Judges or in trial as part of implementation of the legality principle.

Whereas other than regulating the general duty and authority of the State Attorney, the Law regarding the State Attorney regulates also specially the duty and authority of the Attorney General as mentioned in the provision of Article 35 up to Article 37 of the Law regarding the State Attorney. The duty and the special authority granted to the Attorney General is among others the authority to ***"waive a case for the sake of public interest"*** as set out in the provision of Article 35 letter c along with its Elucidation, which reads as follows:

" The Attorney General has the duty and authority:

c. To waive a case for the sake of public interest"

The Elucidation to Article 35 letter c reads:

"Referred to with 'public interest' is the interest of the nation and the State and/or the interest of the public at large. To waive a case as mentioned in this provision is to implement the opportunity principle, which can only be conducted by the Attorney General after having paid regard to the suggestion and opinion from the power agencies of the State having relationship with the matter"

From the provision of Article 35 letter c of the Law regarding the State Attorney along with the Elucidation to the article as such (*a quo*), it can be concluded that: the authority to waive a case (*seponering*) for the sake of public interest is only granted to the Attorney General to implement the opportunity principle, after having paid regard to the suggestion and opinion from statecraft institutions having relationship with the matter.

Nevertheless, the authority of the Attorney General to conduct *seponering* to implement the opportunity principle is a deviation from the duty and authority of the Public Attorney/the State Attorney executing the power of the State in the field of prosecution which has been legitimately determined in the KUHAP and the Law regarding the State Attorney based on the legality principle. Therefore, it can be said that the opportunity principle is a deviation from the legality principle, or in other words, the opportunity principle is an exception of the legality principle.

By referring to the above mentioned finding, the legal matter left behind is:

Firstly, the obscurity of the meaning, scope, and benchmark of public interest as reason for the Attorney General to conduct *seponering.* The Elucidation to Article 35 letter c of the Law regarding the State Attorney interprets public interest only as the interest of the State and nation, and/or the interest of the public at large without a specific clarity regarding the meaning, scope, and benchmark of public interest, so that it is potentially prone to multi-interpretation and *debate.* Even an Attorney General can conduct *seponering* subjectively based on the special authority granted by Law regarding the State Attorney despite the phrase "***after having paid regard to the suggestion and opinion from the power agencies of the State having relationship with the matter"*** in the Elucidation to the article as such (*a quo*). The phrase as such is facultative rather than imperative, so that finally it depends on the Attorney General to consider and to decide whether or not to conduct *seponering*;

Secondly, the obscurity regarding who or which statecraft institutions are meant to be power

agencies of the state having relationship with the matter? If the keyword lies in the phrase "***having relationship with <u>the matter</u>"*** - namely to waive a case (of criminal act) – certainly they are the power agencies of the State within the judicative as well as the law enforcement territory, namely the Police (*Kepolisian*) of the State of the Republic of Indonesia (*Polisi Republik Indonesia*, Polri) and the Supreme Court (*Mahkamah Agung*, MA). But it is limited only to those 2 (two) power agencies of the state, if **the substance of the matter or the case** does not only relate to the perpetrator but also victim? If the substance of the matter or the mentioned case be perceived in its entirety, holistic, comprehensive as well as thoroughly – particularly from the perspective of justice relating to the rights of the victim which shall also be respected and protected, certainly it does not suffice to involve only the 2 (two) above mentioned power agencies of the State, but it shall also involve the power agencies of the State representing the interest the people (*casu quo* the victim), namely the People's Representative Council (DPR). Nevertheless, whichever power agency of the state is involved as well as having relationship with the matter, its suggestion and opinion are not imperative, but rather facultative as mentioned above.

From the above mentioned finding, it appears that there is no definition meaning, scope, and a clear and specific benchmark regarding public interest mentioned in the Elucidation to Article 35 letter c of the Law regarding the State Attorney. There is also no clarity regarding who or which power agency of the State is referred to by the Elucidation as such (*a quo*) having relationship with the matter, besides the not binding nature of the suggestion and opinion from the power agencies of the State rendered to the Attorney General in conducting *seponering*. The obscurity of the matter mentioned above leads to the conclusion that the Law regarding the State Attorney to render free authority (Dutch: *vrij bevoegdheid*) to the Attorney General to conduct *seponering* based on the discretionary power (German: *freies Ermessen*) of the Attorney General *per se*. That free authority on its turn creates the freedom to render consideration (Dutch: *beoordelingsvrijheid*) and the freedom of policy making (Dutch: *beleidsvrijheid*). In other words, the Law regarding the State Attorney to render free authority to the Attorney General to freely consider and make a policy on *seponering*.

Discretion and Arbitrary Act

Discretion

In executing their activities, the officials do not merely hold on to the legality principle. To achieve effectiveness and efficiency for performing their duty and job, the officials have been given discretionary power. The importance of granting discretionary power is in order for the officials to have the freedom as to how that power is to be carried out rather than merely executing detailed rules. Etymologically, discretionary power means the consideration, especially good consideration. Besides, discretionary power also means to choose between two or more options. The consideration as to what is to be rendered and which option is to be taken, and what means is to be used by the officials to execute power in the frame of achieving certain objectives, is not determined by the law makers (Dutch: *wetgever*), and therefore discretionary power is categorized as free authority (Dutch: *vrije bevoegdheid*). That free authority on its turn creates the freedom to make policy (Dutch: *beleidsvrijheid*) and freedom to render consideration (Dutch: *beoordelingsvrijheid*). The freedom to render consideration comes up when the Laws display two alternative options of the authority subject to certain requirements, the execution of which is in the hands of the official. *Beleidsvrijheid* is created when the law makers render the authority to officials to execute their power to conduct inventory and to consider various interests.

The Arbitrary Act

The arbitrary concept (Dutch: *willekeur*) is generally related to discretionary power. D.J.

Galligan stated that **arbitrariness is *related to the rendering of reason in the process of decision making, and is assumed as the antithesis of the reasonable* act. *Rationality is the basic condition in each decision making, especially if based on discretionary power***. In various literatures on law, the arbitrary concept is generally referred to as an act beyond reason or unreasonableness or irrationality.

As the arbitrary concept is related to consideration with common sense, the arbitrary element is tested by means of the principle of rationality or appropriateness (Dutch: *redelijk*). An act is categorized to contain arbitrary element, if the act is obviously beyond reason or has no reason (Dutch: *kennelijk onredelijk*).
Based on the above description on Discretion and Arbitrary Act, the relationship between Discretion with arbitrary act becomes apparent, particularly if ***related to the reasoning in decision making process; whether it is rational or irrational,*** In context case as such (*a quo*), the question is whether the discretion of the Attorney General in the decision making process as well as policy of *seponering* is based on reasonableness or not. It is because - as mentioned above - ***Rationality is the basic condition in each decision making, especially those based on discretionary power.*** Whenever the decision making or policy making of the Attorney General to conduct *seponering* does not comply with rationality being the basic condition of discretionary power, then *seponering* conducted by the Attorney General is an arbitrary act, it is an act ***prohibited by*** the Law Number 30 of 2014 regarding Government Administration. The prohibition to act arbitrarily is clearly and firmly mentioned in Article 17 section (2) letter c in conjunction with Article 18 section (3) letter b. The provision of Article 17 section (2) letter c of the Law as such (*a quo*) states that:

"The prohibition to abuse authority as mentioned in section (*1*) *covers:*
c. ***The prohibition to act arbitrarily"*** ,
while the provision of Article 18 section (3) letter b of the Law as such (*a quo*) states:
"The Agency and/or Government Official is categorized as acting arbitrarily as mentioned in Article 17 section (*2*) *letter c if the Decree and/or act is conducted:*

b. Contrary with a Court Decision having permanent legal force"
Other than as prohibited by the Laws, an arbitrary act also has the strong potential to violate basic human rights which are guaranteed and protected by the Constitution of 1945, especially those mentioned in the provisions of:

Article 28D section (1): *"each person is entitled to recognition, assurance, protection, and equitable legal certainty and equal treatment before the law"*

Article 28I section (1): *"The right to live, the right not to be tortured, the right of freedom of thought and conscience, the right to embrace a religion, the right not to be enslaved, the right of recognition as a person before the law, and the right not to be prosecuted based on a retroactive law are basic human rights which cannot be reduced in whatever situation"*

Article 28I section (2): "*Each person is free from treatment of discriminative nature based on whatsoever and be entitled to obtain protection against such treatment of discriminative nature."*

Related thereto, the *seponering* authority based on irrational reason/beyond reason as well as unreasonable (Dutch: *kennelijk onredelijk*) obviously denies the right to *recognition, assurance, protection, and equitable legal certainty and equal treatment before the law* as affirmed in the provision of Article 28D section (1) of the Constitution of 1945. The unequal

treatment before the law leads to the consequence of violation against *the right of recognition as a person before the law* in accordance with the provision of Article 28I section (1) of the Constitution of 1945. In the context of a victim of a criminal act whose case is made subject to *seponering*, he/she would lose his/her recognized right as a person before the law, as the interest and personality of the victim is really marginalized and as if he/she had not the quality as a person to be treated equal before the law. Besides, the *seponering* authority conducted irrationally and onredelijk (unreasonably) is a real form of discriminative treatment. On the one hand a person and the interest of the victim is marginalized, while on the other hand people who commit criminal act and whose case is waived are treated preferentially before the law. Meanwhile as affirmed in Article 28I section (2) of the Constitution of 1945 that each person shall be free from discriminative treatment based on whatsoever and be entitled to obtain protection from discriminative treatment.

In the context of the case as such (*a quo*), especially the incidence experienced by the victims, the use of the *seponering* authority not based on reasonableness, bears the potential to violate Article 28A of the Constitution of 1945 which guarantees the right to live and to defend life, thereby, as if the act of the perpetrator (a criminal act whose case is waived) who commits torture leading to death and/physical disability on the victim (in this regard it violates the right to live and to defend life) could be pardoned, even justified so that his/her case may be waived. That would certainly become a bad precedent for the law enforcement, and particularly hurts the sense of justice.

[2.3] Considering that against the petition of the Petitioner, the President has rendered his testimony in the trial dated 21 April 2016 and has submitted the testimony in writing and was received at the Office of the Clerk of the Court on the date 24 May 2016, basically as follow:

I. SUBJECT OF THE PETITION OF THE PETITIONERS

1. Whereas the petitioners are victims of a criminal act sensing to have been treated arbitrarily by Mr. Novel (at the time he had the rank of First Police Inspector (*Inspektur Polisi Tingkat Satu*, Iptu), and currently as an investigator with the Commission for the Eradication of Corruption) with the consequence that the Petitioner I became disabled for life due to a shot committed by Mr. Novel. The petitioners feel their constitutional right harmed by virtue of Article 35 letter c and Elucidation to Article 35 letter c of the Law Number 16 of 2004 regarding the State Attorney RI, whereby, **should the prejudiciary petition** filed by the Petitioner I (registered in the case Number 02/PID.PRA/2016/PN.Bgl) against the Decree of Discontinuation of a Prosecution (SKP2) Number B-03/ N.7.10/E.P.1/02/2016 by the Head of the State Attorney of Bengkulu dated 22 February 2016 to discontinue the prosecution in the mentioned case with the reason of lack of evidence and has expired, **be granted by the district court,** the prosecution against the case should be reconducted. The Public Attorney, in this regard the Attorney General will waive a case for the sake of public interest based on the provision as such (*a quo*).
2. Whereas according to the Petitioners the provision as such (*a quo*) is very prone to be abused as a tool to render legal immunity against certain parties *in casu* people being employed as well as those having once been employed with the KPK or whatever institution, being active in, or linked with, or conduct anticorruption activities or to anticorruption activists) in order that they would not be adjudicated before a lawful court in the State of the Republic of Indonesia, bearing in mind that a recommendation rendered by the other power agencies of the State related to the case to be waived would not at all bind the Attorney General.
3. Whereas against the discontinuation of a prosecution and the possibility of waiving a case, it is obviously unjust and is a discriminative treatment and eliminates the assurance to the right to

live and to defend life and protection guarantee as well as legal certainty, and equal treatment before the law by the state to the Petitioners, so that it conflicts with the provisions of Article 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945.

II. REGARDING THE LEGAL STANDING OF THE PETITIONERS

Whereas against the legal standing of the Petitioners, the Government renders its testimony as follow:

1. In accordance with the provision of Article 51 section (1) of the Law Number 24 of 2003 regarding the Constitutional Court (hereinafter referred to as Law Number 24 of 2003), declaring that the petitioners are private persons Indonesian citizens assuming that their constitutional rights and/or authorities to have been harmed by the applicability the Law.
2. Based on the Decision of the Constitutional Court Number 006/PUU-III/2005 dated 31 May 2005 in conjunction with the Decision of the Constitutional Court Number 11/PUU-V/2007 dated 20 September 2007, and judgment of the Constitutional Court has furthermore firmly rendered a cumulative understanding and definition regarding "constitutional loss" related to the applicability of a norm of Law, namely:
   a. there are constitutional rights of the Petitioner granted by the Constitution of 1945;
   b. whereas those constitutional rights are assumed by the Petitioner to have been harmed by a Law to be reviewed;
   c. the loss constitutional loss of the Petitioner as referred to has a specific (special) nature and is actual, or at least bears the potential which according to reasonableness can be ascertained that it will occur;
   d. there is a causal relationship (Dutch: *causal verband*) between the loss and the applicability of the Law petitioned for review; and
   e. There is the possibility that by the granting the petition, the postulated constitutional loss will not or will no longer occur.
3. Whereas in the petition of the Petitioners no causal relationship (Dutch: *causal verband*) is discovered between the loss experienced by the Petitioners having a specific (special) nature especially regarding the act of Mr. Novel who has committed a shot against the left foot of the Petitioner I causing him to become disabled for life and the issuance of a Decree of Discontinuation of a Prosecution (SKP2) Number B-03/N.7.10/ E.P1/02/2016 dated 22 February 2016 by the Head of the State Attorney of Bengkulu by the applicability of the article as such (*a quo*) petitioned for review.
4. The government opines that what is disputed by the Petitioners are constitutional complaint and it is not a constitutional review. Nevertheless, the Petitioners have petitioned the petition to review a Law against the Constitution of 1945 with the postulate that the provision of the article as such (*a quo*) petitioned for review conflicts with the articles of the Constitution of 1945. Whereas Article 24C section (1) of the Constitution of 1945, has firmly declared that the Constitutional Court is authorized to examine, to adjudicate, and to decide against a norm of laws conflicting with the Constitution (constitutional review), while the Constitution of 1945 does not regulate constitutional complaint.
5. Whereas it is incorrect if a weakness or shortcoming occur in the process to implement a norm is overcome by means of revoking such norm. If the above is conducted then whenever a shortcoming occurs in the implementation of a norm of a Law, it has not to be done by revoking that norm, in this regard as meant by the norm in the Law as such (*a quo*), as the above act will not guarantee legal certainty.

Therefore the Government opines that there is no constitutional loss experienced by the Petitioners due to the validity of the article as such (*a quo*).

Based on the above mentioned matters, this petition does not qualify as a party having legal

standing and it is appropriate if the Honorable Chief Justice/the Tribunal of Justices of the Constitutional Court would prudently **declare the petition of the Petitioners unacceptable** (Dutch: *niet ontvankelijk verklaard*).

III. EXPLANATION OF THE GOVERNMENT ON THE PETITION TO REVIEW A LAW PETITIONED BY THE PETITIONERS

1. The provision of Article 35 letter c of the Law regarding the State Attorney along with its elucidation, regulates:

   Article 35 letter c

   "the Attorney General has the duty and authority:
   c. To waive a case for the sake of public interest".

   Elucidation to Article 35 letter c

   "*Referred to with the interest of the nation and the State and/or the interest of the public at large, to waive a case as mentioned in this provision is to implement the opportunity principle which can only be conducted by the Attorney General after having paid regard to the suggestion and opinion from the power agencies of the state having relationship* with the matter."

2. The above mentioned provision is assumed by the Petitioners as conflicting with the provisions of Article 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945, which regulates:

   Article 28A

   "each person is entitled to live and be entitled to defend life and his/her life"

   Article 28D

   (1) each person is entitled to recognition, assurance, protection and equitable legal certainty and equal treatment before the law.

   Article 28I

   (1) The right to live, the right not to be tortured, the right of freedom of thought and conscience, the right to embrace a religion, the right not to be enslaved, the right of recognition as a person before the law, and the right not to be prosecuted based on a retroactive law are basic human rights which cannot be reduced in whatever situation.
   (2) each person is free from treatment of discriminative nature based on whatsoever and be entitled to obtain protection against such treatment of discriminative nature.

Against the petition of the Petitioners, the Government rendered the following explanation:

1. Before responding to the subject of the petition, the Government shall first clarify the decrees of discontinuation of prosecution namely:
   a. Whereas the Petitioned has filed a petition to review Article 35 letter c and the Elucidation to Article 35 letter c of the Law regarding the State Attorney based on the case of shooting against six people by the Defendant Mr. Novel at the State Attorney of Bengkulu which later on, on the date of 22 February 2016 a Decree of Discontinuation of Prosecution (SKP2) Number B-03/N.7.10/E.P.1/02/2016 was issued by the Head of the State Attorney of Bengkulu by basing on the approval of the Attorney General through the Deputy Attorney General of General Criminal Acts at the Attorney General's Office by its letter dated 19 February 2016 Number R-056/E.2/TPP.2/02/2016.
   b. Whereas meant by the decree to discontinue a prosecution is an act of discontinuing a

prosecution being the authority of the Public Prosecutor (Public Attorney having the duty as public prosecutor to handle a case).

c. Whereas that being the basis of the Petitioners to file a review on the Law regarding the State Attorney is inappropriate as the Petitioners have filed a review on the article as such (*a quo*) regarding one of the duties and authorities of the Attorney General regarding waiver of a case for the sake of public interest with the backdrop of the issuance of a Decree of Discontinuation of a Prosecution Number B-03/N.7.10/E.P.1/02/2016 by the Head of the State Attorney of Bengkulu with the suspect Mr. Novel, whereby the scope of this Decree of Discontinuation is not the authority of the Attorney General. That statement is strengthened by the elucidation to Article 77 of the KUHAP stating that meant by the "discontinuation of a prosecution" is not included in waiver of case for public interest which is the authority of the Attorney General.

2. The objective of the enactment of the authority to waive a case for the sake of public interest (*deponeering*):

The waiver of a criminal case for the sake of public interest (*deponeering*) in a criminal process is an exception from the legality principle. According to A.L.Melai, the non-performance of a prosecution by the prosecutor as public prosecutor is a *Rechtsvinding* (from Dutch: invention of a law) which deserves due consideration as the law demands justice and equality before the law. Article 35 letter c of the Law regarding the State Attorney as well as its elucidation stated the waiver of a case (*deponeering*) for the sake of public interest is as follow: as referred to with "public interest" is the interest of the nation and the State and/or the interest of the public at large. To waive a case as mentioned in this provision is to implement the opportunity principle, which can only be conducted by the Attorney General after having paid regard to the suggestion and opinion from the power agencies of the state having relationship with the matter.

Osman Simanjuntak stated that the waiver of this case is the authority bestowed by the Law to the Attorney General to waive a case for the sake of public interest. The basis of deviation in this case lies in our procedural law which adheres to the opportunity principle, whereby it is believed that a case of criminal act will cause a shock in the public if the case is submitted to court trial, or the adjudication of the mentioned case will lead to negative consequence in the public at large.

The legal basis to implement waiver of a case for the sake of public interest (*deponeering*) by virtue of the opportunity principle in Indonesia is:

a. Unwritten law (customary law);
b. Article 4 Government Regulation in Lieu of Law (*Peraturan Pemerintah Pengganti Undang-Undang*, Perpu) Number 24 of 1960 regarding Investigation, Prosecution, and Examination of Criminal Corruption Offense;
c. Article 35 letter c of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia.

The opportunity principle put down in Article 35 letter c of the Law regarding the State Attorney states that the Attorney General possess the duty and authority to waive a case for the sake of public interest. What "public interest" means is explained in the elucidation to Article 35 letter c as follows: "as referred to with public interest is the interest of the nation and the state and or the interest of the public at large".

The opportunity principle as a legal institution is known as the authority of the Attorney General to remove prosecution or not to prosecute somebody to the court, although there is sufficient evidence for prosecution based on the consideration of public interest. The policy to render the authority to choose or to cut a link of a judiciary process is for the legal

benefit of the public. The opportunity principle as a legal institution which tends to be a tradition is in essence the result of a conscious social consensus and is a facility to protect and to guide and to participate in the contribution to give form in the life of the society. If nowadays it is admitted that this growing legal institution can no longer maintain and manifest the essential form of *law*, namely justice, truth, and order, then that legal institution *per se* needs review.

That said, a general conclusion can be drawn that the objective of waiver of a case (*deponeering*) is in principle to render benefit, appropriateness, and good opportunity to protect the interest the public well and correct. Bearing in mind the importance of the use of the *deponeering* authority, then that authority shall remain applicable as mentioned in Article 35 letter c of the Law regarding the State Attorney.

3. Furthermore the Government will render clarification about the subject of the petition as follow:

a. Article 35 letter c of the Law regarding the State Attorney conflicts with Article 28A of the Constitution of 1945.

Against the above postulate of the Petitioners, the Government renders the following description/argument:

1. This Article is a new chapter in the Constitution of 1945 and is simultaneously an extension material on basic human rights as already set down in the Constitution of 1945 prior to amendment.
2. The addition of the basic human rights formulation and assurance of respect, protection, implementation, and its embodiment into the Indonesian Constitution of 1945 is not merely due to the will to accommodate the development of the view regarding basic human rights which increasingly take basic human rights serious as a global issue, but because it is one of the conditions of a state based on law. Basic human rights are frequently made to become one of the indicators for measuring the level of civilization, of democracy, and the level of progress of a country. The formulation of basic human rights already existing in the Constitution of 1945 needs to be equipped by adopting the developing view on basic human rights to date.

   The entrance of the formulation of basic human rights into the Constitution of 1945 is a big progress in the Indonesian process of change and is simultaneously one of the efforts of the Indonesian nation to turn the Constitution of 1945 into more a modern and democratic Constitution.

   With the formulation of basic human rights in the Constitution of 1945, the basic rights of each citizen and the population of Indonesia are constitutionally guaranteed. In this regard, the Indonesian nation perceives that basic human rights shall pay regard to Indonesian characteristics and a basic rights shall also be balanced with obligations, so that mutual appreciation and respect to the basic human rights of the other especially the right to live and the right to defend life and his/her life will hopefully be created.

3. Based on the above, the postulate of the Petitioners to declare that Article 35 letter c of the Law regarding 16 Number 2004 conflicts with Article 28A of the Constitution of 1945 is a postulate which is not legally based, because one objective of Article 35 letter c of the Law regarding 16 Number 2004 instead renders assurance, protection of each citizen personally, family, honor, prestige and property under power and sense of security to live each one's life against public interest.

b. Article 35 letter c of the Law regarding the State Attorney conflicts with Article

28D section (1) of the Constitution of 1945.

The Government renders the following description/argument against the above postulate of the Petitioners,:

1. Any person is entitled to recognition, assurance, protection, and equitable legal certainty and equal treatment before the law without discrimination. It is mentioned in Article 7 of the "*Universal Declaration of Human Rights*" which is the general guidance (*universality*) in any country. The law is a reflection of the soul and thought of the people. The State of Indonesia is a State based on law (Dutch: *Rechtsstaat*). One of the elements possessed by a state based on law is the fulfillment of the basic human rights (fundamental rights).
2. Whereas Article 28D section (1) of the Constitution of 1945 shall be read using systematical interpretation (*sistematische interpretatie*) so that Article 28J section (2) of the Constitution of 1945 is a provision which limits Article 28D section (1) of the Constitution of 1945, because the place of Article 28J section (2) of the Constitution of 1945 is in the closing of the provisions regulating basic human rights in the Constitution of 1945. Such interpretation also causes basic human rights as regulated in Article 28A up to Article 28I abide by the limitation of basic human rights as regulated in Article 28J of the Constitution of 1945.
3. Besides, as Indonesia adheres to the system of civil law, the source of basic human rights is the Constitution and the laws and regulations and therefore if the constitution reduces basic human rights of its citizens, then such is allowed, although the reduced basic human rights *per se* are non-derogable rights because whether there is or not basic human rights depends on its regulation in the constitution.
4. Based on the above then the postulate of the Petitioners declaring that Article 35 letter c of the Law regarding the State Attorney conflicts with Article 28D section (1) of the Constitution of 1945 is a postulate lacking legal base because one of the objectives of Article 35 letter c of the Law regarding the State Attorney is to grant equitable legal certainty and equal treatment before the law and balance between the implementation of public interest and the personal interest of each citizen.

c. Article 35 letter c of the Law regarding the State Attorney conflicts with Article 28I section (1) and section (2) of the Constitution of 1945.

The Government renders the following description/argument against the above postulate of the Petitioners:

1. The provision of this Article intends that each person has the basic rights which cannot be reduced in any form whatsoever and be treated equal and to obtain equal protection against all things of discriminative nature.
2. Indonesia is a state based on law which grants equal protection to the rights or basic rights of each of its citizen. However by the granting and implementation of those basic rights, each citizen shall abide by the definitions rendered by the Laws with the objective of guaranteeing recognition and protection against the rights of other people in accordance with moral, religious values, security consideration, and public order in a democratic society.

3. Based on the above, the postulate of the Petitioners declaring that Article 35 letter c of the Law regarding the State Attorney conflicts with Article 28I section (1) and section (2) of the Constitution of 1945 is a postulate lacking legal base because the provision of this Article does not violate the constitutional right of any citizen, the provision of this Article guarantees performing of public interest which renders benefit to any citizen.

IV. PETITUM

Based on the above mentioned elucidation and argument, the Government has petitioned to the honorable Chief Justice/the Tribunal of Justices of the Constitutional Court examining, deciding and adjudicating the petition to review the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia against the Constitution of the Republic of Indonesia of 1945, may render the following judgment:

1. To dismiss the petition to review of the Petitioners as a whole or at least declaring the petition of the Petitioners to review is unacceptable (Dutch: *niet ontvankelijk verklaard*);

2. To accept the testimony of the Government as a whole;
3. To declare the Petitioners lacking Legal Standing;

4. To declare the provision of Article 35 letter c and Elucidation to Article 35 letter c of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia as not conflicting with Article 28A, Article 28D section (1), Article 28I section (1) and Article 28I section (2) of the Constitution of the Republic of Indonesia 1945.

[2.4] Considering whereas to strengthen its testimony, the President brought forward an expert to be heard of his testimony under oath on the trial dated 24 May 2016 and one expert testimony in writing, as follow:

1. Prof. Dr. Andi Hamzah, S,H.

INTRODUCTION

The opportunity principle (Dutch: *Opportuniteitsbeginsel*) is generally interpreted: *"The public prosecutor may decide - conditionally or unconditionally - to make prosecution to court or not."*

Historically the principle has been implemented in Indonesia as of the colonial era, although not regulated in the laws, because Indonesia's (*Nederlands Indie*) criminal law and criminal procedure law originate from the Netherlands, which in 1926 promulgated the *Strafvordering* (from Dutch: the Code of Criminal Procedure Law (*Kitab Undang-Undang Hukum Acara Pidana*, KUHAP), and the Netherlands affirmed Article 167 whereby the Netherlands adhered to the opportunity principle (Dutch: *opportuniteitsbeginsel*). In the 1950s through the 1960s the opportunity principle became widely implemented in Indonesia, despite the still absent laws. The Attorney General Soeprapto "the father of the office of the State Attorney" has several times implemented the opportunity principle on high profile cases. The Attorney General Soeprapto around the year 1956 has waived (*seponeerd*) the case of an economic delict against Indonesia's foreign minister R.A. who was arrested by the Commander of the Siliwangi Division Colonel Alex Kawilarang at the Kemayoran Airport because he carried Dollar currency without permission of the central bank. At the time, based on the Foreign Exchange Ordinance (from Dutch: *Devizen Ordonnantie*) 1940, it was subject to the Law on Acts of Economic Crime, which prohibited to carry out foreign exchange to the overseas without the permission of the central bank. It became a case waived subject to the condition that the Dollar currency be submitted to the state. Therefore, the reason was for the sake of public interest as the foreign minister was to attend the General Assembly of the UN in New York. Imagine, suppose the opportunity principle was not implemented, the foreign minister became prosecuted, with the consequence that he could not attend the UN General Assembly. *Therefore, the reason for the sake of public interest cannot be defined. That depends on the sound sense of justice of the people.* In countries adhering to the opportunity principle it is not only for public interest and the State, but also in the interest of individuals.

Based on that precedent of the Attorney General, the expert being the economic prosecutor at the District State Attorney of Makassar in the years 1957-1961, at the order of the Head of the State Attorney Mr. Arnold Baramuli frequently drew-up memoranda to the Attorney General Soeprapto and later on, Gunawan, proposing that that the opportunity principle be implemented against smuggling

delict by the Attorney General with the reason, if submitted to the court, it was uncertain and there was the possibility that the defendant be released by the judge. By implementing the opportunity principle subject to the condition that the smuggled goods be submitted as a whole for auction, or if already sent abroad, to repay the price and the monies be cashed by the State. Besides, a fine will also be imposed (Dutch: *schikking*) on the defendant. Therefore, public interest was interpreted as the cashing of a certain amount of money to the State's treasury, rather than the defendant be sentenced for punishment but there is no money cashed into the State's treasury. If the defendant be adjudicated and be subjected to fine, there was the big possibility that the convict would not pay it, and opted to replace the fine with a maximum six month imprisonment. The Attorney General had never rejected that suggestion of the head of the district state attorney. The smuggling delict was then regulated in Article 26 b and 25 lI c of the Rights Ordinance (Dutch: *Rechten Ordonnantie*), which entered the Law on Acts of Economic Crime of 1955 as retold from the Law on Economic Delicts (Dutch: *Wet op de Economische Delicten*) of the Netherlands of 1950 which allowed a fine as agreed by the prosecutor and the defendant (Dutch: *schikking*) based on the opportunity principle.

When Baharuddin Lopa became the Head of the High State Attorney in Aceh and West Kalimantan around the years 19S9-1974, he frequently implemented the opportunity principle against smugglers. Now the public attorney can no longer implement the opportunity principle against smugglers, because based on the Law Number 10 of 1995 as amended by the Law Number 17 of 2006 regarding Customs Office, the Tax and Excise Office monopolizes the investigation of smuggling delict. The *Rechten Ordonnantie* regulating smuggling delict was revoked and smuggling delict became subject to the Customs Law and not to the Law on Economic Acts whereby the prosecutor is authorized to investigate.

As of 1961 the Law regarding the State Attorney has affirmed, that Indonesia embraced that principle and became affirmed again in the Law Number 5 of 1991 which is replaced by the Law Number 16 of 2004 regarding the State Attorney especially Article 35 c. The Draft KUHAP also affirmed adherence to the opportunity principle and out of court case settlements (the Netherlands: *afdoening buiten proces*; England; *transaction out of judiciary*). The opportunity principle became the highest legal base for out of court case settlements. In less serious cases, light motive, indemnification of loss, the prosecution would not be proceeded, a Case would be *seponeerd*. If we do not adhere to the legality principle, it becomes impossible for us to settle cases out of court which is widely known as restorative justice. The implementation of the Restorative justice has now engulfed the world.

DISCUSSION

A. The opportunity principle is embraced in many Countries, among others;

1. The Netherlands

Affirmed in Article 167 of the Criminal Procedure (Dutch: *Strafvordering*) of 1926.

If the discontinuation of a case due to technical reasons, among others, lack of evidence, *ne bis in idem*, expiry of the case, there is a base of rescission of crime (there is a justification or forgiving basis), complaint delict or there is no complaint, or in English it is referred to as simple drop. That is not discretionary power or opportunity principle. If a case is discontinued due to policy reason, if the conduct of prosecution will harm public interest, government interest or interest of individuals (the defendant is already very old, the perpetrator is not a recidivist, the loss has been indemnified), those are referred to as waiver (*seponeren*) of a case by reason of policy or public interest drop. It is based on the opportunity principle.

Based on the opportunity principle as the highest legal protection, in the Netherlands now the out of court case settlement (Dutch: *afdoening buiten proces*) has achieved 60% of cases are no longer submitted to the court. All cases subject to a criminal threat of less of six years can be settled out of court, subject to the condition of light motive, the defendant is not a recidivist, the loss has been indemnified (the testimony of Prof. mr. dr Strijards, an expert to the public attorney in the Netherlands, dated 15 June 2010 to the Indonesian delegation, namely Azis Syamsuddin,

Indrianto Seno Adji, Muh.Saiim and Andi Hamzah).

Besides, based on the opportunity principle as the highest legal protection, the prosecutor (Dutch: *officier van justitie*) of the Netherlands based on Article 257 a Sv (the KUHAP) has again moved further by implementing the sanction *per se* eluding the judge which is referred to *strafbeschikking*. Kinds of *strafbeschikking* are:

a. Duty punishment (Dutch: *taak straf*) learning or working the longest 180 hours;
b. Fine;
c. The prohibition to traffic (vehicle freeze for some time);
d. Payment of an amount of money to the State for submission to the victim;
e. The prohibition to drive a vehicle the longest six months.

Therefore this is to implement conditionally the opportunity principle (not to prosecute). This *strafbeschikking* of the Netherlands copies Sweden where it is termed *strafforellaggende*, although Sweden adheres to the legality principle rather than opportunity.

Because the public prosecutor has implemented its own sanction in Countries adhering to the opportunity principle, the prosecutor has been named a *semi judge* (German: *ein Richter vor einem Richter*). Other than that, the Dutch prosecutor can also combine some cases in one dossier (Dutch: *voeging ad informandum*), for instance: someone has committed theft 10 times, for which only three cases would be submitted to the court. In the Netherlands it is not possible that somebody be adjudicated times and again, whereby the one judge has no knowledge about the judgment of the other judge, so that the punishment of Gayus Tambunan has become 32 years.

2. France

France adheres to the opportunity principle as of 1789 by the term *classer sans suite* if it is perceived that the case does not require prosecution. In 1958 the opportunity principle became formally regulated in the French KUHAP. By reason of policy it became public interest drop, for generally light cases, the defendant is not a recidivist and the loss has been indemnified. Frequently an offense occurs due to the fault of the victim *per se*. In Indonesia, the example is given by motorbike riders hit by a Transjakarta omnibus, due to the fault of the motorbike rider *per se* for having entered the busway lane. Therefore, to implement the opportunity principle is not only for public interest and the State, but also in the interest of the individual.

French public attorney France can also impose *penal aider*, among others the *composition penal*, for instance, vehicle freeze for the maximum of six months, postponement of driving license for the maximum of four months, working without pay for the maximum of 60 hours. All those are decided by the prosecutor without involving the judge.

Other than such discretionary power, as of 1990, the French prosecutor can order a suspect an act of *rappel ala loi*, in English: call to order, namely a certain order for instance, to pay alimentation for a spouse or child, to pay indemnification for the loss suffered by a victim, or to correct the status of one's work. If that is fulfilled, then the prosecution is discontinued without requiring the knowledge of a judge, which is referred to as conditional discontinuation of a prosecution.

3. Belgium

Alike France, the prosecutor may waive a case termed as *classer sans suite*. Beside simple drop, lack of evidence, the Belgian prosecutor can discontinue a prosecution under probation, known as praetorian probation. The discontinuation of a prosecution under probation in the form of among others: prohibited to visit a certain place, prohibited to meet a certain person.

All that become rarely implemented, because like in the Netherlands, where a lot of transactions have been implemented, if there is a threat of fine and/or imprisonment of not more than five years (in the Netherlands not more than six years imprisonment, under the Indonesian Draft KUHAP not more than 4 and 5 years imprisonment) the prosecution will be discontinued, if

the defendant is not recidivist, there is a light motive, and the loss has been indemnified. It is the same in Belgium if it is settled in a civil case. In 1994, mediation in criminal judiciary is included in the Belgian KUHAP, where the prosecutor can act as mediator. Mediation can be conducted for delicts threatened by crime imprisonment of the maximum of two years. However, if there are matters relieving, waiver of the case can be implemented for delicts threatened by imprisonment of the maximum 15-20 years. In cases of alcohol and psychotropic, the prosecutor can offer medical act, therapy and trainings for the sake of healing. Bearing in mind that the mediation system indicates the success, Belgium moved forward, by the Law of *22* June 2005, although a case has been prosecuted, although the convict has done imprisonment or its alternative mediation can still be conducted. This leads prisons to become loose in Belgium, different from Indonesia, where prisons are heavily populated, because people become satisfied only if the law offender be imprisoned. Thomas Raffles the British Governor General in Indonesia, wrote in the Introduction to his book *"History of Java*", "according to the Dutch, the Javanese (he meant Indonesians) are revengeful." Perhaps if this mediation system is implemented in Indonesia, people will say that the Indonesian KUHAP violates the *magna charta*.

4. The Russian Federation

It seems the Russian Federation also implements the opportunity principle, because the Russian KUHAP of 2004 (one of the newest KUHAP in the world), under Article 221 section (2) regarding the act and judgment of the public prosecutor, it reads: "dismissing the criminal case or criminal prosecution as to any of the individual accused in full or in part."

Such is also with the KUHAP of Georgia, a fraction of the former Soviet Union, the Georgian KUHAP of 15 February 2013 (also the newest KUHAP in the world) in Article 106 (Decision to Terminate Investigation and/or Criminal Prosecution/judgment to discontinue an investigation and/or procurement) in section (1) it states: "A prosecutor shall decide the issue of terminating investigation and/or criminal prosecution by his/her ruling. This ruling cannot be appealed in court, it can be appealed by a victim only once to a superior prosecutor."

5. Japan

The KUHAP of Japan regulates the discretionary power of prosecution which if translated into English would read: "postponement of prosecution", which is conducted if :

a. the age, character, and situation of the perpetrator, for instance: the perpetrator is still young or is already old, has never been punished.
b. the weight or dimension of the act, or
c. the condition caused thereby. Including whether the felony committed because he/she is stimulated by the victim, the size of loss of the victim, whether indemnification for the loss has been paid to the victim, whether the emotion of the victim has been healed, whether there is conciliation between the victim and the perpetrator, whether there is an effect to the society, whether the perpetrator has regretted.

According to Koici Miyazawa, more than 50% of theft cases and delicts against wealth of another is not prosecuted by the Japanese prosecutor because the perpetrator is already old. Also, the prosecutor in Japan will not prosecute if he/she is doubtful whether the perpetrator will be punished or set free. Therefore, the prosecutor submits a case to the court if he/she is confident that the perpetrator will be punished. The consequence is, that cases set free by court reached a rate of 0,001%. That means, that from the average 100.000 cases submitted to the court just one has been set free. The more is that the judges, the prosecutors and advocates in Japan undergo one education. Therefore, Japanese prisons are not full.

Other countries also adhering to the opportunity principle, comprise among others South Korea, Thailand, Morocco and Cambodia. Cambodia recently imposes a new KUHAP drafted within some months only because of copying the French KUHAP, its former colonist. It is

different from us. More than seven years after I have submitted the Draft KUHAP to the Minister Andi Manalatta in 2009, we do not know its whereabouts to date.

B. States adhering to a conversely principle, namely the legality principle, which means that all cases with sufficient evidence be submitted to the court. However, because the world is now being blown by the strong wind of restorative justice, all countries adhering to the legality principle have not been consistent in its enforcement.

1. Germany

Although Germany adheres to the legality principle and not opportunity, which means that all cases having sufficient evidence shall be submitted to the court, Germany has loosen that principle with some exceptions. The Public Attorney (German: *Staatsanwalt*) has implemented the opportunity principle (discretionary power of prosecution) against a case involving a house-break to commit felony, certain cases of white collar crime, and cases of sexual felony without violence against underage children. The German Federal Public Attorney can waive special high profile cases, for instance: treason against the state, terrorisrn, if the perpetrator supports efforts to quell dangers against the security of the state (in Indonesia we used to name it "justice collaborator"). The reason is, if the weight of the fault is light, public interest does not require prosecution be conducted.

Even recently the German prosecutor has implemented the punishment order (German: *Strafbefehl*). Because Germany adheres to the legality principle, the prosecutor requests a warrant from the judge, which is rarely dismissed, so that the judge approval has become merely *pro forma*. Therefore, the German model of *Strafbefehl* which is parallel to *strafbeschikking* in the Netherlands, namely the imposition of a fine, the sentencing to brief imprisonment (*confinement* ("*kurungan*" in Indonesia)).

The German Public Attorney (German: *Staatsanwalt*), is permitted to implement discretionary power against provisions out of the KUHP (German: *Ordnungwidrigkeiten*) commensurate with the opportunity principle.

2. Austria

Austria's criminal law always follow Germany's because of the same race, religion, culture and language. There is a saying: *"If Germany has it, Austria will soon get it."* By the validation of the *Strafprozessreformgesetz* (from German: the Law on Reform of the Criminal Procedure Law), the authority of the Austrian Public Attorney has been extended similar to that of Germany and has become *ein Richter vor dem Richter* (a judge before the judge). Initially the diversion of child judiciary became implemented for adult judiciary as of 1999.

3. Italy

Italy with the new KUHAP of 1988 has moved from the French/Dutch *inquisitoir* system to the American system. Automatically Italy imitates the system of the American plea bargaining which means that if the defendant admits, then the prosecution will be reduced. Although Italy adheres to the legality principle in its Constitution, with all means it attempts to loosen that principle. There are two kinds of plea bargaining under the Italian model, firstly: *pattegiamento* for felony delicts, which the prosecutor may approve the suggestion of the suspect/his/her attorney to accept an imprisonment and which duration to be done by the suspect. If the court approve it, then the punishment can be reduced up to the maximum of 1/3. If the maximum punishment is for life, it will be replaced by a term of 30 years.

Secondly, *procedimento per dicreto* for light felonies to be subjected to a fine of 50% of the maximum. This is equal with *schikking* which is implemented in Indonesia in 1950 up to the promulgation of the Law Number 10 of 1995 regarding Customs which investigation became monopolized by the Tax and Excise Office.

4. Spain

For cases of children and juveniles the prosecutor has the full power to conduct discretionary power on prosecution as well as to conduct diversion. The power of the prosecutor to negotiate with the defense/legal counsel can be conducted in fast cases (*judicio rapido; rapid justice*), for cases threatened by punishment to imprisonment of less than five years. For blitz cases which threatened punishment is less than three years imprisonment if there is a consensus between the prosecutor and legal counsel can be immediately decided by a judge commissary without court trial, which punishment is reduced to 1/3 of the maximum threatened punishment. Therefore, although Spain adheres to the legality principle, it does not implement it fully though.

5. Portugal

Although Portugal adheres to the legality principle in its Constitution, the prosecutor can discontinue a prosecution for delicts threatened by imprisonment of less than three years. Because adhering to the legality principle, it is subject to the permission of a judge commissary, it is not a judge of the district court. In Indonesia a pretrial judge is referred to as prejudiciary judge.

6. Sweden

Sweden adheres to the legality principle, which means that all cases with sufficient evidence shall be submitted to the court, besides implementing the simple drop, Sweden also discontinue prosecutions for public interest (public interest drop) with the reason: 1) The defendant will only be subjected to punishment by fine or punishment by imprisonment in lieu of fine; 2) The defendant is being prosecuted in another case and this second case is less important if compared to the first case. If compared with the case of Gayus Tambunan and Nazaruddin who have been adjudicated times and again, so that it surpasses the punishment as regulated by the Laws; 3) The other act as treatment by a psychiatrist be implemented against the defendant. The Swedish Public Attorney can also explicitly declare not to prosecute if public interest is not a delict element.

The order to punish (in Germany *Strafbefehl;* in the Netherlands, *strafbeschikking*) having the same nature with a judge decision having obtained permanent legal force (Dutch: *in kracht van gewijsde*; Latin: *res judicata*). If the defendant rejects, then it will proceed to a full adjudication trial. Besides imposing a fine (*strafforellagende*) like the schikking of the smuggling case in the past in Indonesia, can be combined with some conditions, for instance to do social work without pay.

7. Turkey

Turkey also adheres to the legality principle, because the Turkish KUHAP of 1929 was copied from the German KUHAP during the era of Kemal Ataturk. Although Turkey adheres to the legality principle as Germany, yet under the new KUHAP of 2005, the Public Attorney Turkey is authorized to implement individual interest drop (discontinuation of a prosecution in the interest of an individual) if the perpetrator states his/her regret, thus the suspect pays a prepayment of fine if threatened by a punishment by fine or imprisonment of the maximum three months (in Indonesia: confinement). The Turkish Public Attorney can also conduct mediation with the suspected-victim. If there is a consensus, the prosecutor dismisses the prosecution. The prepayment as well as mediation are much implemented against the under-age perpetrators and old-age perpetrators. In a modern language: Turkey has implemented restorative justice, although adhering to the legality principle.

C. Some countries absent from determining to adhere to the opportunity or legality principle, remain; in practice they implement the discretionary power of prosecution.

1. The United States

The United States does not determine in its laws whether or not adhering to the opportunity or legality principle, yet in practice it implements the discretionary power of prosecution. At the investigation stage the prosecutor particularly the district attorney implements the discretionary power extensively to discontinue investigation. Besides, he/she can implement the plea bargaining with the suspect: if the suspect admits, then the prosecution will be reduced. Although a plea bargaining shall be approved by the judge, in practice the judges approve it. In accordance with its law culture, the American prosecutor performs a double role: 1. as an administrator of the judiciary and 2. as a semi judge which leads to the jargon of quasi-judicial officer.

As an administrator of criminal judiciary or in Indonesia referred to as law enforcers (*penegak hukum*), the prosecutor functions as public prosecutor, playing the role of *Rambo* who can prosecute a crime as heavy as possible. As a semi judge or quasi-judicial officer he/she plays the role of a "minister of justice", playing the role of the Pope, namely to protect innocent people, to consider rights of the suspect and prevent the conduct of prosecution based on revenge. Therefore, the prosecutor is authorized to discontinue prosecution, either by technical reasons (simple drop) as well as by reason of public interest to waive a case. Whereas the American prosecutor conducts an honest duty, the first ethical conduct of the American prosecutor shall not turn the success of prosecuting people as a reason for promotion. Therefore, it is different with Indonesia, where the more corruptions and heavy crime be prosecuted, the more the officers be praised and even the public is willing to grant medals. The American Public Attorney is the most powerful in the world. The authority of the Attorney General, equals the authority of an Indonesian Attorney General plus the authority of the Minister of Law and Human Rights reduced by Immigration and added by the authority of the Chief Police (*Kepala Polisi Republik Indonesia*, Kapolri). The American Public Attorney oversees the FBI/the federal investigator and the Interpol.

2. England and Wales

England and Wales do not determine in its laws whether adhering to the opportunity or legality principle, yet in practice the CPS (Crown Prosecution Service) implements the waiver of a case. That is indicated by the statement of the Attorney General of England Lord Shawcross, more than 50 years ago: “Never has it been a regulation in this country – I hope that it will never happen – that a perpetrator of a criminal offence shall be becoming the subject of prosecution." The discretion of prosecution in England and Wales is implemented against trivial cases, the perpetrator is already old or the perpetrator is still a teenager, the Law breached is obsolete, is still in force but is no longer in accordance with modern way of thought, the Law breached is no longer popular in the view of the society, the prosecution is very heart-breaking, cruel and full of hatred (revenge), the evidence gained is invalid, or can give cause suffering to the witness and the victim.

Therefore, a discontinuation of prosecution in England and Wales is in the form of simple drop, individual interest drop and public interest drop. Surprisingly, Scotland being part of the United Kingdom along with England, Wales and Northern Ireland, adheres to the opportunity principle as France since long ago. Such is also with Northern Ireland which tends to follow Scotland.

3. Singapore

Like the common law countries, Singapore recognizes the principle of expediency, which is actually non-other than the opportunity principle. The Singaporean Public Attorney can also implement plea bargaining like in the United States.

CONCLUSION

1. If the opportunity principle as put down in Article 35 letter c of the Law regarding the State Attorney is revoked, that would mean a set-back for Indonesia, we adhere to the legality principle the same like Germany, Austria, Italy, Portugal, Hungary, Greece and Spain where they have started to become unsteady and will no longer consistently adhere to the legality principle, because the world is now being blown by the wind of restorative justice. The German Public Attorney (German: *Staatsanwalt*) for instance, has implemented the sanction *per se* without court process which they term as *Strafbefehl*, like the Netherlands implementing *strafbeschikking*. Because Germany adheres to the legality principle whereby all cases with sufficient evidence shall be submitted to the court, he/she requests the judge permission for implementing such *Strafbefehl*. In practice there has been no judge rejecting it, judge permission is also only of *pro forma* nature. Therefore, the German prosecutor has in practice become like the Dutch prosecutor and have become semi judge. They name it *ein Richter vor dem Richter* (a judge before the judge).
2. If the opportunity principle is revoked in Indonesia, then a lot of laws shall be amended, including the KUHAP in force now and the Draft KUHAP, the most important amendment of which is indeed implementation of out of court case settlement (Dutch: *afdoeninq buiten proces;* transaction out of the judiciary) the highest legal protection of which is the opportunity principle. All cases threatened by imprisonment of below five/four years can be waived (*seponeerd*) subject to the condition that it has a light motive, the loss has been indemnified, the perpetrator is not a recidivist. To follow the Netherlands and the other countries adhering to the opportunity principle, it is not only the Attorney General who is authorized to *seponeer* a case, but all prosecutors with the strict supervision of the High Public Attorney. Such is also with the Bill of the Criminal Code (*Rancangan Kitab Undang-Undang Hukum Pidana*, R-KUHP) which shall be amended. The Law of Child Courts also regarding restorative justice sheltered under the opportunity principle. In short, the Indonesian criminal procedure law and criminal law need be replaced, only because of one case. Indonesia has frequently petitioned to Saudi Arabia to implement *restorative justice* principle in order to indemnify for the very big loss to the families being victim of murder committed by our work force. Therefore, restorative justice is more extensive than out of court case settlement, because it includes serious cases, namely murder. How can it be that at home we do not want to implement the opportunity principle while abroad we beg for it.
3. Dutch law experts say, there is a criminal law expert in Indonesian, proposing progressive law which is actually a regressive law back to the law of the era of Sultan Hasanuddin, Sultan Agung, and Sultan Tirtayasa.

4. The Petitioner should not have petitioned the revocation of the opportunity principle as put down in Article 35 letter c of the Law the State Attorney, to revoke the opportunity principle which has been embraced for centuries in Indonesia means to recast the whole system of criminal law and criminal procedure law, but pleading to the Attorney General not to implement the opportunity principle or in other words not to *seponeer* the case of Novel, with this and that reason. If there is a mouse in the barn, don't burn the barn.
5. If the opportunity principle is revoked, then the policy of discretionary power of the police for not pursuing violation cases, for instance: important people driving cars in the bus way lane or in sidewalk of highways not be arrested, shall also be revoked, because we would move to adhere to the legality principle.

2. **Fachrizal Afandi, S.Psi., S.H., M.H. (Written Testimony)**

The principle of functional differentiation as regulated in the Code of Criminal Procedure Law (the KUHAP) initially has the objective to avoid conflicts among institutions of law enforcers (Indonesian: *penegak hukum*). This is conducted by minimizing horizontal control in each process stage of the criminal procedure and strengthen vertical control in each law enforcement institution

through the mechanism of built in control in each use of authority in the process of criminal procedure.
In the context of the use of the opportunity principle, this built in control mechanism has even been there as of the Law 15/1961 regarding the State Attorney by limiting the use of this principle only by the Attorney General and it is not granted to each public prosecutor like in the previous eras. This can be understood because the Code of Criminal Procedure Law (Dutch: *Wetboek van Strafvordering*) regulating the mechanism of horizontal supervision through the role of Justices Commissaries has not been chosen as procedure law applicable post Indonesia's independence.
Nevertheless, the expectation for the KUHAP to avoid conflicts among law enforcement institutions seems to be difficult to achieve. There have been some cases of conflict of authority among law enforcement institutions that lead to show of force and giving cause to public uproar up to deeming to disturb public interest.
In the year 2015, conflicts between the Headquarters of the Police of the Republic of Indonesia (*Markas Besar Polisi Republik Indonesia*, Mabes Polri) and the Commission for the Eradication of Corruption (*Komisi Pemberantasan Korupsi*, KPK) had a long trail and led to new conflicts between the Police Headquarters and the State Attorney of the Republic of Indonesia. The conflict started by the stipulation of the candidate Head of the Police Commissary General Budi Gunawan (BG) as a suspect by the KPK, which was retaliated by the Police Headquarters with the arrest and detention of the leaders of the KPK Abraham Samad (AS) and Bambang Widjojanto (BW) and one investigator of the KPK Novel Baswedan (NB) more or less one month later.
If we trace history notes, resembling conflicts with mutual show of force also occurred when the Attorney General Mr. Gatot Tarunamihardja was arrested and detained at the order of the Central War Commander General Nasution because of the diligence of the State Attorney at the time to conduct eradication smuggling being also conducted by some military personnel. Resembling with the decision of President Jokowi to replace the leaders of the KPK subjected to lawsuit and the cancellation of BG as candidate Chief Police, President Soekarno at the time through Presidential Decree Number 273/M/1959 replaced the Attorney General Gatot and conducted mutation against the military officers involved in the smuggling case.
Two cases of conflicts among state institutions occurring in a timespan of almost 50 years indicates that there are serious matters against the implementation of the concept of Rule of Law which is firmly embraced in the Constitution of the Republic of Indonesia. In both incidences it is obvious by borrowing the approach of Bedner (2010) how the element of Rule of Law does not run as it should. It is like using legal procedure for the sake of political interest by using normative reason of the laws without the mechanism of adequate control.

Back to the conflict between the KPK and the Police Headquarters affecting the State Attorney now. It is the *Seponering* decision the case of AS and BW and a Decree of Discontinuation of a Prosecution (*Surat Ketetapan Penghentian Penuntutan*, SKPP) on the case of NB irritating the Police Headquarters. Several organizations with strong affiliation with the Police as the Big Family of the Sons and Daughters of the Police, Indonesia Police Watch, Association of Police Graduates and Profession and some other organizations file a resistance against the decision of the State Attorney through 3 (three) lanes: Prejudiciary, the State Administrative Court (*Pengadilan Tata Usaha Negara*, PTUN) and also Judicial Review at the Constitutional Court.
The result is, on around March 2016 the Prejudiciary judge dismissed the lawsuit related to the SKPP NB and the *Seponering* of AS and BW, while it is difficult to trace the development of the case with the PTUN lawsuit at least up to this writing, and finally it is of course most interesting to follow the development of the Judicial Review under the case Number 29/PUU-XIV/2016 which up to this month of June 2016 is still ongoing with the Constitutional Court.
In this case of Judicial Review to the Law regarding the State Attorney under the case Number 29/PUU-XIV/2016, the petitioners plead to the Tribunal of Justices of the Constitutional Court to decide:

…that Article 35 letter C of the Law regarding the State Attorney along with its elucidation conflicts with Article 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945 and shall be declared not possessing legal binding force or ..
….. has no legal binding force to the extent not to be understood "Whereas Article 35 letter c along with its Elucidation to the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia which renders authority to the Attorney General to waive a case for the sake of public interest is not intended to grant legal immunity to people being employed (as well as having been employed) with the KPK or whatsoever institution being active in or linked with or conduct anti-corruption activists or to anti-corruption activists in order that they will not be prosecuted before a lawful court in the State of the Republic of Indonesia".

It is implicitly apparent from the above petitum that the motivation to petition this judicial review is still related to the conflict between the KPK and the Police Headquarters in 2015. This is the reason which leads the Petitioner assumes that the authority of the Attorney General is based on the opportunity principle in the issuance of the Decree of *Seponering* or waiver of a case based on Article 35 letter C of the Law the State Attorney that is very prone to abuse.

Development of the Opportunity Principle in the Frame of the Rule of Law

Yvon Dandurand (2007), expert on the criminal judiciary system, emphasizes that the public attorney has an important role in strengthening the Rule of Law concept in the criminal judiciary system. In the frame of Rule of law, the public prosecutor is demanded to guarantee that the law enforcement be conducted by all apparatuses of the State is done within the corridor of the supremacy of the law without political interest. The study conducted by Luna and Wade (2010) in European countries adhering to the opportunity principle has even placed the power of the prosecutor almost at the same footing with the judge when deciding on which case is or is not appropriate to be submitted to the court with the opportunity principle it has. Therefore the filter function possessed by the prosecutor in the criminal judiciary system can also be understood as a corrective act vis-à-vis the performance of the investigator in case there is a violation or supposition that there is an attempt to criminalize (malicious prosecution).

One of the interesting debates related to the case Number 29/PUU-XIV/2016 is how some law experts summoned including the Justices of the Constitutional Court adjudicating this case frequently still mix the principles in criminal law with principles in criminal procedure law. The most exposed example in this case is when the opportunity principle is assumed by some experts to conflict with the legality principle as stated in Article 1 of the Code of Criminal Law.

Still, different from the legality principle in criminal law which means that provisions of the law shall be in writing, in the context of criminal procedure law, the legality principle used to be understood as the obligation to conduct the prosecution of a crime without the possibility to conduct discontinuation of a case for the sake of public interest. This principle is embraced in Germany, Italy and some other countries. On the other hand is also known the opportunity principle or usually referred to as the expediency principle which renders the opportunity to the Public Attorney as *dominus litis* to waive a case for the sake of public interest. This is conducted as a facility therefor that not all cases would end up in court, which is also beneficial for saving of the state budgeting. This principle has also the important function as a facility to conduct mediation among parties related to a case. Therefore, a note to be had here is that it is impossible that a state adheres to two criminal prosecution principles simultaneously, namely the legality and opportunity principles.

Indonesia being a state inheriting the legal system from the Netherlands, automatically enforces the opportunity principle in its criminal judiciary system. This is apparent in the inclusion of this principle in Article 167 of the Code of Criminal Procedure Law (Dutch: *Strafvordering*) of 1926 and also in the Regulation on the Judicial Organization and Policy of Justice (Dutch: *Reglement op de Rechterlijke Organisatie en het Beleid der Justitie*, RO), Stb, 1847-23 in conjunction with 1848-58

which also comes into force in Dutch-India at the time. After independence in 1945, when the government of Indonesia choose to apply the Renewed Domestic Regulation (Dutch: *Herzien Inlandsch Reglement*, HIR) or referred to also as the Renewed Indonesian Regulation (*Reglemen Indonesia yang dibaharui*), the public attorney still has the authority to conduct the opportunity principle based on the provision of this RO.

In its development there appears a debate as to who actually possesses the authority to discontinue a prosecution of crime based on the opportunity principle. Noted in the era of the Attorney General Soeprapto in the 1950s. President Soekarno assumed that the authority of the opportunity principle shall be owned by the President and yet this opinion had been strongly opposed by the Attorney General Soeprapto declaring that the opportunity principle is owned by the public attorney as part of the Judicial Powers which is fully independent. This is what later on became one of the matters ending in the discharge of Soeprapto as the Attorney General and later on changing the position of the public attorney to become part of the executive power.

The opportunity principle/expediency principle which at the time was owned by each public prosecutor was deemed a powerful authority which is very prone to abuse. This is what later on became one of the causes that inspire the limitation of the use of this principle only by the Attorney General in the Law 15/1961 regarding the State Attorney. The use of this principle became even more limited in during the authoritarian era of the New Order in the Law 5/1991 in which the new Attorney General can waive a case after obtaining suggestion and opinion from the power agencies of the state having relationship with the matter and can also report in advance a plan to waive a case to the President to obtain guidance.

Enter the era of *Reformasi* which marked the end of the authoritarian regime of the New Order, in 2000 a Stipulation of the People's Consultative Assembly (*Dewan Permusyawaratan Rakyat*) TAP MPR Number VI/MPR/2000 regarding the Separation of the Military (*Tentara Nasional Indonesia*, TNI) and the Police and TAP MPR Number VII/MPR/2000 regarding the Role of the TNI and the Police were issued. Both TAP MPR indicate the end of the role of the military in the field of law enforcement which became returned to the civilians.

Broadly speaking, as of then there is a spirit to return the *dominus litis* or controllers of the pre-prosecution process to the prosecutor and not with another institution beyond the criminal judiciary system as it was during the New Order, whereby the role of the Command for the Restoration of Security and Order (*Komando Pemulihan Keamanan dan Ketertiban*, Kopkamtib) which in 1988 became renamed into Coordinating Agency to Support National Stabilization (*Badan Koordinasi Bantuan Pemantapan Stabilitas Nasional*, Bakorstanas) led by the Commander of the Armed Forces (*Angkatan Bersenjata Republik Indonesia*, ABRI) who was very dominant in the process of law enforcement.

That was followed by the promulgation of the Law 16/2004 regarding the public attorney which strengthened a little the authority of the public attorney in the process of supervising the investigation by conducting additional examination post the submission of a dossier by the investigator. This Law also removes the provision of reporting to the President to obtain guidance in the use of the opportunity principle.

Therefore, ideally as of *Reformasi* was rolled, as of that time the pattern of *a la* military investigation implemented by the Police should have been removed and be adjusted with the interest of the enforcement of civilian law which is more accountable and can be horizontally controlled by the institution of prosecution, let alone that as of the rolling of the *Reformasi* not less than 20 (twenty) state institutions have also the authority to conduct investigation and the investigation of criminal acts, which emphasizes the importance of the opportunity principle to filter cases in the criminal judiciary system.

The variety of state institutions in the investigation stages possessing the authority to conduct compelling efforts like arresting, detaining, confiscation and searching risk to violate the rights of citizens. As an illustration, for instance: if a member of *Adat* (customary) Law community gets

arrested by the Forest Civilian Public Servant Investigators (*Penyidik Pegawai Negeri Sipil* (PPNS) *Kehutanan*) because he/she has been accused of illegal logging and fulfills the element of the alleged criminal act. At the same time it is known that the mentioned *Adat* community cut down the same tree and pay regard to local prudence, although there is still a dispute regarding the stipulation of the *Adat* forest area and the control of a Forest Domination License (*Hak Penguasaan Hutan,* HPH) by one of the foreign companies. Here is when the *dominus litis* of the public attorney will be subject to test, whether it will prosecute this case in trial or will file a waiver of the case to the Attorney General through the opportunity principle he/she owns to minimize the serious social effect bearing in mind that for instance: although there are already 2 (two) instruments of evidence, yet based on the data obtained by the intelligence of the public attorney, information is gained that there is an interest of a foreign company in play behind the criminal case involving a member of the *Adat* community.
From this becomes apparent that to implement the opportunity principle on its turn has the objective to guarantee the right to defend life (Article 28A of the Constitution), the right for recognition, assurance, protection, and equitable legal certainty, and equal treatment before the law [Article 28D section (1) of the Constitution of], the right to live, the right not to be tortured, the right of freedom of thought and conscience, the right to embrace a religion, the right not to be enslaved, the right of recognition as a person before the law, and the right to obtain non-discriminative treatment [Article 28I section (1) and section (2) of the Constitution of].
Nevertheless, as noted by Surachman, although as of 1961 this authority is legally regulated in the Law regarding the State Attorney, there have been less than 10 (ten) criminal cases *seponeerd* by the State Attorney. This figure is much smaller if compared with the same in the civil law countries which also adhere to the expediency principle like Indonesia, where annually almost 50 (fifty) percent criminal cases have been waived based on the opportunity principle.
If later on, related to the reason for the lawsuit under the case Number 29/PUU-XIV/2016 declaring the use of the opportunity principle is prone to abuse, then at least it appears that that argument has really no reason. This is at least apparent from: Firstly, the rarity that this principle is used by the Attorney General and only targets to controversial criminal cases drawing the attention of the public to the effect that it disturbs public interest. Secondly, the strict and limiting control against the implementation of this principle to render the opportunity only to the Attorney General to *seponeer* a criminal case after having heard the suggestion of related institutions, this matter can be understood as to implement vertical control *a la* the KUHAP which renders little opportunity for abuse of authority.

The phrase that reads: "… having heard the suggestions of related institutions" indeed contains the meaning that the Attorney General is not obliged to abide by those suggestion when waiving a case for the sake of public interest. Nevertheless, it does not mean that the Attorney General in understanding this matter is an individual who can act as he/she likes. As an official of the State and highest public prosecutor in the institution of the public attorney, the independence of the Attorney General is indeed guaranteed by the Law and the constitution. Nevertheless, in the frame of decision making including when waiving a case, there is internal procedure and supervision of the public attorney office to be abode by the prosecutors even including the Attorney General. This is what is meant by the mechanism of built in control in functional differentiation principle introduced and embraced by the KUHAP.
It is quite different if later on, the authority to *seponeer* a case is granted to each public prosecutor as implemented in countries in the other parts of the world adhering to the opportunity principle, then the opportunity principle in this context shall be subject to horizontal review of its legality by a judge in court as part of the judicial power.

[2.5] Considering that the People's Representative Council conveyed its testimony in writing against the petition of the Petitioners received at the Office of the Clerk on the date 10 June 2016, basically as follows:

A. THE PROVISION OF THE LAW 16 OF 2004 PETITIONED FOR REVIEW AGAINST THE CONSTITUTION OF 1945

The Petitioners in their petition petitioned to review Article 35 letter c of the Law 16 of 2004 along with its Elucidation which is assumed as conflicting with Article 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945.

Whereas the content of the provision of Article 35 letter c of the Law 16 of 2004 along with its Elucidation is as follows: "*The Attorney General has the duty and authority: c. waive a case for the sake of public interest*".

Elucidation to Article 35 letter c:

"Referred to with "public interest" is the interest of the nation and the state and/or the interest of the public at large. To waive a case as mentioned in this provision is to implement the opportunity principle, which can only be conducted by the Attorney General after having paid regard to the suggestion and opinion from the power agencies of the state having relationship with the matter."

B. THE CONSTITUTIONAL RIGHTS AND/OR AUTHORITIES ASSUMED BY THE PETITIONERS TO HAVE BEEN HARMED BY THE APPLICATION OF THE LAW 16 OF 2004 ARTICLE 35 LETTER C ALONG WITH ITS ELUDIDATION.

The Petitioners in their petition as such (*a quo*) have expressed that their constitutional rights have been harmed and violated by the applicability of Article 35 letter c of the Law 16 of 2004 along with its Elucidation which in essence is as follows:

1. Whereas according to the Petitioners, the constitutional rights of the Petitioners have been harmed or at least there is the strong potential to be harmed by the applicability of Article 35 letter c of the Law 16 of 2004 because the validity of the article as such (*a quo*) clearly runs against the constitutional rights of the Petitioners guaranteed by the Constitution of 1945, because based on the article, the Attorney General may waive a case for the sake of public interest. (vide the petition page 5).
2. Whereas according to the Petitioners, the loss of the Petitioners are obviously very real and is actual or at least bears the potential which according to normal reason can be ascertained that it will occur, namely the emergence of injustice and discriminative treatment against the Petitioners and removes the protection guarantee as well as legal certainty and equal treatment before the law because the act to waive a case of torture (by shooting) will clearly ignore the right to live and to defend life which are basic rights of the Petitioners and the other suspects as determined in Article 28A of the Constitution of 1945, whereby as if the Petitioners and the other Defendant were assumed not deserving assurance of the right to live and the right to defend their life, and therefore may be tortured (shot) and therefore the perpetrators cannot be prosecuted. (*vide* the petition page 5).

Whereas the Petitioners assumed that the article as such (*a quo*) conflicts with Article 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945 providing as follow:

- Article 28A: *"each person is entitled to live and be entitled to defend life and his/her life"*.
- Article 28D section (1): *"each person is entitled to recognition, assurance, protection, equitable legal certainty and equal treatment before the law"*.
- Article 28I section (1): *"The right to live, the right not to be tortured, the right of freedom of thought and conscience, the right to embrace a religion, the right not to be enslaved, the right of recognition as a person before the law, and the right not to be prosecuted based on a retroactive law are basic human rights which cannot be reduced in whatever situation"*.
- Article 28I section (2): *"each person is entitled to be free from treatment of discriminative nature based on whatsoever and be entitled to obtain protection against such treatment of discriminative nature"*.

Whereas the Petitioners in their Petitum have petitioned to the Tribunal of Justices as follows:

In the Provision:

1. To grant the petition of the Petitioners for injunction as a whole;
2. Before handing its Final Judgment, to declare the postponement of the implementation of the applicability of Article 35 letter c of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia of Number 4401) namely the duty and authority of the Attorney General to waive a case for the sake of public interest until there is final judgment of the Court against the subject of the petition as such (*a quo*).

In the Subject Matter of the Case

1. To grant the petition of the Petitioners as a whole;
2. Primary:
   a. To declare that Article 35 letter c along with its Elucidation to the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia of Number 4401) conflicts with the Constitution of 1945,
   b. To declare Article 35 letter c along with its Elucidation to the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia of Number 4401) has no binding force of law;

   Subsidiary:

   a. To declare that the phrase "*after having paid regard to the suggestion and opinion from the power agencies of the state having relationship with the matter*" in the Elucidation to Article 35 letter c of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia of Number 4401) conflicts with the Constitution of 1945 to the extent not to be understood "*after obtaining the approval in writing of the People's Representative Council (Dewan Perwakilan Rakyat) of the Republic of Indonesia*";
   b. To declare that the phrase "*after having paid regard to the suggestion and opinion from the power agencies of the state having relationship with the matter*" in the Elucidation to Article 35 letter c of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia of Number 4401) has no legal binding force to the extent not to be understood "*after obtaining the approval in writing of the People's Representative Council of the Republic of Indonesia*"

   More Subsidiary:

   a. To declare the sentence "*to waive a case as mentioned in this provision is to implement the opportunity principle which can only be conducted by the Attorney General after having paid regard to the suggestion and opinion from the power agencies of the state having relationship with the matter*" in the Elucidation to Article 35 letter c of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia of Number 4401) conflicts with the Constitution of 1945 to the extent not to be understood "*to waive a case as mentioned in this provision, the Attorney General shall pay regard to and follow the suggestion and opinion of the majority of the power agencies of the state namely the People's Representative Council of the Republic of Indonesia, the Supreme Court, and the Police of the State of the Republic of Indonesia*".
   b. To declare the sentence "*to waive a case as mentioned in this provision is to implement atas the opportunity principle which can only be conducted by the Attorney General after*

having paid regard to the suggestion and opinion from the power agencies of the state having relationship with the matter" in the Elucidation to Article 35 letter c of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia of Number 4401) has no legal binding force to the extent not to be understood "*to waive a case as mentioned in this provision, the Attorney General shall pay regard to and follow the suggestion and opinion of the majority of the power agencies of the state namely the People's Representative Council of the Republic of Indonesia, the Supreme Court, and the State Police of the Republic of Indonesia*".

3. To order the loading of the content of this judgment of the Constitutional Court in the State Gazette *of the Republic of* Indonesia.

C. TESTIMONY OF THE DPR-RI

The DPR-RI in conveying its opinion against the postulate of the Petitioners as described in the petition as such (*a quo*), would in advance describe the legal standing to be explained as follows:

1. **The Legal Standing of the Petitioners**

The qualification to be complied with by the Petitioners as a party is regulated in the provision of Article 51 section (1) of the Law Number 24 of 2003 in conjunction with the Law Number 8 of 2011 regarding the Constitutional Court (the Law regarding the Constitutional Court), declaring that "*The Petitioners are a party assuming their constitutional rights and/or authorities harmed by the applicability of the law, namely:*

a) Indonesian individual citizens;
b) unities of the adat law societies to the extent that they are still alive and are in accordance with the development of the public and the principle of the Unitary State of the Republic of Indonesia as is regulated in Laws;
c) public or private legal entities;
d) state institutions.

The constitutional rights and/or authorities as referred to in the provision of Article 51 section (1) mentioned, are affirmed in its elucidation, that referred to "*the constitutional right*" are "*rights as regulated in the Constitution of the Republic of Indonesia of 1945*." This Elucidation to Article 51 section (1) affirms, that only rights which are explicitly regulated in the Constitution of 1945 are "constitutional rights".

Therefore, according to the Law regarding the Constitutional Court, in order that someone or a party can be accepted as a Petitioner having legal standing in the petition to review a law against the Constitution of 1945, a petitioner shall first clarify and substantiate:

a. His/her qualification as a Petitioner in the petition as such (*a quo*) as mentioned in Article 51 section (1) of the Law regarding the Constitutional Court;
b. His/her constitutional rights and/or authorities as mentioned in the "Elucidation to Article 51 section (1)" are assumed to have been harmed by the applicability of the Law as such (*a quo*).

With regard to the definition of constitutional loss, the Constitutional Court has rendered an understanding and definition regarding constitutional loss which emerges because the applicability of a law has to comply with 5 (five) conditions (vide the Decision of Number 006/PUU-III/2005 and Number 011/PUU-V/2007) namely as follow:

a. there are constitutional rights and/or authorities of the Petitioner granted by the Constitution

of 1945;

b. whereas those constitutional rights and/or authorities of the Petitioner is assumed by the Petitioner to have been harmed by a Law to be reviewed;
c. the loss of the constitutional rights and/or authorities of the Petitioner as referred to has specific (special) nature and is actual or at least bears the potential which according to reasonableness can be ascertained that it will occur;
d. there is causal relationship (Dutch: *causal verband*) between the loss and the applicability of the Law against which a review is petitioned;
e. there is the possibility that by the granting of the petition the loss and/or a constitutional authority postulated will not or will no longer occur.

If those five condition are not fulfilled by the Petitioners in a review case of a Law as such (*a quo*), then the Petitioner has no legal standing as Petitioner. Responding to the petition of the Petitioners as such (*a quo*), the DPR-RI opines that the Petitioners shall substantiate in advance that the Petitioners are a party assuming their constitutional rights and/or authorities have been harmed by the applicability of the provision petitioned for review, especially in constructing that there is loss of constitutional rights and/or authorities as an effect of the enactment of the provision petitioned for review.

Based on the above mentioned descriptions, with regard to the legal standing of the Petitioners, the DPR-RI submits fully to the Chief Justice/the Tribunal of the Constitutional Justices to consider and to assess whether the Petitioners have legal standing as regulated in Article 51 section (1) of the Law regarding the Constitutional Court and the Decision of the Constitutional Court Number 006/PUU-III/2005 and the Decision of Number 011/PUU-V/2007 regarding parameter of a constitutional loss.

2. Review on Subject Matter of the Case

Whereas against the subject of the petition to review Law regarding 16 of 2004 Article 35 letter c along with Clarification, the DPR-RI opines as follow:

a) Whereas the Constitution of 1945 has mandated, that the State of Indonesia is based on law (*rechtsstaat*), it is not based merely on power (*machtstaat*). The philosophy of a state based on law as embraced by the Constitution of 1945 namely a democratic state based on law, on Pancasila and the Constitution of 1945, highly uphold basic human rights and guarantees all citizens equality before the law and government, and shall uphold the law and Government with no exception. On such constitutional basis, the perceptiveness, practice, protection and assurance to implement basic human rights as well as obligation to respect the basic rights of others in the frame of enforcing justice should become a guide for governance in the conduct of government;
b) Whereas the assurance, protection, and respect to implement basic human rights as affirmed in Article 28A of the Constitution of 1945 has granted assurance to each person to be entitled to live and be entitled to defend life and his/her life. The guarantee for protection and legal certainty and equal treatment before the law are also basic human rights mandated in Article 28D section (1) of the Constitution of 1945 which affirms: "*each person is entitled to recognition, assurance, protection, equitable legal certainty and equal treatment before the law*". Furthermore the Constitution of 1945 also renders assurance and protection against the right to live, right not to be tortured, the right of freedom of thought and conscience, the right to embrace a religion, the right not to be enslaved, the right of recognition as a person before the law, and the right not be prosecuted based on a retroactive law are basic human rights which cannot be reduced in whatsoever situation [vide Article 28I section (1) of the Constitution of 1945]. The assurance and protection for each person against discriminative treatment is

mandated in Article 28I section (2) of the Constitution of 1945 which regulates: *"each person is entitled be free from treatment of discriminative nature based on whatsoever and be entitled to obtain protection against such treatment of discriminative nature."*

c) Whereas the Constitution of 1945 determines firmly that the State of Indonesia is a state based on law. In line with that provision, one of the important principles of a state based on law is the assurance of equality for each person before the law (*equality before the law*). Therefore each person is entitled to recognition, assurance, protection, and equitable legal certainty, and equal treatment before the law. In the effort to strengthen that principle, one of the important substance of the amendment to the Constitution of 1945 has brought about a basic amendment in statecraft especially in the implementation of judicial powers. That amendment has affirmed that the provision of other agencies which functions relating with the judicial powers are regulated in laws. The provision of those other agencies is affirmed by the Law Number 48 of 2009 regarding Judicial Powers (previously the Law Number 4 of 2004) (hereinafter referred to as the Law Number 48 of 2009) declaring that the State Attorney of the Republic of Indonesia is one of the agencies with functions relating with the judicial powers;

d) Whereas in line with the amendment to the Constitution of 1945, the Law Number 4 of 2004 regarding Judicial Powers and several new laws, and based on the development of legal need of the public and constitutional life, the Law Number 5 of 1991 regarding the State Attorney of the Republic of Indonesia is no longer up to date, so that comprehensive amendment is required by means of forming new laws. Whereas based on assurance and protection for respect to the implementation of basic human rights mandated in the articles of the Constitution of 1945, the Law Number 16 of 2004 has been drawn up and is intended to further strengthen the position and role the State Attorney of the Republic of Indonesia as a government state institution that executes the powers of the state in the field of prosecution which shall be free from the influence of any power, namely a power that is implemented independently regardless of the influence of government power and the influence of other powers. The State Attorney being one of the law enforcement institutions is demanded to play a greater role in enforcing supremacy of the law, protection of public interest, the enforcement of human rights, and the eradication of corruption, collusion, and nepotism.

e) Whereas in executing its function, duty, and authority, the State Attorney of the Republic of Indonesia as a government institution executing the powers of the state in the field of prosecution shall be capable of materializing legal certainty, legal order, justice and legally based truth and pay regard to religious norms, etiquette, and morality, and shall extract human values, law and justice alive in the society. The State Attorney shall also be capable to be fully involved in the development process of among others to create a condition which supports and secures the implementation of development to materialize equitable and prosperous society based on Pancasila, and be obliged to also safeguard and enforce the authority of the government and the state and to protect public interest. Whereas based on the Law as such (*a quo*), in the conduct of its function, duty and authority the State Attorney as a government institution executing the power of the State in the field of prosecution shall be capable of materializing legal certainty, legal order, justice and legally based truth and pay regard to religious norms, etiquette, and morality and shall extract human values and law and justice alive in the society;

f) Whereas the DPR-RI disagrees with the postulate of the Petitioners assuming that the provision of Article 35 letter c along with the Elucidation to the Law Number 16 of 2004 is of a discriminative nature so that the Petitioners assume it to be in conflict with Article 28I section (2) of the Constitution of 1945. Whereas referring to the understanding of discrimination based

on Article 1 numeral 3 of the Law Number 39 of 1999 regarding basic human rights (hereinafter abbreviated as Law on Human Rights) is each limitation, harassment, or isolation directly as well as indirectly based on human discrimination based on religion, tribe, race, ethnic, group, category, social status, economic status, gender, language, political conviction, leading to reduction, deviation or elimination of recognition, implementation or the use of basic human rights and basic freedom in individual as well as collective life in the field of politics, economy, law, social, culture, and the other aspects of life. In this regard there is no provision in the article as such (*a quo*) of discriminative nature, because the norm formulation of the article as such (*a quo*) does not comply with the criteria or definition of discrimination as regulated in the Law on Human Rights. Whereas there is no relevance between the duty and authority of the Attorney General to waive a case subject to the definition of discrimination as regulated in Article 1 numeral 3 of the Law on Human Rights. Whereas instead, the provision of Article 35 letter c along with the Elucidation to the Law Number 16 of 2004 in line with Article 28I section (2) of the Constitution of 1945 which renders assurance and protection to each person from treatment of discriminative nature;

g) Whereas in the provision of Article 13 in conjunction with Article 14 letter g in conjunction with Article 137 of the Law Number 8 of 1981 regarding the Criminal Procedure Law (hereinafter referred to as the KUHAP) has regulated that the Public Prosecutor is the Public Attorney equipped with the authority to conduct prosecution against whomsoever accused of having committed a criminal act in its legal territory by submitting the case to a court being authorized to adjudicate. Whereas in accordance with the opportunity principle, the Public Attorney has the authority in the matter of prosecution against criminal cases submitted in trial. Whereas the authority of the prosecution is granted to the Public Prosecutor is referred to as *dominus litis.*

h) Whereas related to the subject of the case in the petition of the Petitioner, the DPR-RI opines that it is important to understand cases which prosecution is discontinued for the sake of law with cases which prosecution is discontinued for the sake of public interest as regulated in the KUHAP and the Law Number 16 of 2004. Whereas in Article 14 letter h, Article 46 section (1) letter c, and Article 140 section (2) letter a of the KUHAP cases which prosecution is discontinued for the sake of law are cases which prosecution is discontinued by the Public Attorney due to the lack of evidence or the incidence is not a criminal act (due to the principle of *ne bis in idem*, expiry, death *et cetera*). Whereas against this matter a prejudiciary effort can be conducted as regulated in Article 77 of the KUHAP;

i) Whereas related to cases which prosecution is discontinued for the sake of public interest namely only cases waived by the Attorney General based on the consideration of public interest. This authority is already applicable and has been there as of the first Law regulating the State Attorney namely in the Law Number 15 of 1961 regarding Principal Provisions of the State Attorney of the Republic of Indonesia. Later on, in the Law Number 5 of 1991 regarding the State Attorney of the Republic of Indonesia, furthermore the latest in the Law Number 16 of 2004 in Article 35 letter c, declaring that the Attorney General has the duty and authority to waive a case for the sake of public interest. According to the Elucidation to Article 35 letter c of the Law Number 16 of 2004, "to waive a case" is to implement the opportunity principle which can only be conducted by the Attorney General after having paid regard to the suggestion and opinion of the power institutions of the State having relationship with the matter. Whereas against a case waived for the sake of public interest by the authority of the Attorney General being a Public Prosecutor, no prejudiciary effort can be conducted as explained in the Elucidation to Article 77 of the KUHAP, which declares that meant by discontinuation of a prosecution does not include the waiver of a case for the sake of public interest which is the authority of the Attorney General. This is different from cases which

prosecution has been discontinued for the sake of public interest, against which prejudiciary effort as regulated in Article 77 of the KUHAP can be conducted.

j) Whereas according to the Grand Dictionary of the Indonesian Language (*Kamus Besar Bahasa Indonesia, KBBI*) "to waive" (*mengesampingkan*) means "to waive" to the side or ignoring. The logic of the law is that if a case has been waived, its prosecution is not discontinued, yet it has only been waived. That case is still there and having an active status yet cannot be proceeded or not be proceeded to prosecution process. Basically this matter is right and the authority of the Attorney General who because of his/her function (Dutch: *ambtshalve*) to waive criminal cases for the sake of public interest. So that although there are sufficient evidences for submission to trial, if the Attorney General opines that there will a lot of loss for public interest by prosecuting a case rather than not prosecuting it, then the Attorney General may waive a case for the sake of public interest certainly after having paid regard to the suggestion and opinion of the power institutions of the State having relationship with the matter;

k) Whereas the authority of the Attorney General to prosecute or not prosecute as referred to as the opportunity principle is in principle almost the same with the principle of discretionary power (German: freies Ermessen) in the field of public law which renders the authority to a public official to take a legal act based on an assessment *per se*. This opportunity principle shall be interpreted negatively namely that its implementation shall always be extraordinary (Dutch: *uitzondering*) against the general obligation to conduct prosecution against each criminal act. This is in accordance with the memorandum of Elucidation to Article 12 and Article 493 of the Code of Criminal Procedure (Dutch: *Wetboek Van Strafvordering*) as follows: "*the composition of the wording of this opportunity principle had been conducted with all apprehension. In the formulation chosen therefor, it can immediately be seen that its center of gravity shall remain to be placed in the stance that in general the prosecution of each criminal act is absolute, but in matters which are based on public interest, a deviation of that principle may be made. The objective of the opportunity principle is only to soften the sharpness (Dutch: scherpte) existing in the legality principle. A positive interpretation means that a prosecution can only be conducted if the formal requirements have been fulfilled and it shall also be assumed that it is needed for public interest, so that the Public Attorney will not prosecute a case before the public interest element has been fulfilled, namely whether a prosecution is really desired by the public interest or not";* (Andi Hamzah, Criminal Procedure Law Indonesia, Jakarta, Sinar Grafika, 2016, matter 39).

l) Whereas related to the postulate of the Petitioner saying that there shall be a measure or limitation regarding the understanding of "*public interest*" or "*the interest of the nation and the State and/or the interest of the public at large"* as explained in the Elucidation to Article 35 letter c of the Law Number 16 of 2004, the DPR-RI opines that public interest or the interest of the nation and the State and/or the interest of the public at large is the result of considering various interests in the society by placing the main interest as public interest or interest of the nation and the State and/or the interest of the public at large. Each case is a different legal incidence and legal interest, so that a philosophical, sociological, and juridical consideration is needed to waive a case for the sake of public interest or the interest of the nation and the State and/or the interest of the public at large, after having paid regard to the suggestion and opinion from the power agencies of the state having relationship with the matter. In the Law as such (*a quo*), if the definition of public interest or the interest of the nation and the State and/or the interest of the public at large is formulated concretely and in detail, it would instead bear the potential to conflict with the public interest *per se*. Because a definition of public interest is dynamic in accordance with the development of the law of the public and situation, so that the

provision of Article 35 letter c of the Law Number 16 of 2004 does not mean violating legal certainty and does not mean treatment of discriminative nature, but instead the provision of Article 35 letter c of the Law Number 16 of 2004 regulates a waiver of a case for the sake of public interest adjusted with the development of the law of the public and situation for the sake of public interest or the interest of the nation and the State and/or the interest of the public at large;

m) Whereas it is perceived as also necessary to consider the interest of the State and the public as explained in the Regulation of the Government Number 27 of 1983 regarding the implementation of the KUHAP which renders this clarification: "*Therefore the criterion "for the sake of public interest" in the implementation of the opportunity principle in our State is based in the interest of the State and the public and not in the interest of the public";*

n) Whereas in its implementation, the Attorney General shall relate the authority to conduct a criminal prosecution with the public interest in general and the interest of legal order. Both interests shall influence each other mutually. By virtue of the opportunity principle embraced by the Law as such (*a quo*), the Attorney General is given the authority to prosecute criminal cases and is authorized not to conduct the prosecution if the prosecution will inflict loss for public interest, social life, statecraft, and government. This is the basic point of departure and reason to equip the Attorney General as Public Prosecutor with the highest authority in Indonesia being a state based on law for not prosecuting a case to the court based on public interest. The provision as such (*a quo*) is in accordance with the opinion of Soepomo saying: *"in the Netherlands as well as in Dutch India where the opportunity principle is applicable in criminal prosecution means that the public prosecutor agency is authorized not to conduct a prosecution if the prosecution is assumed being not "opportune" of no use for public interest"*; (Soepomo, *Legal System in Indonesia Before the II World War* (*Sistem Hukum di Indonesia Sebelum Perang Dunia II*, Pradnya Paramita, Jakarta, 1981, page 137.)

o) Whereas based on the view of the DPR-RI, the provision of Article 35 letter c and Elucidation Law Number 16 of 2004 does not conflict with the right to live and the right defend life and his/her life, the right to recognition, assurance, protection, equitable legal certainty and equal treatment before the law, the right to live, the right not to be tortured, the right of freedom of thought and conscience, the right to embrace a religion, the right not to be enslaved, the right of recognition as a person before the law, and the right not be prosecuted based on a retroactive law, and the right to be free from treatment of discriminative nature based on whatsoever and be entitled to obtain protection against treatment of discriminative nature as guaranteed in Article 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945;

Whereas based on the above mentioned testimony, the DPR-RI has humbly petitioned therefor that the honorable Chief Justice/the Tribunal of Justices of the Constitutional Court render the award of the judgment as follows:

1) To declare the Petitioner having no legal standing, so that the petition of the Petitioner is unacceptable;
2) To declare the petition as such (*a quo*) dismissed as a whole or at least the petition as such (*a quo*) is unacceptable;
3) To declare the Testimony of the DPR-RI be received as a whole;
4) To declare Article 35 letter c and Elucidation of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia not in conflict with 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945;
5) To declare Article 35 letter c and Elucidation of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia remains to have binding force of law.

If the honorable Chief Justice/The Tribunal of Justices of the Constitutional Court opines otherwise, pleading a judgment *ex aequo et bono*.

[2.6] Considering whereas the Petitioners has conveyed the conclusion in writing as received at the Office of the Clerk of the Court on the date 21 August 2016, which basically declares to remain with its stance;

[2.7] Considering whereas to shorten the description in this judgment, all matters occurring in the trial suffice to be referred to in the minutes of the trial, which is an inseparable part of this judgment;

3. THE LEGAL CONSIDERATION

Authority of the Court

[3.1] Considering whereas based on Article 24C section (1) of the Constitution of the Republic of Indonesia of 1945 (hereinafter referred to as the Constitution of 1945), Article 10 section (1) letter a of the Law Number 24 of 2003 regarding the Constitutional Court as has been amended by the Law Number 8 of 2011 regarding the Amendment to the Law Number 24 of 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia of 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereinafter referred to as Law Number the Constitutional Court), and Article 29 section (1) letter a of the Law Number 48 of 2009 regarding Judicial Powers (State Gazette of the Republic of Indonesia of 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076), the Court is authorized to adjudicate at the first and final instance the decision of which is final to review a Law against the Constitution of 1945;

[3.2] Considering whereas because the petition of the Petitioners is the review of the constitutionality of the Law, *in casu* of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (hereinafter referred to as Law Number 16/2004) against the Constitution of 1945 then the Court is authorized to adjudicate the petition of the Petitioners;

Legal Standing of the Petitioners

[3.3] Considering whereas based on Article 51 section (1) of the Law on the Constitutional Court along with its Elucidation, those who can file a petition to review a Law against the Constitution of 1945 are those who assume that their constitutional rights and/or authorities granted by the Constitution of 1945 are harmed by the applicability a Law, namely:

a. Indonesian private person (including groups of people having the same interest);
b. unities of the adat law societies to the extent that they are still alive and are in accordance with the development of the public and the principle of the Unitary State of the Republic of Indonesia as is regulated in Laws;
c. public or private legal entities; or
d. state institutions;

Therefore, the Petitioner in the review of a Law against the Constitution of 1945 shall clarify and substantiate in advance:

a. its position as the Petitioner mentioned in Article 51 section (1) of the Law on the Constitutional Court;
b. there is a loss of constitutional rights and/or authorities granted by the Constitution of 1945 caused by the applicability of the Law against which a review is petitioned;

[3.4] Considering whereas the Court as of the judgment of the Constitutional Court Number 006/PUU-III/2005, dated 31 May 2005 and the judgment of the Constitutional Court Number 11/PUU-V/2007, dated 20 September 2007, and its further judgments, opines whereas the loss of the constitutional rights and/or authorities as mentioned in Article 51 section (1) of the Law Number the Constitutional Court has to comply with five requirements, namely:

a. there are constitutional rights and/or authorities of the Petitioner granted by the Constitution of 1945;
b. the constitutional right and/or authority by the Petitioner has been assumed harmed by the

applicability of the Law against which a review is petitioned;

c. the constitutional loss shall be of specific (special) nature and is actual or at least potential which according to reasonableness can be ascertained that it will occur;
d. there is causal relationship (Dutch: *causal verband*) between the loss and the applicability of the Law against which a review is petitioned;
e. there is the possibility that by the granting of the petition then the constitutional loss as postulated will not or will no longer occur;

[3.5] Considering whereas the Petitioners postulated that their constitutional rights have been harmed by the applicability of the provision of Article 2 section (4) of the Law Number 14/2008 basically with the following reason:

1. The Petitioners are individual Indonesian citizens whose constitutional rights as regulated in Article 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945 have been harmed or at least bear the potential to be harmed by the applicability of Article 35 letter c along with its Elucidation in the Law Number 16/2004.
2. The Petitioners are part of the victims of an incidence of criminal torture occurring on the date 18 February 2004 and was allegedly conducted by a Police having the name Novel which at the time had the rank of First Inspector of the Police (*Inspektur Polisi tingkat Satu*, Iptu);
3. Against the case of torture alleged to have been committed by the Defendant Novel was just submitted by the Public Attorney to the District Court of Bengkulu for prosecution around the date 29 January 2016. Nevertheless, it appeared that following the appointment of the trial date, the Public Attorney revoked the indictment with the reason for correction/perfection. Rather than correcting/perfecting the indictment, the Public Attorney instead issued a Decree of Discontinuation of Prosecution Number B-03/N.7.10/ E.p.1/02/2016, dated 22 February 2016 (the "**SKP2**") to discontinue the prosecution in the mentioned case with the reason it lacked evidence and had expired. Against the SKP2 as such (*a quo*) a Prejudiciary effort had been conducted to the District Court of Bengkulu on the date 1 March 2016 as registered in the case Number 02/PID.PRA/2016/PN.Bgl., and on the date 31 March 2016 the District Court of Bengkulu issued its judgment which in essence declared the SKP2 invalid. Responding to such Prejudiciary judgment, the Attorney General opened the opportunity to conduct waiver of a case for the sake of public interest (*seponering*) based on Article 35 letter c of the Law Number the State Attorney;
4. Whereas based on the above mentioned description, according to the Petitioners, the constitutional rights of the Petitioners guaranteed by Article 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945, namely (i) of the right to live and to defend life, (ii) recognition, assurance, protection, and equitable legal certainty and equal treatment before the law, (iii) the right of recognition as a person before the law, and (iv) be free from treatment of discriminative nature based on whatsoever and be entitled to obtain protection against such treatment of discriminative nature, have been harmed or at least potential to be harmed by the applicability of the provision of Article 35 letter c of the Law Number 16/2004 along with its elucidation;

[3.6] Considering whereas based on the consideration in paragraf [3.3] up to paragraf [3.5], the Court considers as follow:

[3.6.1] Whereas based on evidence P-3 and evidence P-4, the Petitioners are truly individual Indonesia citizens;

[3.6.2] Whereas the Petitioners have the constitutional right which is guaranteed by the Constitution of 1945 especially in Article 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945;

[3.6.3] Whereas the Petitioners are victims of a criminal act alleged to have been conducted by a Police having the rank of First Inspector of the Police (Iptu) with the name Novel on whose case later on was issued the SKP2 by the Public Attorney while the mentioned case had been submitted to the

District Court of Bengkulu. A prejudiciary effort was then made against the SKP2 and the SKP2 was declared invalid. According to the Petitioners, the Attorney General would use Article 35 letter c of the Law Number 16/2004 to waive the case for the sake of public interest. Based on the above, the act to be taken by the Attorney General to use Article 35 letter c of the Law Number 16/2004 against a criminal act alleged to have been conducted by First Inspector of the Police (Iptu) with the name Novel whose SKP2 have been declared invalid by the District Court of Bengkulu, which, according to the Court, is in accordance with reasonableness clearly bear the potential to harm the constitutional rights of the Petitioners as victims;

[3.6.4] Whereas the potential loss of the constitutional rights of the Petitioners has a causal relationship (Dutch: *causal verband*) by the applicability of Article 35 letter c of the Law Number 16/2004 along with its Elucidation to Article 35 letter c which if granted, the potential loss of the constitutional rights of the Petitioners as postulated by the Petitioners will no longer occur;

Based on the consideration above, the Court assessed, the Petitioners are potentially harmed by the applicability of the provision of Article 35 letter c of the Law Number 16/2004 along with its Elucidation to Article 35 letter c, so that the Petitioners have the legal standing to file the petition as such (*a quo*)*;*

[3.7] Considering whereas because the Court is authorized to adjudicate the petition as such (*a quo*) and the Petitioners have legal standing to file the petition as such (*a quo*), the Court will then consider the subject of the petition;

In the Provision

[3.8] Considering whereas against the provisional demand of the Petitioners that the Court would hand its injunction before handing its Final Judgment, the Court opines as follow:

Basically in the law of procedure of the Constitutional Court an injunction can only be granted against a petition about Dispute on Authority of State Institutions whose Authority is granted by the Constitution as regulated in Article 63 of the Law on the Constitutional Court, yet the Court has once handed its injunction in the petition to review a Law with a very special consideration, namely in the Decision of the Court Number 133/PUU-VIII/2009 dated 25 November 2009, with the consideration to prevent the possibility of constitutional loss of the Petitioners if they become defendants because of being permanently dismissed by the President, while the basis of the Law or article of the Law to be become the basis of the discharge is in process for review of its constitutionality in the Court. Whereas related to the petition of the Petitioners, according to an assessment of the Court, there is no high urgency nor is it highly important having the direct consequence to the personal safety of the Petitioners if Article 35 letter c of the Law Number 16/2004 remains applicable as occurring with the Petitioners in their Decision of the Court Number 133/PUU-VIII/2009 dated 25 November 2009 .

Based on the consideration mentioned, according to the Court, the petition for injunction of the Petitioners is unreasonable according to the law so that it shall be dismissed;

In the Principal Petition

[3.9] Considering whereas the Petitioners postulated that basically Article 35 letter c of the Law Number 16/2004 along with its Elucidation to Article 35 letter c conflicts with Article 28A, Article 28D section (1), Article 28I section (1) and section (2) of the Constitution of 1945;

[3.10] Considering whereas after the Court have meticulously examined the petition of the Petitioners, the testimony of the President, the testimony of the DPR, evidence letters/writing of the Petitioners, the expert of the Petitioners, the expert of the President, and the conclusion of the Petitioners, the Court considers as follow:

[3.10.1] There are two principles known in the legal system, namely the legality principle and the opportunity principle. The legality principle has the understanding that all cases with sufficient evidence shall be submitted to the Court. Countries adhering to the legality principle are among others, Germany, Austria, Italy, Spain, Portugal, Sweden. The opportunity principle is a principle having the understanding that not all cases submitted to the court can be discontinued of its prosecution for the

sake of law by the Public Attorney. Countries of adhering to the opportunity principle are among others, the Netherlands, France, Belgium, Japan, including Indonesia.

[3.10.2] According to Soepomo, "*in the Netherlands as well as in Dutch India where the opportunity principle is applicable in criminal prosecution means that the public prosecutor agency is authorized not to conduct a prosecution if the prosecution is assumed being not "opportune" of no use for public interest*"; (Soepomo, *Legal System in Indonesia Before the II World War* (*Sistem Hukum di Indonesia Sebelum Perang Dunia II*, Pradnya Paramita, Jakarta, 1981, page 137). The enactment of the opportunity principle in Indonesia was set out in Article 167 of the Code of Criminal Procedure Law (Dutch: *Strafvordering*) of 1926 and also in the Regulation of the Judicial Organization and Policy of Justice (Dutch: *Reglement op de Rechterlijke Organisatie en het Beleid der Justitie*, RO). Therefore, the principle comes into force in Indonesia already in the era of the Dutch-India and remains in force until now. The further question is whether the opportunity principle conflicts with the Constitution of 1945 or is not conflicting with the Constitution of 1945;

[3.10.3] The opportunity principle as embraced in the Indonesian legal system is not intended to ignore the constitutional rights of citizens which are guaranteed by the Constitution of 1945, let alone to remove the constitutional rights of citizens. The opportunity principle is a principle in the legal system embraced by many countries also highly upholding human rights, like the Netherlands and France. Even in the United States whose legal system does not adhere to the legality and the opportunity principle in practice implements the principle of discretionary power of prosecution, while in England which also does not adhere to the legality and the opportunity principle implements waiver of a case (vide the testimony of the expert of the President Prof. Dr. Andi Hamzah, SH). Therefore, the legality principle as well as the opportunity principle or not choosing either one of the two principles is an option of the Law makers of the respective states. Because Indonesia choose in its legal system to adhere to the opportunity principle, the option is an option not conflicting with the Constitution of 1945;

[3.10.4] The waiver of a case for the sake of public interest or which is known as *seponering* is one of the duties and authorities granted by the Law to the Attorney General (vide Article 35 letter c of the Law Number 16/2004). To waive a case as meant in this provision is to implement the opportunity principle which can only be conducted by the Attorney General after having paid regard to the suggestion and opinion from the power agencies of the state having relationship with the matter. The authority of the Attorney General to conduct *seponering* is the authority gained attributively or the authority is directly granted by the laws, in this regard the Law Number 16/2004. The *seponering* authority is to implement the opportunity principle (vide Elucidation to Article 35 letter c of the Law Number 16/2004) which is part of the principle of discretionary power (German: *freies Ermessen*) by the Attorney General to prosecute or not to prosecute a case;

[3.10.5] The Law Number 48 of 2009 regarding Judicial Powers (Law Number 48/2009), determines that the public attorney is one of the agencies with functions relating to the judicial powers (vide Article 38 of the Law Number 48/2009 and its Elucidation). The function of a Public Attorney in its relation to the judicial powers is, among others, to execute the powers of the state in the field of prosecution to uphold criminal law. Based on the Law Number 8 of 1981 regarding Criminal Procedure Law (the KUHAP). As the only one holder of the prosecution authority (*dominus litis*), the Public Attorney shall submit a case to the District Court with the request to soonest adjudicate the case along with the letter of indictment, yet the Public Attorney can also discontinue prosecution, if the case lacks evidence, the case being examined appears to be not a criminal case, or the case is closed for the sake of law (vide Article 140 of the KUHAP);

[3.10.6] The *seponering* authority in Article 35 letter c of the Law Number the State Attorney is not intended to remove *the right to recognition, assurance, protection, and equitable legal certainty and equal treatment before the law (equality before the law)* as determined in Article 28D section (1) of the Constitution of 1945 nor is it to treat discriminatively the one citizen vis-à-vis the other citizen. Article

35 letter c of the Law Number 16/2004 is implemented by the Attorney General for the sake of public interest, in this regard for the sake of the interest of the nation and the State and/or the interest of the public at large. According to the Court the problem is indeed the great authority of the Attorney General does only pay regard to the suggestion and opinion from the power agencies of the state having relationship with the matter (vide Elucidation to Article 35 letter c of the Law Number 16/2004);

[3.10.7] Whereas indeed there is no single article in the Constitution of 1945 which renders the authority or can be used as a basis to justify the implementation of the opportunity principle to uphold criminal law in Indonesia, but it does not mean that the implementation of the opportunity principle conflicts with the Constitution of 1945. If the logic of the Petitioner is used then the formation of the institution not regulated in the Constitution of 1945 would conflict with the Constitution of 1945. Therefore, the logic of the Petitioner that the opportunity principle is not regulated in the Constitution of 1945 so that it conflicts with the Constitution of 1945 is not correct. According to the Court, *seponering* which implements the opportunity principle is not conflicting with the Constitution of 1945 although that matter is not regulated in the Constitution of 1945;

[3.10.8] The *seponering* authority as regulated in Article 35 letter c of the Law Number 16/2004 remains needed to uphold criminal law in Indonesia, nevertheless, in order that no abuse by the authority by the Attorney General takes place, bearing in mind its great authority, then strict limitation to the validity of the article as such (*a quo*) is needed so as it does not violate or conflicts with the constitutional rights as well as basic human rights which are guaranteed in general by the Constitution of 1945;

[3.10.9] From the Elucidation to Article 35 letter c of the Law Number 16/2004, an understanding is gained that (i) "*public interest"* is interpreted as *"the interest of the nation and the State and/or the interest of the public at large"* and "*seponering can only be conducted by the Attorney General after having paid regard to the suggestion and opinion from the power* agencies *of the state having relationship with the matter"*. Because public interest is interpreted "*the interest of the nation and the State and/or the interest of the public at large*" and no further definition is explained about the *interest of the nation and the State and/or the interest of the public at large* in the Elucidation to Article 35 letter c of the Law Number 16/2004, it can be interpreted extensively by the Attorney General being the holder of the *seponering* authority. The authority is very prone to be interpreted in accordance with the interest of the Attorney General, although in implementing *seponering* the Elucidation to Article 35 letter c of the Law Number 16/2004 states, "*after having paid regard to the suggestion and opinion from the power agencies of the state having relationship with the matter";*

[3.10.10] Nevertheless as a matter of fact, the suggestion and opinion from the power agencies of the state as such (*a quo*) are as if it is not at all binding and the Attorney General only pays regard thereto. That said, the authority to conduct *seponering* really becomes the full authority that can be used by the Attorney General. Therefore, to protect constitutional rights of citizens which is guaranteed by the Constitution of 1945 in the implementation of *seponering,* the Court needs to render an interpretation against Elucidation to Article 35 letter c of the Law Number 16/2004 therefor that it does not conflict with the Constitution of 1945, namely that the phrase "*after having paid regard to the suggestion and opinion from the power agencies of the state having relationship with the matter*" shall mean, "*the Attorney General shall pay regard to the suggestion and opinion from the power agencies of the state having relationship with the matter*". The interpretation is needed so that there is a strict and clear measure in the use of the *seponering* authority by the Attorney General, because there is no other legal effort to cancel the *seponering* authority save if by the Attorney General *per se*, although there is little possibility that such will be conducted. Besides, the Court needs to make such interpretation, because a *seponering* is different from discontinuation of a prosecution. Against discontinuation of a prosecution as determined in Article 140 section (2) of the KUHAP, there is the prejudiciary effort as determined in Article 77 letter a of the KUHAP and the Decision of the Court Number 21/PUU-XII/2014, dated 28 April 2015;

[3.11] Considering whereas based on all descriptions on the above mentioned consideration, the Court opines that the postulate of the Petitioners is reasoned for a part according to the law.

4. CONCLUSION

Based on the above described assessment on the facts and law, the Court concludes:

[4.1] The Court is authorized to adjudicate the petition as such (*a quo*)*;*

[4.2] The Petitioners have legal standing to file the petition as such (*a quo*);

[4.3] The subject matter of the petition is reasoned for a part according to the law;

Based on the Constitution of the Republic of Indonesia of 1945, the Law Number 24 of 2003 regarding the Constitutional Court as has been amended by the Law Number 8 of 2011 regarding the Amendment to the Law Number 24 of 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia of 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226), and of the Law Number 48 of 2009 regarding Judicial Powers (State Gazette of the Republic of Indonesia of 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076);

5. AWARD OF THE JUDGMENT

To Adjudicate,

In the Provision

To dismiss the petition in the Provision of the Petitioners.

In the Subject Matter of the Petition

1. To grant the petition of the Petitioners for a part;
2. To declare the phrase "*to waive a case as mentioned in this provision is to implement the opportunity principle which can only be conducted by the Attorney General after having paid regard to the suggestion and opinion from the power agencies of the state having relationship with the matter*" in the Elucidation to Article 35 letter c of the Law Number 16 of 2004 regarding the State Attorney of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2004 Number 67 and Supplement to the State Gazette of the Republic of Indonesia Number 4401) conflicts conditionally with the Constitution of the Republic of Indonesia of 1945 and has no legal binding force to the extent not to be understood as "*the Attorney General shall pay regard to the suggestion and opinion from the power agencies of the state having relationship with the matter*";
3. To dismiss the other petition of the Petitioners and the remaining;
4. To order the loading of the content of this judgment in the Official Gazette of the State of the Republic of Indonesia as it should be.

Thus has been decided in the Consultative Session of the Justices by nine Constitutional Justices namely Arief Hidayat being the Chief Justice concurrently as a Member, Anwar Usman, Suhartoyo, Wahiduddin Adams, Maria Farida Indrati, Manahan MP Sitompul, Patrialis Akbar, Aswanto, and I Dewa Gede Palguna, respectively as a Member, on **the day of Wednesday, dated the sixteenth, the month of November, the year two thousand sixteen**, and **the day Monday, dated the ninth, the month January, the year two thousand seventeen,** pronounced in the Plenary Session of the Constitutional Court open for the general public on the **day Wednesday, dated eleven, the month of January, the year two thousand seventeen**, fully pronounced **at 15.06 hours West Indonesian Time**, by nine Constitutional Justices namely Arief Hidayat as Chief Justice concurrently as a Member, Anwar Usman, Suhartoyo, Wahiduddin Adams, Maria Farida Indrati, Manahan MP Sitompul, Patrialis Akbar, Aswanto, and I Dewa Gede Palguna, respectively as a Member, in the presence of Cholidin Nasir as Replacing Registrar, and attended by the Petitioners, the President or his representative, and the People's Representative Council or its representative.

CHIEF JUSTICE,

(signed)

Arief Hidayat

THE MEMBERS,

(signed)	**(signed)**
Anwar Usman	**Suhartoyo**
(signed)	**(signed)**
Wahiduddin Adams	**Maria Farida Indrati**
(signed)	**(signed)**
Manahan MP Sitompul	**Patrialis Akbar**
(signed)	**(signed)**
Aswanto	**I Dewa Gede Palguna**

SUBSTITUTE REGISTRAR,

(signed)

Cholidin Nasir