



JUDGMENT

Number 13/PUU-XV/2017

FOR JUSTICE BASED ON THE ONE AND ONLY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Adjudicating constitutional case at the first and final instance, passing the judgment for the case of Judicial Review of the Law Number 13 of 2003 concerning Manpower against the 1945 Constitution of the Republic of Indonesia, lodged by:

1. Name : **Ir. H. Jhoni Boetja, S.E.**
 Date of Birth : Tanjung Karang, 2 June 1963
 Nationality : Indonesia
 Occupation : Employee of PT. PLN (Persero) of S2JB Area
 Position : Chairman of Board of State Electricity Company Labor Union of PT. PLN (Persero) WS2JB
 Address : Jalan Kapten A. Riva'I Number 37 Palembang - 30129

As ----- **Petitioner I;**

2. Name : **Edy Supriyanto Saputro, Amd.**
 Date of Birth : Palembang, 2 April 1973

Nationality : Indonesia
Occupation : Employee of PT. PLN (Persero) of S2JB
Area of Palembang
Position : Secretary of Board of State
Electricity Company Labor Union of PT.
PLN (Persero) WS2JB
Address : Jalan Kapten A. Riva'i Number 37
Palembang - 30129

As ----- **Petitioner II;**

3. Name : **Ir. Airtas Asnawi**
Date of Birth : Palembang, 20 March 1963
Nationality : Indonesia
Occupation : Employee of PT. PLN (Persero) of S2JB
Area
Position : Chairman of Board of State Electricity
Company Labor Union of PT. PLN
(Persero) of S2JB Regional Office
Address : Jalan Kapten A. Riva'i Number 37
Palembang - 30129

As ----- **Petitioner III;**

4. Name : **Saiful**
Date of Birth : Jambi, 5 May 1963
Nationality : Indonesia
Occupation : Employee of PT. PLN (Persero) of S2JB
Area

Position : Chairman of City Board of State
Electricity Company Labor Union of PT.
PLN (Persero) of S2JB Regional Office
Address : Jalan Urip Sumoharjo Number 2, Jambi

As ----- **Petitioner IV;**

5. Name : **Amidi Susanto**

Date of Birth : Lampung, 03 September 1967

Nationality : Indonesia

Occupation : Employee of PT. PLN (Persero) of S2JB
Area of Palembang

Position : Chairman of Board of State Electricity
Company Labor Union of PT. PLN
(Persero) of WS2JB Area of Palembang

Address : Jalan Kapten A. Riva'i Number 37,
Palembang

As ----- **Petitioner V;**

6. Name : **Taufan, S.E.**

Date of Birth : Kota Donok, 26 December 1964

Nationality : Indonesia

Occupation : Employee of PT. PLN (Persero) of S2JB
Area of Bengkulu

Position : Chairman of Board of State Electricity
Company Labor Union of PT. PLN
(Persero) of WS2JB Area of Bengkulu

Address : Jalan Prof. Dr. Hazairin, SH Number 8
Bengkulu

As ----- **Petitioner VI;**

7. Name : **Muhammad Yunus**
 Date of Birth : Palembang, 20 October 1983
 Nationality : Indonesia
 Occupation : Employee of PT. PLN (Persero) of S2JB
 Region of Sumanjalu Distribution
 Control
 Position : Chairman of Board of State Electricity
 Company Labor Union of PT. PLN
 (Persero) of WS2JB Area of Sumanjalu
 Address : Jalan Gubernur Hasan Bastari,
 Palembang

As ----- **Petitioner VII;**

8. Name : **Yekti Kurniasih, Amd.**
 Date of Birth : Bandung, 24 September 1989
 Nationality : Indonesia
 Occupation : Former Employee of PT. PLN (Persero)
 of S2JB Area of Jambi
 Position : Member of the State Electricity
 Company Labor Union
 Address : Jalan Urip Sumoharjo Nomor 2, Jambi

As ----- **Petitioner VIII;**

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

[1.2] Having heard the Petitioners' explanation;

Having read the Petitioners' petition;

Having heard and read the explanation provided by the President of the Republic of Indonesia;

Having read explanation from the House of Representatives of the Republic of Indonesia;

Having heard and read explanation of Related Party, namely the Indonesian Entrepreneur Association/*Asosiasi Pengusaha Indonesia* (APINDO);

Having read explanation from the informing party, PT. Perusahaan Listrik Negara (Persero);

Having examined the evidence provided by the Petitioners and the Related Party, namely the Indonesian Entrepreneur Association (APINDO);

Having read conclusion provided by the Petitioners, the President of the Republic of Indonesia, and the Related Party, namely the Indonesian Entrepreneur Association (APINDO);

2. FACTS OF THE CASE

[2.1] Considering that the Petitioners lodged the petition dated January 30, 2017 received at the Registrar Office of the Constitutional Court (hereinafter referred to as the Court's Registrar Office) on February 2, 2017, based on the Petition Receipt Certificate Number 17/PAN.MK/2017 and recorded in the Constitutional Case Register on February 13, 2017 Number

13/PUU-XV/2017, already revised and received at the Court's Registrar Office on March 6, 2017, elaborates as follows:

I. AUTHORITY OF THE CONSTITUTIONAL COURT

The Petitioners in the petition as referred to in the *quo* case explain that provisions regulating the Constitutional Court's authority to review the Law Number 13 of 2003 concerning Manpower Article 153 paragraph (1) letter f against the 1945 Constitution of the Republic of Indonesia shall be as follows:

1. Whereas based on the 1945 Constitution Article 24C paragraph (1), "The Constitutional Court shall be authorized to adjudicate, at the first and final instance of which judgment shall be final, review any laws against the 1945 Constitution, decide any disputes of any state institutions of which authority is granted by the 1945 Constitution, decide dissolution of political party and decide any disputes with respect to the general election result (exhibit P1);
2. Whereas based on Article 10 paragraph (1) letter a of the Law Number 24 of 2003 concerning Constitutional Court, "The Constitutional Court shall be authorized to adjudicate, at the first and final instance of which judgment shall be final, review any laws against the 1945 Constitution of the Republic of Indonesia (exhibit P2);

3. Whereas based on Article 12 paragraph (1) letter a of the Law Number 4 of 2004 concerning Judicial Power, "The Constitutional Court shall be authorized to adjudicate, at the first and final instance of which decision shall be final, review any laws against the 1945 Constitution of the Republic of Indonesia of 1945 (exhibit P3);

II. LEGAL STANDING OF THE PETITIONERS

The Petitioners' legal standing in the judicial review case of the *a quo* law shall be as follows:

1. Whereas the provision of Article 28C paragraph (2) of the 1945 Constitution of the Republic of Indonesia second amendment reads "Every person shall have the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state." (Exhibit P1);
2. Whereas Article 28D paragraph (1) of the 1945 Constitution second amendment reads "Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law." (exhibit P1);
3. Whereas the Law Number 24 of 2003 concerning Constitutional Court Article 51 paragraph (1) reads:

A petitioner is a party who claims that his/her/its constitutional rights and/or competency are lost by the enactment of a law, such party constitutes:

- a. Indonesian natural person;
 - b. A community group espousing customary law in existence and in conformity with development in society within the principles of the Unitary State of the Republic of Indonesia as prescribed by law;
 - c. Public or private legal entity; or
 - d. State institution (Exhibit P2).
4. Therefore, the petition for judicial review of the Law Number 13 of 2003 concerning Manpower, Article 153 paragraph (1) letter f "Prohibiting an employee/a worker related by blood and/or marriage to another employee/worker working at the same company, unless the same has been regulated under Employment Agreement, Company Regulation or Collective Labor Agreement" contradicts the 1945 Constitution (exhibit P5);

III. GROUNDS/PRINCIPAL MATTERS OF THE PETITION

In a company an employment agreement is entered into between the employer and an employee, company regulation is made by the employer while collective labor agreement (PKB) is entered into between the employer and employees/workers.

Based on the position, the employment agreement shall subject to the collective labor agreement, however, the company regulation shall not necessary exist if the collective labor agreement exists. However, there is similarity in both of them, namely regulating rights and obligations of the parties as well as work conditions. Under the work conditions, the company regulation limiting the right to marry between workers is usually provided.

The rule stating that if two workers working at the same company are married, one of them shall resign or even be terminated as regulated under the employment agreement, company regulation or collective labor agreement, it is contained in Article 153 paragraph (1) letter f of the Labor Law. Prohibitions regulated by the law relating to termination by the employer, one of which is prohibition of termination of employment due to the worker/employee is related by blood or marriage to another worker/employee working at the same company, unless it has been regulated under the employment agreement, company regulation or collective labor agreement.

Therefore, to the extent that the rule still exists under the employment agreement, company regulation or collective labor agreement, then the employees/workers shall comply with the rule.

The Petitioners' constitutional right and/or competency are lost by the enactment of the Law Number 13 of 2003 Article 153 paragraph (1) letter f resulting in Termination of Employment because it has been regulated by the Company Regulation, Employment Agreement or Collective Labor Agreement, which obviously will significantly harm the employees/workers because of losing their constitutional right in getting employment security and decent life.

Article 28B paragraph (1) of the 1945 Constitution reasserts under Article 10 paragraph (1) of the Human Rights Law, "Every person shall have the right to found a family and to bear children through a legitimate marriage", moreover paragraph (2) states that the legitimate marriage may only occur upon free will of the intending spouses pursuant to the applicable laws and regulations (exhibit P8).

Article 1 of the marriage law states that marriage is a physical and emotional relation between a man and a woman as husband and wife with the purpose of founding a happy and eternal family for the sake of the Almighty God (exhibit P6).

Article 2 thereof states that the marriage shall be legitimate if held according to the law of the spouses' religion and belief (Exhibit P6).

Whereas the prohibition of marriage according to the Government Regulation Number 45 of 1990 Article 8 "shall apply to any persons related by blood in a direct line upwards or downwards or by marriage namely mother/father in law or step child, son/daughter in law, and step father/mother" (exhibit P7).

If the company regulation/employment agreement or collective labor agreement requires one of the spouses working at the same company shall resign or even be terminated as experienced by the Petitioner Mrs. Yekti Kurniasih and to many workers experiencing the same, namely being terminated because they relate by marriage to another person working at the same company, the Company Regulation, Employment Agreement or Collective Labor Agreement having legal ground of the Law Number 13 of 2003 Article 153 paragraph (1) letter f shall evidently contravene the 1945 Constitution Article 28D paragraph (2) (exhibit P1).

In the event of the Law Number 13 of 2003, Article 153 paragraph (1) letter f stating the words "unless it has been regulated under the employment agreement, company regulation or collective labor agreement" is not revoked/canceled by the Court, then it more likely will make employers prohibit marriage between employees working at the same company and employment termination will continue to occur because the workers practice the

thing ordered by their respective religion by doing the marriage while the marriage cannot be prevented because marriage between a man and a woman loving each other will be difficult to deny and surely upon achieving connection and agreement, the relation shall be further continued to marriage.

Another issue that may arise is that the worker couple could finally decide not to marry in order to make them both stay at the company, then both of them mutually agree to separate and it should not be a problem, however, there is still a possibility that they choose to live together without marriage relation in order to avoid sanction under the company regulation. It obviously contradicts the principles of life adopted by Indonesian people who persistently and strictly respect marriage.

The limitation of right to found family and the right to work shall not be necessarily made if every individual working at the company has good moral and ethics, hence, it is necessary to have individuals implementing such good ethics.

A marriage between workers working at the same company is actually beneficial for the company because it can save the company's expense in term of paying worker family healthcare cost because for the husband and wife working at the company, the company shall pay the healthcare cost only for 1 (one) worker while the company employs them

both, whereas the husband or the wife for which the cost shall be paid is the one registered at the company, while for a husband working for the company having a household wife, the company shall only employed 1 (one) person, namely only the husband but the company shall still pay the cost also for his wife and children.

If the company has a reason that the prohibition is made for preventing corruption, collusion and nepotism in the company, according to the Petitioners it shall be unreasonable because the causing element of corruption, collusion and nepotism is individual mentality.

In the event of Article 153 paragraph (1) letter f stating the words "unless it has been regulated under the employment agreement, company regulation or collective labor agreement" is revoked by the Constitutional Court, then the company shall, in this case the employer, not include the prohibition of employee/worker related by blood and/or marriage into the employment agreement, company regulation or collective labor agreement, under which the employer may terminate the employee/worker because of having a marriage between workers working at the same company.

By the cancelation of the words "unless it has been regulated under the employment agreement, company regulation or collective labor agreement", then the

constitutional right of the employees/workers shall be protected.

Therefore the Petitioners plead to the Constitutional Court to cancel the part of the Law Number 13 of 2003 concerning Manpower Article 153 paragraph (1) letter f that reads "Unless it has been regulated under the employment agreement, company regulation or collective labor agreement" because it contradicts the 1945 Constitution Article 28B paragraph (1) and Article 28D paragraph (2).

Whereas the Petitioners' Constitutional Rights vest in:

- Article 28B paragraph (1) of the 1945 Constitution;
- Article 28D paragraph (2) of the 1945 Constitution.

IV. THE PRAYERS FOR RELIEF REQUESTED BY THE PETITIONERS

1. To grant the Petitioners petition;
2. To declare that the part of Article 153 paragraph (1) letter f of the Law Number 13 of 2003 concerning Manpower that reads "unless it has been regulated under the employment agreement, company regulation or collective labor agreement" shall be cancelled because it contradicts the 1945 Constitution and to declare that the same has no binding legal effect as of the date on which the judgment is passed by the Constitutional Court;

3. To order the inclusion of the judgment into a State Gazette of the Republic of Indonesia.

[2.2] Considering that in order to support the arguments, the Petitioners presented documented/written evidence marked as exhibits P-1 to P-8 as follows:

- 1 Exhibit P-1 Copy of the 1945 Constitution of the Republic of Indonesia;
- 2 Exhibit P-2 Copy of the Law Number 24 of 2003 concerning Constitutional Court;
- 3 Exhibit P-3 Copy of the Law Number 4 of 2004 concerning Judicial Power;
- 4 Exhibit P-4 Copy of the Petitioners' data;
- 5 Exhibit P-5 Copy of the Law Number 13 of 2003 concerning Manpower;
- 6 Exhibit P-6 Copy of the Law Number 1 of 1974 concerning Marriage;
- 7 Exhibit P-7 Copy of the Government Regulation Number 45 of 1990 concerning Amendment to the Government Regulation of the Republic of Indonesia Number 10 of 1983 concerning Marriage and Divorce Permit for Civil Servant;
- 6 Exhibit P-8 Copy of the Law Number 39 of 1999 concerning Human Rights;

[2.3] Considering that for the Petitioners' petition, the President of the Republic of Indonesia provided explanation before the trial on May 15, 2017, which is principally as follows:

I. PRINCIPAL MATTERS OF PETITIONERS' PETITION

Whereas the Petitioners principally request for review of whether: the Provision of Article 153 paragraph (1) letter f of the Labor Law, which reads:

The Employer shall be prohibited from terminating the employment because of the following reasons:

f. the employee/worker is related by blood and/or marriage to another employee/worker working at the same company, unless it has been regulated under the employment agreement, company regulation or collective labor agreement;

contradicts:

Article 28B paragraph (1) of the 1945 Constitution, which reads:

"Every person shall have the right to found a family and to bear children through a legitimate marriage".

Article 28D paragraph (2) of the 1945 Constitution, which reads:

"Every person shall have the right to work and to receive fair and proper remuneration and treatment in employment".

on the grounds as follows:

Whereas the existing phrase *"unless it has been regulated under the employment agreement, company regulation or collective labor agreement"* in Article 153 paragraph (1) letter f of the Labor Law, more likely will make the employer prohibit marriage between employers working at the same company, hence, it may result in Termination of Employment which contradicts Article 28B paragraph (1) and Article 28D paragraph (2) of the 1945 Constitution.

II. LEGAL STANDING OF THE PETITIONERS

In relation to the Petitioners' legal standing, the Government is of the opinion as follows:

1. Whereas Article 51 paragraph (1) of the Law Number 24 of 2003 as amended by the Law Number 8 of 2011 concerning Constitutional Court states that a Petitioner shall be a party who claims that his/her/its constitutional rights and/or competency are lost due to the enactment of a law, namely:
 - a. Indonesian natural person;
 - b. A community group espousing customary law in existence and in conformity with development in society within the principles of the Unitary State of the Republic of Indonesia as prescribed by law;
 - c. public or private legal entity; or
 - d. state institution.

The foregoing provision is asserted under explanation thereof that "*constitutional rights*" means any rights under the 1945 Constitution;

Therefore, in order to make a person or a party acceptable as a Petitioner having legal standing in a petition for judicial review of a Law against the 1945 Constitution, then the person or party shall first explain and prove:

- a. His/her qualification in the *a quo* petition as referred to in Article 51 paragraph (1) of the Law Number 24 of 2003 concerning Constitutional Court as amended by the Law Number 8 of 2011;
 - b. His/her constitutional right and/or competency under the said qualification claimed to have been lost by the enactment of the Law being reviewed;
 - c. Inflicted loss on the Petitioner's constitutional right and/or competency as a result of the enactment of the Law being reviewed.
2. Whereas subsequently, through the Constitutional Court Judgment Number 006/PUU-III/2005 and the Constitutional Court Judgment Number 11/PUU-V/2007 and other judgments thereafter, the Court is of an opinion that the damage to the right shall be determined under five conditions:
- a. existing right and/or competency of the Petitioner granted by the 1945 Constitution;

- b. the Petitioner's right and/or competency is/are claimed to have been lost by the enacted law being reviewed;
 - c. the loss shall be specific and actual or at least potential in nature which based on reasonable logic it can be almost assured to occur;
 - d. an existing causality (*causaal verband*) of the said loss to the enacted law being reviewed;
 - e. a possibility that by granting the petition, then the loss as argued shall not occur /or no longer occur;
3. Whereas based on the whole elaboration aforesaid, according to the Government, we want to know whether the Petitioners' interest is correct that they are the parties claiming that their constitutional right and/or competency is/are harmed by the enactment of Article 153 paragraph (1) letter f of the Labor Law and also whether the Petitioners' constitutional right is lost on a specific and actual or at least potential manner which based on reasonable logic it can be almost assured to occur and whether there is a causality (*causal verband*) between the loss and the enacted Law being reviewed;
4. Whereas according to the Government, there is no loss suffered by the Petitioners because actually either in their arguments or in their prayers for relief, the

Petitioners do not mention any form of constitutional loss they suffer by the enacted Article 153 paragraph (1) letter f of the Labor Law claimed to contradict Article 28B paragraph (1) and Article 28D paragraph (2) of the 1945 Constitution and the Petitioners are not prevented, prejudiced, omitted, limited, obstructed or harmed by the enactment of the *a quo* provision. Therefore, according to the Government, the arguments of the existence of constitutional loss experienced by Petitioners shall be evidently not proven.

Based on the foregoing arguments, the Government is of an opinion that the Petitioners fail to fulfill the requirements of legal standing and it shall be correct for the Honorable of Panel of Constitutional Judges to wisely declare that the Petitioners' petition shall be unacceptable (*niet ontvankelijk verklaard*).

III. THE GOVERNMENT'S EXPLANATION FOR MATERIAL OF THE PETITION FOR JUDICIAL REVIEW

Whereas the fourth paragraph of Preamble of the 1945 Constitution stipulates that one of the purposes of the State of the Republic of Indonesia is to support public welfare and social justice. The development of manpower affairs as an integral part of national development based on the *Pancasila* and the 1945 Constitution of the Republic of Indonesia shall be implemented for developing

Indonesian people in its entirety and the development of the whole Indonesian people in order to uphold the dignity and self-esteem of workers and actualize prosperous, fair and equal community, either materially or spiritually.

The development of manpower affairs has many dimensions and relations. The relations are not only to manpower interest but also those related to employer, the government and public. Therefore industrial relation as part of the development of manpower affairs shall be aimed at continuously actualizing a harmonic, dynamic and fair industrial relation by persistently encouraging optimum participation of all personnel and employees/workers in Indonesia to build the Indonesian nation.

Whereas the formulation of Labor Law is mandated by Article 27 paragraph (2), Article 28D paragraph (2), and Article 33 of the 1945 Constitution, namely to more technically regulate manpower affairs one of which regulates industrial relation. In other words, the regulation with respect to industrial relation under the Law No. 13/2003 constitutes legal policy of the law formulator in stipulation thereof.

The Labor Law regulates the matters relating to industrial relation including employee/worker protection, protection of employee/worker basic rights to negotiate

with employer, protection of occupational safety and health, special protection for woman, child and disabled employee/worker, protection relation to wage, prosperity and worker social security.

One form of protection for employee/worker under the Labor Law is protection from Termination of Employment (PHK). Article 151 paragraph (1) Labor Law expressly states that employer, employee/worker, labor union and the government shall in any ways prevent termination of employment. Such ways shall mean all positive activities which in the end can avoid the Termination of Employment.

Whereas Labor Law has regulated the prohibition for employer to terminate employment based on particular causes, namely as provided for in Article 153 paragraph (1) of the Labor Law which reads:

The Employer is prohibited from terminating the employment because of the following reasons:

- a. The employee/worker is absent from work because he or she is taken ill as attested by a written statement from the physician who treats him or her provided that he or she is not absent from work for a period of longer than 12 (twelve) months consecutively;*
- b. The employee/worker is absent from work because he or she is fulfilling his or her obligations to the State in accordance with what is prescribed in the valid statutory legislation;*

- c. *The employee/worker is absent from work because he or she is practicing what is required by his or her religion*
- d. *The employee/worker is absent from work because he or she is getting married.*
- e. *The employee/worker is absent from work because she is pregnant, giving birth to a baby, having a miscarriage, or breast-feeding her baby. a woman employee/worker is pregnant, giving birth, miscarriage or breastfeed her baby;*
- f. *The employee/worker is related by blood and or marriage to another worker working at the same company, unless it has been regulated under the employment agreement, company regulation or collective labor agreement;*
- g. *The employee/worker establishes, becomes a member of and or an administrator/ official of a trade/ labor union; the employee/worker carries out trade/ labor union activities outside working hours, or during working hours with permission by the entrepreneur, or according to that which has been stipulated in the employment agreement or company regulation or collective employment agreement.*
- h. *The employee/worker reports to the authorities the crime committed by the entrepreneur the*

employee/worker reports the employer to the authority with respect to the employer's criminal act;

- i. Because the employee/worker is of different understanding/ belief, religion, political orientation, ethnicity, color, race, sex, physical condition or marital status.*
- j. Because the employee/worker is permanently disabled, ill as a result of a work accident, or ill because of an occupational disease whose period of recovery cannot be ascertained as attested by the written statement made by the physician who treats him or her.*

Whereas one of prohibitions as referred to in Article 153 paragraph (1) letter f of the Labor Law is on the ground that the employee/worker is related by blood and/or marriage to another employee/worker working at the same company, unless it has been regulated under the employment agreement, company regulation or collective labor agreement.

Whereas the *a quo* provision is basically intended to provide opportunity for actors in industrial relation both employer and employee/worker to provide an alternative. It means that the employment agreement, company regulation or collective labor agreement is a form of agreement made by the actors of industrial relation and binding the parties.

Whereas the definition of employment agreement as referred to in Article 1 point 14 of the Labor Law shall be *"Employment agreement means an agreement entered into between the employee/worker and the employer containing work conditions, rights and obligations of the parties"*, while Article 1 point 20 of the Labor Law states *"the Company Regulation means written rules made by the employer containing work conditions and the company's rules of order"* and Article 1 point 21 of the Labor Law states *"The collective labor agreement means an agreement resulted from a negotiation between one or several labor unions registered at a competent institution having responsibility for manpower affairs and one or several employers containing work conditions, rights and obligations of both parties"*.

Whereas the employment agreement, company regulation or collective labor agreement is an agreement or covenant and constitutes a law for those entering into the same as provided for in Article 1338 of the Indonesian Civil Codes, *"All agreements entered into pursuant to applicable laws shall constitute a law for those entering into the same. The agreement shall not be revoked without mutual agreement of both parties or unless due to reasons provided by the laws. The agreement shall be performed on a goodwill basis"*.

Whereas the phrase "unless it has been regulated under the employment agreement, company regulation or collective labor agreement" as set out in Article 153 paragraph (1) letter f of the Labor Law, basically means that the formulator of the Law admits that the source of law that shall apply to and used as basis for the employment relation between the employer and employee/worker shall be the *employment agreement, company regulation or collective labor agreement*. Therefore substantially, the power to determine whether the existing relation by blood and/or marriage that could make the employee/worker get terminated or continue to work in the same company shall vest to the parties (the employer and the employee/worker) to decide. Therefore the employee/worker should have known and been able to predict the consequences if they marry to his/her coworker after both parties enter into the employment agreement.

Whereas the *a quo* phrase is intended to facilitate nature and type of work and characteristic of the company in particular business, however, the existing provision enacting the employment agreement, company regulation or collective labor agreement shall be first reviewed by the Government, it is aimed at preventing coercion of will unilaterally by the employer in relation to the matter of relation by blood and relation by marriage. In this case,

the Government shall review substantial matter under the employment agreement, company regulation or collective labor agreement, and if finding any matters contradicting the laws and regulations, the Government shall make correction as the form of the Government's supervision.

Therefore the phrase "*unless it has been regulated under the employment agreement, company regulation or collective labor agreement*" under Article 153 paragraph (1) letter f of the Labor Law does not contradict Article 28B paragraph (1) and Article 28D paragraph (2) of the 1945 Constitution. Therefore, the Petitioners argument shall be groundless.

IV. PRAYERS FOR RELIEF

Based on the foregoing elaborations and arguments, the Government pleads to the Honorable Chief/Panel of Constitutional Judges to pass the judgment as follows:

- 1) To declare that the Petitioners have no legal standing;
- 2) To overrule the Petitioner's petition for judicial review in its entirety or at least to declare that the Petitioner's petition for judicial review shall be unacceptable (*niet ontvankelijk verklaard*);
- 3) To accept explanation from the President of the Republic of Indonesia in its entirety;
- 4) To declare that the provision of Article 153 paragraph (1) letter f of the Law Number 13 of 2003 concerning

Manpower does not contradict the provision of Article 28B paragraph (1) and Article 28D paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

[2.4] Considering that with respect to the Petitioners' petition, the House of Representatives provided a written explanation received at the Court's Registrar Office on June 13, 2017, which is principally as follows:

A. The Provision Under the Labor Law Being Reviewed Against the 1945 Constitution

The Petitioners, in their petition, lodges the petition for judicial review of Article 153 paragraph (1) letter f of the Labor Law claimed to contradict Article 28B paragraph (1) and Article 28D paragraph (2) of the 1945 Constitution. Whereas the provision of Article 153 paragraph (1) letter f of the Labor Law reads as follows:

(1) The Employer shall be prohibited from terminating the employment because of the following reasons: ... f. the employee/worker is related by blood and/or marriage to another employee/worker working at the same company, unless it has been regulated under the employment agreement, company regulation or collective labor agreement...";

B. The Petitioners' Constitutional Right and/or Power Claimed to Have Been Lost by the Enacted Article 153 Paragraph (1) Letter f of the Labor Law

The Petitioners in the *a quo* petition state that their constitutional right is lost and violated by the enacted Article 153 paragraph (1) letter f of the Labor Law, which is principally as follows:

By the enacted *a quo* article, the Petitioners claim that their constitutional right has been violated. In addition thereto, the provision of *a quo* article also contradicts the provision under the 1945 Constitution. The provision of Article 153 paragraph (1) letter f of the Labor Law has inflicted loss on the Petitioners due to loss of employment security and decent life because the enacted *a quo* provision may result in termination of employment. In addition thereto, the *a quo* article also contradicts the provision under the 1945 Constitution Article 28B paragraph (1) concerning the founding of family and bearing children. It was actually experienced by one of the Petitioners, namely Mrs. Yekti Kurniasih. The provision contradicts the provision of Article 2 of the Law Number 1 of 1974 concerning Marriage (hereinafter referred to as Marriage Law) and the provision of Article 8 of the Government Regulation Number 45 of 1990 concerning Amendment to the Government Regulation Number 10 of 1983 concerning Marriage Permit (hereinafter referred to as GR 45/1990) (refer to the petition pages 5 to 7).

The Petitioners claim that the provision of Article 153 paragraph (1) letter f of the Labor Law contradicts Article 28B paragraph (1) and Article 28D paragraph (2) of the 1945 Constitution as follows:

➤ Article 28B paragraph (1) of the 1945 Constitution

"(1) Every person shall have the right to found a family and to bear children through a legitimate marriage."

➤ Article 28D paragraph (2) of the 1945 Constitution

"(2) Every person shall have the right to work and to receive fair and proper remuneration and treatment in employment."

Whereas based on elaborations as stated in their petition, the Petitioners in their prayers for relief plead to the Panel of Judges as follows:

1. To grant the Petitioners petition;
2. To declare that the part of Article 153 paragraph (1) letter f of the Law Number 13 of 2003 concerning Manpower that reads "unless it has been regulated under the employment agreement, company regulation or collective labor agreement" shall be cancelled because it contradicts the 1945 Constitution and to declare that the same has no binding legal effect as of the date on which the judgment is passed by the Constitutional Court;

3. To order the inclusion of the judgment into a State Gazette of the Republic of Indonesia.

C. Explanation from the House of Representatives of the Republic of Indonesia

With respect to the Petitioners' arguments as elaborated in the *a quo* petition, the House of Representatives of the Republic of Indonesia in giving its opinion first elaborates the legal standing as follows:

1. Legal Standing of the Petitioners

Qualifications that shall be fulfilled by the Petitioners as the party provided for in Article 51 paragraph (1) of the Law Number 24 of 2003 concerning Constitutional Court (hereinafter referred to as Constitutional Court Law), stating that "*The Petitioner shall be a party who claims that his/her/its constitutional rights and/or competency are lost by the enactment of a law, namely:*

- a. Indonesian natural person;*
- b. A community group espousing customary law in existence and in conformity with development in society within the principles of the Unitary State of the Republic of Indonesia as prescribed by law;*
- c. public or private legal entity; or*
- d. state institution".*

The constitutional right and/or competency as referred to in Article 51 paragraph (1), is/are asserted

under explanation thereof, whereas "*constitutional rights*" mean any rights regulated under the 1945 Constitution of the Republic of Indonesia." Explanation of the provision of Article 51 paragraph (1) asserts that only those rights expressly provided for in the 1945 Constitution shall be included as "*constitutional rights*".

Therefore, according to the Constitutional Court Law, in order to make a person or a party acceptable as a petitioner having legal standing in a petition for judicial review of a Law against the 1945 Constitution, the person or party shall first explain and prove:

- a. His/her qualification as the Petitioner in the a quo petition as referred to in Article 51 paragraph (1) concerning the Constitutional Court Law;
- b. His/her constitutional right and/or competency as referred to in "Explanation of Article 51 paragraph (1)" claimed to have been lost by the enacted a quo law

With respect to constitutional loss, the Constitutional Court has provide definition and limitation regarding the constitutional loss arising out of the enactment of a law shall fulfill 5 (five) conditions (refer to the Constitutional Court Judgment Number 006/PUU-III/2005 and the Constitutional Court Judgment Number 011/PUU-V/2007) as follows:

- a. existing right and/or competency of the Petitioner granted by the 1945 Constitution;

- b. the Petitioner's right and/or competency is/are claimed to have been lost by the enacted law being reviewed;
- c. the loss to the Petitioner's constitutional right and/or competency shall be specific and actual or at least potential in nature which based on reasonable logic it can be almost assured to occur;
- d. an existing causality (*causaal verband*) of the said loss to the enacted law being reviewed;
- e. a possibility that by granting the petition, then the loss as argued shall not occur /or no longer occur;

If the five conditions are not fulfilled by the Petitioners in the *a quo* judicial review case, then actually no Petitioner's constitutional right and/or competency is lost by the enactment of articles of the *a quo* Law being reviewed.

With respect to the arguments presented by the *a quo* Petitioners, the House of Representatives of the Republic of Indonesia provides the following elaborations:

- a. Whereas the Petitioners in the *a quo* petition explain that their constitutional right has been lost and violated by the enactment of Article 153 paragraph (1) letter f of the Labor Law. However, explanation of the Petitioners' legal standing does not explain the constitutional right harmed by the enacted Article 153 paragraph (1) letter f of the Labor Law. The Petitioners do not elaborate the loss experienced by

the Petitioners in the *a quo* petition. The Petitioners do not explain the specific, actual or at least potential nature which based on reasonable logic it can be almost assured to occur in accordance with parameter of constitutional loss stipulated by the Constitutional Court (refer to the Constitutional Court Judgment Number 006/PUU-III/2005 and the Constitutional Court Judgment Number 011/PUU-V/2007).

- b. Whereas in the petition lodged, the Petitioners fails to logically prove the causality (*causal verband*) of the loss experienced by the Petitioners to the enacted *a quo* article being reviewed. The Petitioners are the board and members of labor union acting for and on behalf of themselves through the petition who collectively claim that by the enacted *a quo* article, they, as worker, will be harmed by the rule allowing termination of employment due to related by blood and/or marriage to another employee/worker working at the same company.

However in the petition, all Petitioners (the Petitioners I to VIII) acting on behalf of themselves cannot construct the existence of loss against their respective constitutional right and/or competency by the enacted *a quo* article, hence, the Petitioners has experienced no constitutional loss at all. The Petitioners' petition becomes obscure and unclear

(*obscuur libel*) because there is no violation against constitutional right of the Petitioners I to VIII to which the *a quo* articles shall apply. By the non-existence of violation, the *a quo* Petitioners do not fulfill the qualification as referred to in Article 51 paragraph (1) of the Constitutional Court Law.

- c. Whereas in the legal principle there is a widely known legal provision that no interest shall result in no lawsuit which in French is known as the phrase *point d'interest*, *point d'action* and in Dutch is known as the phrase *zonder belang geen rechtsingang*. It is the same as the principle in *Reglement op de Rechtsvordering* (Rv) especially Article 102 adopting the provision that "no action without legal connection". The requirement of the existing legal interest is also reduced in legal standing requirement as contained in the Constitutional Court Judgment Number 006/PUU-III/2005, dated May 31, 2005 and the Constitutional Court Judgment Number 11/PUU-V/2007, dated September 20, 2007 letter d stipulating an existing causality (*causal verband*) of *the concerned loss to constitutional right and/or competency and the enacted law being reviewed*.

In regard to the Petitioners' legal standing, the House of Representatives of the Republic of Indonesia fully renders the same to the Chief/Panel of Judges of the Constitutional Court to consider and assess whether the

Petitioners actually have the legal standing or not as provided for in Article 51 paragraph (1) of the Constitutional Court Law and based on the Constitutional Court Judgment Number 006/PUU-III/2005 and the Constitutional Court Judgment Number 011/PUU-V/2007.

2. Judicial Review of Article 153 paragraph (1) letter f of the Labor Law

In regard to the judicial review of Article 153 paragraph (1) letter f of the Labor Law against the 1945 Constitution, the House of Representatives of the Republic of Indonesia provides explanation as follows.

- 1) Whereas paragraph 4 (four) of the Preamble of the 1945 Constitution expressly states that the purposes of the establishment of the Government of the Republic of Indonesia are among other things to protect the whole Indonesian people and country and to increase public welfare. In order to increase public welfare, the government shall be responsible to increase welfare, hence, the rights to get appropriate job and life shall become security and constitutional right of each citizen. The right to get job can increase welfare of a person which in turn fulfill decent life.
- 2) Article 1 paragraph (3) of the 1945 Constitution states that "*Indonesia is a constitutional state*". One of characters of a constitutional state is the existence of constitutional supremacy (A.V. Dicey) meaning that

all efforts with respect to law enforcement and law placement shall be put before any other matters and making the law as the highest leader or commander in the effort to maintain and protect stability in a nation's and country's life (Abdul Manan).

- 3) Whereas in formulating the Labor Law, the Law formulator had also considered international standards such as ILO Convention and UN Convention either those already ratified by Indonesia or not. The provision of Article 7 and Article 8 of the UN Convention regarding Economic, Social and Cultural Rights with respect to the state's obligation to guarantee that each worker shall be treated fairly without discrimination in all manpower aspects had been also included into provisions of the Labor Law.
- 4) Whereas the provision of Article 153 paragraph (1) letter f of the Labor Law which reads, "*unless it has been regulated under the employment agreement, company regulation or collective labor agreement*" had adopted the principle of freedom of contract under agreement laws, whereas the provision shall be only implemented upon mutual agreement of both parties through employment agreement, company regulation and collective labor agreement. In addition thereto, in formulating a rule, a company shall not include any provision contradicting any applicable laws in the area in which

the company is domiciled or incorporated. Rules regulating contract are provided for in Article 1320 of the Indonesian Civil Codes as follows:

"In order to make an agreement valid, it shall contain four elements as follows;

- 1. agreement to which they bind themselves;*
- 2. capability to create a covenant;*
- 3. a particular subject matter;*
- 4. a cause that shall not be prohibited."*

- 5) Whereas the employment agreement constitutes part of the agreement as referred to in Book III of the Indonesian Civil Codes (hereinafter referred to as ICC). As part of the Book III of the ICC, one of general principles of a covenant, namely *pacta sun servanda* as provided for in Article 1338 ICC shall apply. The *pacta sun servanda* principle states that an agreement shall constitute law for those entering into the same. A law constitutes part of constitution and as a constitutional state, the people shall automatically obey any agreements they make because agreements based on Article 1338 of the ICC have the same function as laws for those entering into the same. The employment agreement is also binding in nature because it is resulted from an agreement between parties that shall be resulted without duress as referred to in Article 1320 of the ICC regulating validity requirements of an

agreement. Therefore, the agreement shall not be revocable unless otherwise mutually agreed by the parties, namely the employer and the employee. The acceptance or rejection of the agreement or contract shall result in different consequences.

- 6) The House of Representatives of the Republic of Indonesia is of an opinion that it is incorrect that the provision of Article 153 paragraph (1) letter f of the Labor Law contradicts the freedom to found a family and to bear children through a legitimate marriage based on a free will of the intending spouses. The workers shall have freedom to anyone they are intended and connected, however, by the existing employment agreement, collective labor agreement or company regulation prohibiting marriage between coworkers at the company, one of the worker may resign from his/her job because the employment agreement, collective labor agreement or company regulation has been agreed and binding to all workers at the organization. On the contrary, if the worker insists to marry his/her coworker, the worker shall be in default and sanction can be imposed to him/her pursuant to the company regulation and applicable laws.
- 7) Whereas basically, the prohibition of marriage relation between employees working at the same company shall be aimed at maintaining employee professionalism. In

addition thereto, the prohibition of having marriage relation between workers working at the same company shall be also aimed at preventing conflict of interest between the husband and wife working at the same company. The conflict of interest may occur if an individual or organization involves various interests, hence, it could affect motivation to take action and do other activities. The conflict of interest arises out when a person holding particular position has conflicting professional and personal interests. The conflict of interest makes the person in difficulty performing his duties. A conflict of interest may arise out even the matter does not result in unethical or improper act.

- 8) Whereas according to Thomas Hobbes, justice is an arrangement of an agreement. Therefore, justice is deemed as an act already regulated under the agreement. A worker entering into an employment agreement or contract in which a rule that prohibition of marriage relation is contained shall obey the rule already agreed. According to the justice theory stated by Thomas Hobbes, if the worker violates any provision contained in the agreement, it can be said that the worker commits an unfair act and may inflict loss on the other person's justice.

- 9) Whereas each person's right to found a family and to bear children through a legitimate marriage actually becomes one of human rights (HR) provided for in Article 28B paragraph (1) of the 1945 Constitution. However, it is not included as one of rights that shall not be taken in any conditions whatsoever pursuant to Article 28I of the 1945 Constitution and Article 4 the Law Number 39 of 1999 concerning Human Rights (hereinafter referred to as Human Right Law). Therefore, in a particular condition, the right to found family may be waived. Article 153 paragraph (1) letter f of the Labor Law constitutes one of articles that can waive the rule.
- 10) However, the waiver is not only provided for in the Labor Law but also contained in a special Law regulating marriage, namely Article 8 letter f of the Marriage Law. The Article prohibits a marriage between two persons having a relation that, based on their religion or other applicable regulations, prohibit them to marry due to the relation. The existing article asserts that the prohibition to marry may be also regulated by other laws and regulations including the Labor Law.
- 11) Whereas termination of employment by a company to any of its workers getting married to his/her coworker, meaning that the worker violates the provision already

agreed in the employment agreement or collective labor agreement, hence, it can be said that he/she is in default or violates the agreement entered into by the employer and the employee when entering into a contract made between the parties, is the consequence already expressly regulated under the agreement between the parties through the employment agreement, collective labor agreement or company regulation. Therefore, it is incorrect that the provision of Article 153 paragraph (1) letter f of the Labor Law contradicts the provision of Article 28D paragraph (2) of the 1945 Constitution.

- 12) Whereas if there is any issue with the employment agreement, the Law Number 2 of 2004 concerning Dispute Settlement in Industrial Relation (hereinafter referred to as Law No. 2/2004) has actually regulated how the settlement process for the dispute in industrial relation between parties either inside or outside court of justice. Any disputes relating to termination of employment shall be categorized as dispute in industrial relation according to Article 1 point 1 of the Law No. 2/2004.

Whereas based on the foregoing arguments, the House of Representatives of the Republic of Indonesia pleads to the Chief of Panel of Constitutional Judges to pass the judgment with the following verdicts:

1. To declare that the Petitioners have no legal standing, hence, the *a quo* petition shall be declared unacceptable (*niet ontvankelijk verklaard*);
2. To overrule the *a quo* petition in its entirety or at least to declare that the *a quo* petition shall be unacceptable;
3. To accept the explanation from the House of Representatives of the Republic of Indonesia in its entirety;
4. To declare that Article 153 paragraph (1) letter f of the Law Number 13 of 2003 concerning Manpower especially the part "*unless it has been regulated under the employment agreement, company regulation or collective labor agreement*" does not contradict the 1945 Constitution of the Republic of Indonesia;
5. To declare that Article 153 paragraph (1) letter f of the Law Number 13 of 2003 concerning Manpower especially the part "*unless it has been regulated under the employment agreement, company regulation or collective labor agreement*" shall have binding legal effect.

If the Honorable Panel of Constitutional Judges is of other opinions, kindly to pass the fairest possible judgment (*ex aequo et bono*).

[2.5] Considering that in regard to the quo case, the Indonesian Entrepreneur Association (APINDO) has presented explanation before the trial on May 15, 2017, which is principally as follows:

Whereas in relation to the petition for judicial review of the Law Number 13 of 2003 concerning Manpower Article 153 paragraph (1) letter f especially the clause stating the phrase *"unless it has been regulated under the employment agreement, company regulation or collective labor agreement"* against Article 28B paragraph (1) and Article 28D paragraph (2) of the 1945 Constitution for cancellation thereof, then we provide explanation as follows:

1. Whereas marriage between male worker and female worker working at the same company or government body have been practiced since a long time ago and resulted in positive or negative impacts to the employer and the workers themselves and other workers as part of the company.
2. Whereas the positive impact of the marriage between workers in a company is that the couples will emotionally strengthen each other due to the family relation so they will feel safer due to protecting each other. However, in addition to the positive impact, there are negative impacts relating to the feeling being protected by each other which potentially results in a negative impact, namely reducing or omitting objectiveness in work relation between the employees and the company's management. For

example, an HR Manager of a company recruits the wife or husband of his superior, namely General Manager of the company as Supervisor, whereas in a particular condition, the wife or husband of the HR Manager's superior commits disciplinary or any other kinds of violation that shall be punishable by a sanction regulated under the Employment Agreement, Company Regulation, or Collective Labor Agreement. In such condition, there will be a psychological and emotional conflict for the Manager HR to enforce the company's regulation.

3. Whereas by the existing negative and positive impacts, the Government regulates the same under the Law Number 13 of 2003 of Article 153 paragraph (10) letter f with the purpose of preventing the negative impacts from occurring at corporate environment and establishing appropriate, professional and fair work conditions.
4. Whereas the 1945 Constitution, Chapter XA regarding Human Rights, Article 28B paragraph (1) states that *"any persons shall have the right to found a family and to bear children through a legitimate marriage"*. Subsequently, Article 1 of the Law Number 1 of 1974 concerning Marriage asserts the same that *"marriage is a physical and emotional relation between a man and a woman as husband and wife with the purpose of founding a happy and eternal family for the sake of the Almighty God"* and Article 33 of the Law Number 1 of 1974 concerning Marriage also asserts

that "A husband and a wife shall love and respect, faithful and physically and emotionally support each other". Based on the foregoing elaboration, it can be concluded that marriage is a sacred right of any persons creating obligation to married couple making them both strong and "special".

5. Whereas principally, the company does not prohibit the couple to marry, however, if the married couple work at the same company it will potentially result in conflict of interest in taking the company's internal decision and also may interfere objectiveness and professionalism in their work. For example, in relation to assessment of work performance, career development, promotion, sanction imposition, etc., which will harm the fairness principle for other workers having no special relation as husband and wife in the company of which number is surely greater as provided for in Article 28D paragraph (2) of the 1945 Constitution that reads "*Every person shall have the right to work and to receive fair and proper remuneration and treatment in employment*".
6. Whereas the provision of Law Number 13 of 2003 concerning Manpower Article 153 paragraph (1) letter f does not contradict the 1945 Constitution. It is aimed at protecting greater interest in protecting right of any citizens to marry but at the same time also to protect the right of any working persons to be fairly treated whereas

both constitute human rights collectively regulated by the 1945 Constitution Article 28J paragraph (1) asserting that *"Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state"* and paragraph (2) that reads *"In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society"*.

Based on the foregoing explanation, APINDO is of an opinion as follows;

1. Whereas the provision of Article 153 paragraph (1) letter f of the Law Number 13 of 2003 concerning Manpower, principally asserting that the Employer shall not make any employment termination on the ground that the employee/worker is related by blood and/or marriage to another employee/worker working at the same company, *unless it has been regulated under the employment agreement, company regulation or collective labor agreement*, does not contradict Article 28B paragraph (1) and Article 28D paragraph (2) of the 1945 Constitution.
2. Whereas the existing article 153 paragraph (1) letter f of the Law Number 13 of 2003 concerning Manpower provides

assurance of a conducive cooperation amongst workers or between workers and employer.

Whereas the Indonesian Entrepreneur Association (APINDO) presented additional explanation before the trial on June 5, 2017, which is principally as follows:

I. Custom Constitutes Formal Source of Law

1. Whereas the provision prohibiting the employment of a male worker and a female worker related by marriage (marital relationship) in a company or government body has been applied since a long time ago, similarly with the provision prohibiting the employment of personnel or employee/worker related by blood to another worker working at the same company (excluding for family business) which has been also applied since a long time ago and giving positive and negative impacts either to the company or to the workers themselves and other workers as part of the company.
2. Whereas the provision has become generally applied custom in business especially in connection with industrial relation. The provision existed far before the formulation of the Law Number 13 of 2003 concerning Manpower. As we all know that generally applied custom shall become formal source of law in Indonesia. Custom constitutes formal source of law provided that:

- a. There should be a particular act or deed repeatedly conducted for the same matter and followed by public in general;
 - b. There should be a legal belief of interested persons/groups meaning that there should be a belief that the rules resulting from the custom contain good and appropriate matters to follow/obey and have binding effect.
3. Whereas one of the customs in business can be seen by the existing rules made by *Bank Pembangunan Indonesia* (BAPINDO) in 1973, currently Mandiri Bank, which were expressed rules with respect to marriage between BAPINDO employees principally regulating prohibition of employment of a worker related by marriage.
- The Decision of the Board of Directors of Bank Pembangunan Indonesia (BAPINDO) Number 6 of 1973 concerning Marriage between BAPINDO Employees (currently Mandiri Bank) (exhibit 1).

Article 1

"Upon the issuance hereof, the employment relation between Bapindo and one of employees intending to marry to another employee also working at Bapindo shall be automatically terminated as of the date of marriage".

Article 2

"The termination of employment as referred to in Article 1 aforesaid shall apply to the employee having the shortest service period from the two (2) employees intending to marry, unless otherwise they decide in writing about who shall resign from them both".

Article 3

"The two employees intending to marry shall, 1 (one) month prior to the date of marriage, jointly notify Bapindo in writing of their respective intention in relation to the provision of Article 2".

II. Application of Good Corporate Governance Especially in relation to Prevention of Nepotism Practice in the Company

1. Whereas in order to prevent nepotism practice at companies, provisions relating to prohibition the employment of personnel or employee/worker related by blood or marriage to another personnel or employee/worker had been applied far away before the formulation of the Law Number 13 of 2003 concerning Manpower. The provision can be seen from the Decision of Board of Directors of Bank Pembangunan Indonesia (BAPINDO) Number 6 of 1973 concerning Marriage Between BAPINDO Employees (currently Mandiri Bank) (exhibit 1).

Article 1

"Upon the issuance hereof, the employment relation between Bapindo and one of employees intending to marry to another employee also working at Bapindo shall be automatically terminated as of the date of marriage".

Article 2

"The termination of employment as referred to in Article 1 aforesaid shall apply to the employee having the shortest service period from the two (2) employees intending to marry, unless otherwise they decide in writing about who shall resign from them both".

Article 3

"The two employees intending to marry shall, 1 (one) month prior to the date of marriage, jointly notify Bapindo in writing of their respective intention in relation to the provision of Article 2".

2. Whereas the Decision of Board of Directors of BAPINDO Number 6 of 1973 (currently Mandiri Bank) asserts that Termination of Employment of an employee related by marriage to another employee at the company was unilaterally applied by the company in order to prevent potential nepotism because it was an important factor in banking (banking and financial sectors). However,

after the enactment of the Law Number 13 of 2003 concerning Manpower especially Article 153 paragraph (1) letter f, the provision regarding Termination of Employment shall be applied through an existing agreement mutually stipulated by both parties, namely employer and personnel or employee/worker of the concerned company and contained in an Employment Agreement, Company Regulation, or Collective Labor Agreement.

3. Whereas the prohibition to employ any personnel or employee/worker related by blood or marriage has been also applied at State-Owned Enterprises (SOEs) referring to the principle of Good Corporate Governance, Equality and Non-Discriminative as contained in the Ministerial Circular Letter of SOE Number SE-06/MBU/2014 concerning Prevention of Nepotism Practice at State-Owned Enterprise (Exhibit 2).
4. Whereas referring to the Ministerial Circular Letter of SOE as referred to in point 3 above, SOE companies including banking company-owned SOE such as BNI, Mandiri, BRI Banks and followed by other private banking companies will surely apply the same provision into their respective Company Regulation and contained into Collective Labor Agreement (PKB) (Exhibit - 3).

III. Providing Job Opportunity for Other Family Heads

1. Whereas the existing provision prohibiting the employment of any personnel or Employees/Workers related by marriage at a company applied by several particular companies considering their respective corporate condition will provide job opportunity to the broadest extent for other jobseekers, meaning that if out of 1,000 workers at a company are family heads supporting a number of wives and children, then the company indirectly supports the welfare of all members of the 1,000 families. On the contrary, if there are 200 workers out of the 1,000 workers working at the company have marital relation as husband and wife, then the company only supports the welfare of 900 families indirectly closing the opportunity for other family heads (100 family heads) to get the opportunity to work and achieve welfare jointly with the company.
2. Whereas the Termination of Employment of a personnel or employee/worker working at a company either acting as husband or wife will not close his/her opportunity to work at another company. The job opportunity at the other company shall be easily acceptable for the Personnel or Employee/Worker being terminated provided that he/she has good capacity and competency.

Based on the foregoing explanation, we conclude our opinion as follows;

1. Whereas the phrase "*unless it has been regulated under the employment agreement, company regulation or collective labor agreement*" under Article 153 paragraph (1) letter f of the Law Number 13 of 2003 concerning Manpower provides opportunity to the Company and its Employees/Workers and/or Labor Union at the Company to manage the industrial relation related issues at the company in accordance with the company's condition and capacity by first negotiating conditions and mechanism mutually agreed and surely to be contained in an agreement, namely Employment Agreement and/or Collective Labor Agreement (PKB).
2. Whereas the provision of Article 153 paragraph (1) letter f of the Law Number 13 of 2003 concerning Manpower principally asserting that an Employer shall not make any employment termination on the ground that an employee/a worker related by blood and/or marriage to another employee/worker working at the same company, unless it has been regulated under the employment agreement, company regulation or collective labor agreement does not contradict Article 28B paragraph (1) and Article 28D paragraph (2) of the 1945 Constitution of the Republic of Indonesia.
3. Whereas the existing Article 153 paragraph (1) letter f of the Law Number 13 of 2003 concerning Manpower provides

assurance of a conducive employment relation amongst workers or between the workers and the company's management, hence, affects work professionalism and provides fairness either amongst workers themselves or between the workers and the company.

4. Whereas based on the matters elaborated above, we plead to the Honorable Panel of Constitutional Judges for this case to overrule the Petitioners' petition for judicial review lodged by Ir. H. Jhoni Boetja, S.E. and partners in its entirety.

Or if the Honorable Panel of Constitutional Judges for this case is of other opinions, kindly to pass the fairest possible judgment (*et aequo et bono*).

[2.6] Considering that in order to affirm its explanation, the Related Party, namely APINDO presents documented/written evidence marked as exhibits PT-1 to PT-3 as follows:

- 1 Exhibit PT-1 Copy of Written Announcement of the Decision of Board of Directors of Bank Pembangunan Indonesia (BAPINDO) Number 6 of 1973 concerning Marriage Between BAPINDO Employees;
- 2 Exhibit PT-2 Copy of the Ministerial Circular Letter of State-Owned Enterprise Number SE-06/MBU/2014 concerning Prevention of

Nepotism Practice at State-Owned Enterprise;

3 Exhibit PT-3 Copy of the Collective Labor Agreement (PKB) of BNI Bank of 2015 Article 69;

[2.7] Considering that with respect to the *a quo* petition, PT. PLN (Persero) submitted an explanation received at the Court's Registrar Office on June 12, 2017, which principally explains as follows:

1. Article 153 paragraph (1) letter f of the Labor Law provides that an Employee shall not terminate employment due to an employee/a worker related by blood and/or marriage to another employee/worker working at the same company, unless it has been regulated under the employment agreement, company regulation or collective labor agreement.
2. Companies have different corporate codes of conduct regulating marital relation between workers. At PT. PLN (Persero), especially as a company having a special characteristic, regulates termination of employment due to marriage between workers under consideration of professionalism and prevention of conflict of interest amongst workers that may detriment the company's performance. Employees that cannot separate personal and company related matters have negative effect to the company and image of the employees themselves.

3. Whereas the background of PT. PLN (Persero) and the Labor Union agreed the rule regulating marriage between workers as included in the Second Addendum to the Collective Labor Agreement dated October 11, 2013 were as follows:

- a. The Law Number 1 of 1974 concerning Marriage provides that marriage is a physical and emotional relation between a man and a woman as husband and wife with the purpose of founding a happy and eternal family for the sake of the Almighty God. A husband and a wife shall love and respect, faithful and physically and emotionally support each other. Therefore, marriage is a physical and emotional relation between the husband and wife that is strong and special.

From industrial relation perspective, marital relation potentially inflicts a risk that may interfere and/or harm professionalism of employment relation such as, among other things:

- i. From conflict of interest perspective - collusion, special treatment

Conflict of interest occurs when an employee as a husband and/or wife serves a position personally beneficial due to directly or indirectly related by marriage affecting business interest of the company. If there are married employees working at the same office and both have strategic position

or function, it potentially inflicts conflict of interest.

For example:

- a) Employee A serves as HR Manager, while on the other side his wife is performing a fit & proper test for selection of a certain position at the Employee A's office.
- b) Employee A serves as General Manager, Employee B as the wife serves Procurement Official.
- c) Employee A serves as an engineer in information and technology, employee B as his wife serves in trading, information of data security of electricity sale in PLN'S technology system can be used for personal interest in electricity sale.

ii. From Talent Pool perspective

Marriage between employees may interrupt the company in career development of the concerned employees. There is a position available for qualified and potential employee to serve the positions, however, due to the position formation affects the position/function of the husband/wife which is also an employee, the company cannot assign the position to the concerned employee, hence, the company loses potential human resource having the same quality or better from the

concerned employee (no right man in the right place).

By the existing resources, the company can more focus on running strategic function of personnel competency development instead of handling administrative matters, hence, personnel career development can be monitored better, limited positional formation.

The company will professionally assign employees in accordance with their respective competency, hence, the employees can obtain career development without being prevented by marital status factor. Therefore, there it will result in harmonization between employee personal interest and the company's interest on a proportional manner by considering the company's condition.

iii. Request/rejection of transfer interfering work professionalism

For PLN, a company having integrated business process and location widely spread in Indonesian territory, personnel transfer is a common thing conducted for fulfilling manpower requirement. Having become PLN employee, the concerned employee should have been aware the consequence of working at PLN that he/she shall agree if he/she is assigned at any PLN work unit.

Marital relation causes many requests/rejections of transfer due to personal consideration, namely if an employee (the husband or wife) is transferred while the spouse is not. The condition in which the husband and wife do not live at the same residence is surely not an expected condition for their marriage, it is also provided for in Article 34 of the Law Number 1 of 1974:

- (1) A married spouse shall have permanent residence.
- (2) The residence as referred to in paragraph (1) of this Article shall be jointly decided by the husband and wife

The business managed by PLN shall surely not prevent the husband/wife to have the same permanent residence because marital relation is stronger and special in nature compared to industrial relation, hence, it becomes an obstruction in improving work professionalism that surely will linearly interfere the company's performance.

- b. Type of business becomes one of the main consideration factors in regulating marital relation in a company. Several companies having high risk business and transaction and highly prioritizing service quality and professionalism prohibit marriage between employees

working at the same company (banks, insurance companies, integrated businesses, PLN, etc.).

Each company has different business/industrial characteristic. For example, multinational company, integrated business across Indonesian territory, localized in an area, strict confidentiality/trust, high technology, etc. Whereas the Labor Law does not regulate industrial relation with special characteristic each company has. The Labor Law provides opportunity to employer and employees to arrange employment rules through Employment Agreement, Company Regulation and/or Collective Labor Agreement.

Business characteristic of PLN is a company processing its business from upstream to downstream with various supporting businesses and locations of PLN'S work units widely spread across Indonesian territory. Therefore human resource of PLN is part of Personnel Formation that shall be able and willing to perform the work optimally at any work location across Indonesian territory.

PLN'S personnel formation prepared is continuously increasing in each year which makes it require prepared and professional personnel to perform electricity business on a professional manner, PLN minimizes risk of potential conflict of interest interfering the company's performance. Therefore the existing Article

153 paragraph (1) letter f of the Labor Law actually provides legal certainty and encourages a professional business.

c. From Juridical and Legal Aspects

i. Article 1338 of the ICC

Article 1338 of the ICC states that *all agreements* entered into pursuant to applicable laws shall constitute a law for those entering into the same. The agreement shall not be revoked without mutual agreement of both parties or unless due to reasons provided by the laws. The agreement shall be performed on a goodwill basis.

Therefore, each party shall be given freedom to agree on content of an agreement or commonly known as the principle of freedom of contract. An agreement contains rights and obligations binding respective parties. The freedom of contract principle shall be owned by any interested parties. The interests between parties shall be then reduced into the agreement containing rights and obligations that shall bind and be complied with by the parties entering into the same.

The freedom of contract principle has the meaning that the parties that shall enter into the agreement/contract freely without duress. The parties cannot be forced to agree on the same

because it contradicts the objective condition under Article 1320 ICC namely agreement of those binding themselves.

Article 153 paragraph (1) letter f of the Labor Law provides the freedom to employer and worker to arrange marital relation in industrial relation to the extent the same is regulated under Employment Agreement, Company Regulation, and/or Collective Labor Agreement.

Article 1 points 14, 20 and 21 of the Labor Law regulates:

14. Employment agreement means an agreement entered into between the employee/worker and the employer containing work conditions, rights and obligations of the parties.

20. Company regulation means written rules made by the employer containing work conditions and the company's rules of order.

21. Collective labor agreement means an agreement resulted from a negotiation between one or several labor unions registered at a competent institution having responsibility for manpower affairs and one or several employers containing work conditions, rights and obligations of both parties.

Based on the foregoing regulation, the arrangement of termination of employment due to marital relation is permitted by the law provided subject to prior agreement contained in an Employment Agreement, Company Regulation, and/or Collective Labor Agreement.

The worker and/or labor union shall be given the freedom to agree or not to agree the Employment Agreement and the employer shall not force the worker candidate to sign the Employment Agreement and/or Collective Labor Agreement. Therefore, if the worker agrees on the agreement, the workers shall consciously comply with and obey the Employment Agreement already made and enforceable as laws for the parties (the *pacta sunt servanda* principle). Judges or any third parties shall respect substantial matter of the agreement entered into by the parties as a law.

All provisions and codes of conduct already regulated by the company shall be complied with by the workers and the employer. The workers who have agreed on the Employment Agreement shall be bound by rights and obligations contained in the Employment Agreement and applicable company regulation.

- ii. Law Number 13 of 2003 concerning Manpower

Article 1 point 15 of the Law Number 13 of 2003 concerning Manpower regulates that employment relation is a relation between an employer and an employee/a worker based on Employment Agreement of which elements are work, salary and order.

The order element shall be the power owned by the employer to the worker in order to make any actions taken by the worker in line with the company's interest provided that it does not contradict the Collective Labor Agreement and Company Regulation. The order may be in the form of verbal order to do something or not to do something as contained in the Employment Agreement or the Company Regulation.

Based on the foregoing provision, the employer may enforce a rule that requires or prohibits an action with the purpose of improving the company's performance and service and working professional behavior.

Article 61 paragraph (1) letter d of the Law Number 13 of 2003 concerning Manpower regulates that the Employment Agreement shall be terminated upon any of particular condition or events as set forth in the Employment Agreement, Company Regulation, or Collective Labor Agreement that may result in termination of employment relation.

In accordance with the foregoing provision, the company may make a rule to arrange a particular condition which if the same occurs at the company and committed by the worker, the company may terminate the employment relation.

iii. Law Number 40 of 2007 concerning Limited Liability Company, Article 92 paragraph (1) of the Law on Limited Liability Company states that Board of Directors shall manage the company's business for the company's interest in accordance with the company's purpose and objective.

Article 97 paragraph (2) of the Law on Limited Liability Company reads: The management as referred to in paragraph (1) shall be performed by each member of the board of directors on a goodwill basis and in a fully responsible manner.

The board of directors shall be entitled to issue any policies and rules in managing the company's activity. All policies and rules issued by the board of directors shall be merely for the company's interest implemented on the goodwill basis and in the fully responsible manner. Therefore, the company may arrange matters for the company's interest own good including managing matters potentially inflict interruption on

professional relation in work including marital relation between workers.

The employer or the company shall be also given with appropriate and fair legal assurance to run its business and support the country's economy as provided for in Article 28D paragraph (1) of the 1945 Constitution which reads:

"Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law."

4. As elaborated above, PLN has a special business process namely from upstream to downstream with various supporting businesses and work units widely spread across Indonesian territory. Therefore, in order to avoid conflict of interest, according to talent pool, PLN and the labor union have reached an agreement contained under the Addendum to the Collective Labor Agreement namely applying the Article 153 paragraph (1) letter f to arrange termination of employment for an employee/a worker having marital relation to another employee/worker working at the same company.
5. The marriage between employees may potentially inflict loss on the company's interest and performance due to conflict of interest, decreasing professional behavior of the employees, hence, resulting in the company's taking policy unsmooth, especially the policy for organizational

and personnel career development. In order to minimize the risk, Article 153 paragraph (1) letter f actually provides the employer with legal assurance to run the business appropriately and professionally and for the worker to have a professional employment relation to achieve decent life

6. Whereas the arrangement of marital relation between workers working at the same company under Article 153 paragraph (1) letter f provides the company and the workers with legal assurance so they can make rules with respect to termination of employment due to marital relation between the workers provided that the rules have been regulated under the Employment Agreement, Company Regulation, and/or Collective Labor Agreement aimed at improving the company's performance and minimizing conflict of interest. The agreement in the form of Employment Agreement, Company Regulation, and/or Collective Labor Agreement constitutes appropriate and fair legal assurance given pursuant to the laws and Article 28D paragraph (1) of the 1945 Constitution to the employer and workers.

[2.8] Considering that the Petitioners, the President of the Republic of Indonesia and the Related Party (the Indonesian Entrepreneur Association) had presented their respective written conclusion received at the Court's Registrar Office on

June 13, 2017 and June 14, 2017, which principally remains on their respective opinion;

[2.9] Considering that in order to shorten the elaborations hereof, anything occurred in the trial shall be sufficiently referred to the court record, which shall form an integral and inseparable part hereof;

3. LEGAL CONSIDERATION

The Court's Power

[3.1] Considering that based on Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), Article 10 paragraph (1) letter a of the Law Number 24 of 2003 concerning Constitutional Court as amended by the Law Number 8 of 2011 concerning Amendment to the Law Number 24 of 2003 concerning 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 Constitutional Court Law) and Article 29 paragraph (1) letter a of the Law Number 48 of 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia of 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076, hereinafter referred to as Law No.

48/2009), one of constitutional powers of the Court is to adjudicate at the first and final instance of which judgment shall be final to review a Law against the 1945 Constitution;

[3.2] Considering that because the Petitioners' petition is a constitutional review of norm under a Law, in this case Article 153 paragraph (1) letter f of the Law Number 13 of 2003 concerning Manpower (State Gazette of the Republic of Indonesia of 2003 Number 39, Supplement to the State Gazette of the Republic of Indonesia Number 4279, hereinafter referred to as the Law No. 13/2003) against the 1945 Constitution, then the Court shall be entitled to adjudicate the *a quo* petition;

Legal Standing of the Petitioners

[3.3] Considering that based on Article 51 paragraph (1) of the Constitutional Court Law along with Explanation thereof, the party(ies) who shall be entitled to lodge a request for judicial review of a Law against the 1945 Constitution shall be those claiming that the enactment of the Law inflicts loss on his/her/their/its constitutional right and/or competency granted by the 1945 Constitution, namely:

- a. Indonesian natural person (including group of persons having the same interest);
- b. A community group espousing customary law in existence and in conformity with development in society within the

principles of the Unitary State of the Republic of Indonesia as prescribed by law;

- c. public or private legal entity; or
- d. state institution;

Therefore, the Petitioners in the judicial review of the Law against the 1945 Constitution shall first explain and prove:

- a. Their standing as Petitioner as referred to in Article 51 paragraph (1) of the Constitutional Court Law;
- b. An existing loss of constitutional right and/or competency granted by the 1945 Constitution inflicted by the enactment of the Law being reviewed and legal standing as referred to in letter a;

[3.4] Considering that the Court after passing the Constitutional Court Judgment Number 006/PUU-III/2005, dated May 31, 2005, and the Constitutional Court Judgment Number 11/PUU-V/2007, dated September 20, 2007, and subsequent judgments is of an opinion that loss of constitutional right and/or competency as referred to in Article 51 paragraph (1) of the Constitutional Court Law shall fulfill the five conditions, namely:

- a. existing right and/or competency of the Petitioner granted by the 1945 Constitution;
- b. such Petitioner's right and/or competency is/are claimed to have been lost by the enacted law being reviewed;

- c. the loss shall be specific and actual or at least potential in nature which based on reasonable logic it can be almost assured to occur;
- d. an existing causality (*causaal verband*) of the said loss to the enacted law being reviewed;
- e. a possibility that by granting the petition, then the loss as argued shall not occur /or no longer occur;

[3.5] Considering that based on the provision of Article 51 paragraph (1) of the Constitutional Court Law and conditions of loss of constitutional right and/or competency elaborated above, the Court shall then consider the Petitioners' legal standing as follows:

[3.5.1] Whereas the norm under the law being reviewed based on the *a quo* petition is contained in Article 153 paragraph (1) letter f of the Law No. 13/2003;

[3.5.2] The Petitioners argue that:

1. The Petitioners I to VII are employees of PT. PLN (Persero) and Members of Board of Labor Union of State Electricity Company and the Petitioner VIII is former of employee of PT. PLN (Persero), respectively acting as Indonesia natural person as referred to in Article 51 paragraph (1) letter a of the Constitutional Court Law along with explanation thereof;

2. The Petitioners potentially experience constitutional loss, in fact, there were workers that had experienced actual loss by the enacted a *quo* Law;
3. Referring to Article 28C paragraph (2) of the 1945 Constitution which reads, "*Every person shall have the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state.*", it can be concluded that the Petitioners have legal standing to fight for their own interest with respect to assurance to keep their work in the event of termination of employment;
4. Article 28D paragraph (1) of the 1945 Constitution states, "*Every person shall have the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state.*";
5. Based on the foregoing elaboration, the Petitioners have legal standing and constitutional interest to lodge the petition for judicial review of Article 153 paragraph (1) letter f of the Law No. 13/2003 against the 1945 Constitution because according to the Petitioners, the article constitutes material that omits and results in termination of employment to the Petitioners due to marital relation in the company, hence, the Petitioners loss work assurance to get appropriate work and life;

[3.5.3] Whereas based on the provision of Article 51 paragraph (1) of the Constitutional Court Law in relation to the constitutional loss argued by the Petitioners, according to the Court, based on reasonable logic, the Petitioners do have legal standing to lodge the *a quo* petition;

[3.6] Considering that because the Court shall be authorized to adjudicate the *a quo* petition *and* the Petitioners do have legal standing to lodge the *a quo* petition, then the Court shall subsequently consider the principal matters of the petition;

Principal Matters of the Petition

[3.7] Considering that the Petitioners argue that Article 153 paragraph (1) letter f of the Law No. 13/2003 contradicts Article 28C paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution, based on the argument principally as follows:

- a. To found a family and bear children through a legitimate marriage are constitutional rights protected by Article 28B paragraph (1) of the 1945 Constitution. The same is also asserted under Article 10 paragraph (1) of the Law Number 39 of 1999 concerning Human Rights. Meanwhile, the legitimate marriage can be only experienced upon the husband's and the wife's free will in accordance with applicable laws and regulations. The existing Article 153

paragraph (1) letter f of the Law No. 13/2003 results in a consequence that the employer will prohibit marriage between workers working at the same company. Because according to the Marriage Law, the marriage shall be valid if conducted according to religious laws which means the norm under the *a quo* Law also prohibits people to practice their respective religion;

- b. The provision of Article 153 (1) letter f of the Law No. 13/2003 omit the protection of the Petitioners' work and right upon decent life and to get paid and fairly treated in the employment relation protected by the Article 28D paragraph (1) of the 1945 Constitution. If the company argues that the provision is important to prevent corruption, collusion and nepotism, it shall be acceptable because corruption, collusion and nepotism depend on individual mentality;
- c. A marriage between workers working at the same company is actually beneficial for the company because it can save the company's expense in term of paying worker family healthcare cost because for the husband and wife working at the company, the company shall pay the healthcare cost only for one worker while the company employs them both, whereas the husband or the wife for which the cost shall be paid is the one registered at the company.

[3.8] Considering that in order to support their arguments, the Petitioners presented documented/written evidence marked as exhibits P-1 to P-8, as detailed in the Facts of the Case;

[3.9] Considering that the House of Representatives had submitted the explanation to the Registrar Office of the Constitutional Court on June 13, 2017 (as detailed in the Facts of the Case);

[3.10] Considering that the President of the Republic of Indonesia represented by the Minister of Law and Human Rights and the Minister of Manpower Affairs had given verbal explanation in the Plenary Session held on May 15, 2017 and submitted written explanation to the Registrar Office of the Constitutional Court on May 15, 2017 (as detailed in the Facts of the Case);

[3.11] Considering that the Related Party, namely the Indonesian Entrepreneur Association (APINDO) had given verbal explanation and submitted written explanation in the Plenary Sessions held on May 15, 2017 and June 5, 2017 (as detailed in the Facts of the Case);

[3.12] Considering that the Informing Party, namely PT. PLN (Persero) had submitted written explanation to the Registrar

Office of the Constitutional Court on June 12, 2017 (as detailed in the Facts of the Case);

[3.13] Considering that after the Court carefully examines the Petitioners' petition, the Petitioners' documented/written evidence, the House of Representatives' written explanation, the President's verbal and written explanation, explanation submitted by the Indonesian Entrepreneur Association (APINDO) and written explanation submitted by PT. PLN (Persero), documented/written evidence presented by the Indonesian Entrepreneur Association (APINDO), written conclusions submitted respectively by the Petitioners, the President and the Indonesian Entrepreneur Association (APINDO), the Court considers the following matters:

[3.13.1] Whereas Article 28D paragraph (2) of the 1945 Constitution reads, "*Every person shall have the right to work and to receive fair and proper remuneration and treatment in employment*". In line with the foregoing, Article 23 paragraph (1) of the UN Universal Declaration of Human Rights also expressly states, "*Every person has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment*". The constitutional right as provided for in Article 28D paragraph (2) of the 1945 Constitution is part of human rights categorized into economic, social and cultural rights. Different from human

rights categorized into civil and political rights that shall be on the contrary fulfilled to the minimum extent by the hand of the state, moreover in particular limitations, the state shall not interfere with them, the fulfillment of rights categorized as economic, social and cultural shall on the contrary require active role of the state in accordance with capacity or resources of the state.

[3.13.2] Whereas Article 28I paragraph (4) of the 1945 Constitution expressly states, "*Protection, improvement, exercise and fulfillment of human rights shall be the responsibility of the state, especially the government*". Therefore, regardless its category and type, the state's responsibility as referred to in Article 28I paragraph (4) of the 1945 Constitution shall persistently vest to the state, especially the Government. The same also applies to the rights becoming constitutional issues in the *a quo* petition, in this case especially the right to work and get paid and fair and just treatment in employment relation and the right to establish family and have children through a legitimate marriage. Even the constitution expressly provides that the responsibility to protect, improve and fulfill human rights shall be the responsibility of the state, especially the government, it does not mean that any institutions or individuals outside the government are not required to respect the existing rights. Because, the essence of each right owned

by a person shall result in obligation to another parties or persons to respect the existing right.

[3.13.3] Whereas subsequently, the right to work also relates to the right to prosperity. Therefore, the Law Number 39 of 1999 concerning Human Rights (Law No. 39/1999) asserts the provision under Article 28D paragraph (2) of the 1945 Constitution. Article 38 paragraph (1) of the Law No. 39/1999 states, *"Every citizen shall, according to talent, knowledge and skill, be entitled to descent work."* Paragraph (2) thereof reads, *"Every person has the right to free choice of employment he/she prefers and to just conditions of work"*. The provision is in line with the provision under Article 6 paragraph (1) International Covenant on Economic, Social, and Cultural Rights already ratified by the Law Number 11 of 2005 concerning Ratification of International Covenant on Economic, Social and Cultural Rights, which reads *"The States Parties to the present Covenant recognize the right to work, which includes the right of every person to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right, and shall take appropriate steps to protect the right"*.

The considerations as elaborated in sub-pharagraphs **[3.13.1]** to **[3.13.3]** above show that the obligation to protect the right to work shall be only as constitutional obligation of the state but also become international legal obligation,

in this case, the obligation born from Indonesia's participation in the International Covenant on Economic, Social, and Cultural Rights. It is true that the Constitution grants constitutional right to the state to make limitations to the human rights but the power shall be limited by conditions as stipulated by the Constitution as further elaborated in the following considerations.

[3.13.4] Whereas if the provisions under the 1945 Constitution, the Law No. 39/1999, the Universal Declaration of Human Rights, and the International Covenant on Economic, Social, and Cultural Rights are related to the Article 153 paragraph (1) letter f of the Law No. 13/2003 that contrarily means that a company prohibiting an employee/a worker to have relation by blood and/or marriage to another employee/worker working at the same company and using the same as basis for termination of employment to the concerned employee/worker, the Court is of an opinion that the rule is not in line with the norm under Article 28D paragraph (2) of the 1945 Constitution and Article 38 paragraph (1) and paragraph (2) of the Law No. 39/1999, Article 6 paragraph (1) of the International Covenant on Economic, Social, and Cultural Rights already ratified by the Law Number 11 of 2005, and Article 23 paragraph (1) of the Universal Declaration of Human Rights aforesaid. Relation by blood or marriage shall be destiny that cannot be planned or avoided. Therefore, making

destiny as a requirement waiving the fulfillment of human rights, in this case the right to work and the right to establish family shall be unacceptable as a constitutionally legitimate reason. In accordance with Article 28J paragraph (2) of the 1945 Constitution, limitation on human rights shall be only made with the purpose of protecting acknowledgment and respect upon right and freedom of others and fulfilling fair demand by considering moral, religious values, safety and public order in a democratic society.

The limitation under Article 153 paragraph (1) letter f of the Law No. 13/2003 does not fulfill the condition of respect upon right and freedom of others because no right or freedom of others being harmed by the existence of relation by blood and/or marriage. Similarly no moral norms, religious values, safety and public order in a democratic society being harmed by the fact that an employee/a worker related by blood and/or marriage to another employee/worker working at the same company.

[3.14] Considering that the Indonesian Entrepreneur Association (APINDO), and PT. PLN (Persero), in their explanations state that the application of Article 153 paragraph (1) letter f of the Law No. 13/2003 in their respective company is aimed at preventing negative impacts occur at their respective company and establishing good, professional and fair condition and preventing potential

inflicted conflict of interest in taking any decision in their respective company. Regarding the matter, the Court is of an opinion that the reason does not fulfill the condition for constitutional limitation under Article 28J paragraph (2) of the 1945 Constitution. Whereas the concern of inflicted negative impacts on the companies and the potential inflicted conflict of interest in taking any decision at their respective company can be prevented by formulating strict company regulation, hence, it shall be still possible to establish high integrity of employees/workers which in turns results in the good, professional and fair work condition.

Whereas the arguments presented by either the President or the Related Party, namely APINDO principally using *pacta sunt servanda* doctrine as the basis by connecting it to Article 1338 ICC which reads, "*All agreements entered into pursuant to applicable laws shall constitute a law for those entering into the same. The agreement shall not be revoked without mutual agreement of both parties or unless due to reasons provided by the laws. The agreement shall be performed on a goodwill basis*", according to the Court, the argument is not always relevant to apply without noting equal position between the parties entering into the agreement when the agreement is made. In relation thereto, it shall be reasonably evident that the Employer and the employees/workers are not in equal positions. Because the employees/workers are the party in weaker position as they need the job. By the existing unequal

positions, hence, then in this case the philosophy of freedom of contract which one of conditions for valid agreement cannot be fulfilled. Based on the foregoing consideration, the word "has been" contained in the formulation of Article 153 paragraph (1) letter f of the Law No. 13/2003 shall not automatically mean fulfillment of the philosophy of freedom of contract principle.

[3.15] Considering that based on all the considerations aforesaid, the court is of an opinion that the Petitioners' arguments under the petition are legally reasonable.

4. CONCLUSION

Based on assessment of facts and laws elaborated above, the Court concludes that:

[4.1] The Court shall be entitled to adjudicate the *a quo* petition;

[4.2] The Petitioners have legal standing to lodge the *a quo* petition;

[4.3] The Petitioners' petition is legally reasonable;

Based on the 1945 Constitution of the Republic of Indonesia, the Law Number 24 of 2003 concerning Constitutional

Court as amended by the Law Number 8 of 2011 concerning Amendment to the Law Number 24 of 2003 concerning 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 the Law Number 48 of 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia of 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076);

5. VERDICTS

Adjudicating,

1. Granting the Petitioners' petition in its entirety;
2. Declaring that the phrase "*unless it has been regulated under the employment agreement, company regulation or collective labor agreement*" in Article 153 paragraph (1) letter f of the Law Number 13 of 2003 concerning Manpower (State Gazette of the Republic of Indonesia of 2003 Number 39, Supplement to the State Gazette of the Republic of Indonesia Number 4279) contradicts to the 1945 Constitution of the Republic of Indonesia and shall not have binding legal effect;
3. Ordering the inclusion of the judgment in a State Gazette of the Republic of Indonesia in appropriate manner.

This judgment is passed in Judicial Proceeding presented by seven Constitutional Judges, namely Anwar Usman as

Presiding Judge also acting as Associate Judge, Suhartoyo, Aswanto, Maria Farida Indrati, I Dewa Gede Palguna, Wahiduddin Adams and Manahan M.P Sitompul, respectively as Associate Judge, on **Thursday** the **seventh** day of **December two thousand seventeen**, pronounced in an open Plenary Session of Constitutional Court on **Thursday** the **fourteenth** day of **December two thousand seventeen**, completely pronounced at **12.26 WIB**, by nine Constitutional Judges, namely Arief Hidayat as Presiding Judge also acting as Associate Judge, Anwar Usman, Suhartoyo, Aswanto, Maria Farida Indrati, I Dewa Gede Palguna, Wahiduddin Adams, Manahan M.P Sitompul, and Saldi Isra, respectively as Associate Judge, accompanied by Wilma Silalahi as Acting Registrar, in the presence of the Petitioners, the President or his representative, the House of Representatives or its representative, and the Related Party/its attorney.

CHAIRMAN,

Signed

Arief Hidayat

MEMBERS,

Signed

Anwar Usman

Signed

Suhartoyo

Signed

Aswanto

Signed

Maria Farida Indrati

Signed

I Dewa Gede Palguna

Signed

Wahiduddin Adams

Signed

Manahan MP Sitompul

Signed

Saldi Isra

SUBSTITUTE COURT CLERK,

Signed

Wilma Silalahi