



DECISION

Number 40/PUU-X/2012

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Hearing constitutional cases at the first and final level, has passed a decision in the case of Petition for Judicial Review of Law Number 29 Year 2004 concerning Medical Practice against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] Name : **H. Hamdani Prayogo**

Occupation : Dental Artisan

Address : Jalan Kiruntag Number 21 Neighborhood Ward
002/Neighborhood Block 001 Kelapa Dua
Kebon Jeruk West Jakarta

In this case by virtue of special power of attorney dated April 13, 2012 granting authority to **M. Soleh Amin, S.H., M.Hum., A. Wirawan Adnan, S.H., AH. Wakil Kamal, S.H., M.H., Iim Abdul Halim, S.H., Rinny Ariany, S.H., MH., and**

Nirsam MN Makarau, S.H., M.H., all being Advocates and Legal Consultants associated in the Legal Aid Institute (*Lembaga Bantuan Hukum/LBH*) Mandiri, having its address at Harsono RM Number 36 Ragunan, South Jakarta, either jointly or severally acting for and on behalf of the Principal;

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

[1.3] Having read the petition of the Petitioner;

Having heard the statement of the Petitioner;

Having heard and read the written statement of the Government;

Having heard and read the written statement of the People's
Legislative Assembly;

Having heard and read the written statements of the witnesses and
experts of the Petitioner;

Having heard and read the written statements of the experts of the
Government;

Having examined the evidence presented by the Petitioner;

Having read the conclusions of the Petitioner and the Government;

2. FACTS OF THE CASE

[2.1] Whereas the Petitioner has filed the petition by petition letter dated April 16, 2012, received at the Registrar's Office of the Constitutional Court (hereinafter referred to as the Registrar's Office of the Court) on April 16, 2012, based on Certificate of Petition File Receipt Number 132/PAN.MK/2012 and registered in the Constitutional Case Registry under Number 40/PUU-X/2012 on April 25, 2012, as revised by petition dated May 22, 2012, and received at the Registrar's Office of the Court on May 23, 2012, which describes the following matters:

A. Authorities of the Constitutional Court

1. Whereas the Petitioner requested the Constitutional Court to conduct a judicial review of Article 73 paragraph (2) and Article 78 of the Medical Practice Law against the provisions of Article 27 paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution;
2. Whereas with reference to the provision of Article 24C paragraph (1) of the 1945 Constitution *juncto* Article 10 paragraph (1) sub-article (a) of Law Number 24 Year 2003 concerning the Constitutional Court (hereinafter referred to as the Constitutional Court Law), stating that one of the Constitutional Court's authorities is to conduct judicial review of Laws against the 1945 Constitution (the 1945 Constitution), Article 24C paragraph (1) of the 1945

Constitution states that *“The Constitutional Court shall have authority to hear at the first and final level, the decisions of which shall be final, to review Laws against the Constitution, ...and so on.”*

Subsequently, Article 10 paragraph (1) sub-article a of the Constitutional Court Law among other thing states that *“The Constitutional Court shall have authority to hear at the first and final level, the decisions of which shall be final to:*

(a) Review Laws against the 1945 Constitution of the State of the Republic of Indonesia, ...and so on.”

3. Whereas Article 7 paragraph (1) and paragraph (2) *juncto* Article 9 paragraph (1) of Law Number 12 Year 2011 concerning the Formulation of Laws and Regulations states that the position of the 1945 Constitution is hierarchically higher than Laws, so that any provisions of Laws shall not be inconsistent with the 1945 Constitution (*constitutie is de hoogste wet*). In the event that a Law is alleged inconsistent with the 1945 Constitution of the State of the Republic of Indonesia, it shall be reviewed by the Constitutional Court.
4. Whereas based on the above-mentioned matters, the Petitioner is of the opinion that the Court has authority to examine and to decide

upon this judicial review petition;

B. Legal Standing of the Petitioner

1. Whereas in a petition of judicial review of a Law against the 1945 Constitution, for the legal standing of a person or a party to be accepted as a Petitioner before the Court, Article 51 paragraph (1) of the Constitutional Court Law provides that *“The Petitioners shall be parties considering that their constitutional rights and/or authority are impaired by the coming into effect of a law”*, namely:
 - a) *individual Indonesian citizens (including groups of persons having a common interest);*
 - b) *Customary Law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the Republic of Indonesia as regulated in law;*
 - c) *public or private legal entities; or*
 - d) *state institutions”*.
2. Whereas the Petitioner works as a dental artisan categorized as an individual Indonesian citizen whose constitutional rights and/or

authority are impaired by the coming into effect of the provisions of Article 73 paragraph (2) and Article 78 of the Medical Practice Law;

3. Whereas the evidence that the Petitioner is an individual Indonesian citizen is having the identity card (*Kartu Tanda Penduduk/KTP*) Number 3175012110720007, issued by Kebon Jeruk District, West Jakarta;
4. Whereas the evidence that the Petitioner works as a Dental Artisan is the Registered Traditional Physician Certificate Number 30315-310-28/07/2005.0, issued by the Head of Service Office of Health Services of Central Jakarta. The Petitioner has also obtained a permit to open traditional treatment facilities based on Traditional Treatment Facility Registration Certificate Number 30179-310-7041-28/07/2007.0, issued by the Head of Service Office of Health Services of Central Jakarta;
5. Whereas following the Decision of the Court Number 006/PUU-III/2005 up to date, it has been the Court's standpoint that for the impairment of constitutional rights and/or authority to be established, the provisions of Article 51 paragraph (1) of the Constitutional Court Law must be fulfilled;

6. Whereas the existence of impairment of constitutional rights and/or authority of the Petitioner in the filing of this petition may be described as follows:
 - a. The existence of constitutional rights and/or authority of the Petitioner granted by the 1945 Constitution:
 - 1) The Petitioner shall have the constitutional right to work and to a living befitting human beings as intended in Article 27 paragraph (2) of the 1945 Constitution;
 - 2) The Petitioner shall have the right to obtain legal certainty as intended in Article 28D paragraph (1) of the 1945 Constitution;
 - b. The aforementioned constitutional rights and/or authority are considered to have been impaired by the coming into effect of the reviewed Law;
 - 1) Prior to the enactment of the Medical Practice Law, the Petitioner had income from his occupation as a dental artisan so as to obtain a living befitting human beings for the Petitioner and his family as a Citizen;
 - 2) Whereas the Petitioner's occupation as a dental

artisan *a quo* is regulated in Regulation of the Minister of Health Number 339/MENKES/PERK/1989 concerning the Occupation of Dental Artisan ("Regulation of the Minister of Health/*Permenkes* 339/1989");

- 3) Following the enactment of the Medical Practice Law, the Ministry of Health issued Regulation of the Minister of Health Number 1871/MENKES/PER/IX/2011 ("Regulation of the Minister of Health/*Permenkes* 1871/2011") concerning Revocation of Regulation of the Minister of Health/*Permenkes* 339/1989 which shall not extend or grant permit to the Petitioner to work as a dental artisan. If the Petitioner continues to work, the Petitioner is threatened with a criminal sanction as provided for in Article 78 of the Medical Practice Law. Regulation of the Minister of Health/*Permenkes* 1871/2011 was issued based on Article 73 paragraph (2) of the Medical Practice Law.
- 4) Whereas the existence of Article 73 paragraph (2) and Article 78 of the Medical Practice Law as the basis for Regulation of the Minister of

Health/*Permenkes* 1871/2011 has resulted in the elimination of the Petitioner's constitutional rights, while the norms of Article 73 paragraph (2) and Article 78 are intended for fake dentists and fake doctors, or at least the norms of these articles are not intended for the profession of dental artisan and thus the Petitioner believes to have been impaired by the coming into effect of the Medical Practice Law;

- c. Such impairment of constitutional rights and/or authority shall be specific and actual or at least potential in nature which, based on logical reasoning, can be assured of occurring;

Whereas with the existence of Article 73 paragraph (2) and Article 78 of the Medical Practice Law as the basis for Regulation of the Minister of Health/*Permenkes* 1871/2011, the Petitioner, in real terms, has actually suffered material losses in the form of the loss of the Petitioner's income every month in the average of Rp2,000,000 - Rp3,000,000 per month. As a result of the loss of the Petitioner's income every month, the Petitioner has lost his livelihood for the Petitioner and his family so that the Petitioner believes that

he has been deprived of his constitutional right to a decent work and living as a citizen;

- d. The existence of a causal relationship (*causal verband*) between the intended impairment and the coming into effect of the Law petitioned for review;

Whereas the Petitioner will not suffer material losses if Article 73 paragraph (2) and Article 78 of the Medical Practice Law are revoked because the Petitioner will continue to work legally as a dental artisan, as there will no more prohibition for the profession of dental artisan to work as a dental artisan;

- e. It is expected that the constitutional impairment does not or will no longer occur if the petition is granted;

If Article 73 paragraph (2) and Article 78 of the Medical Practice Law are revoked, the Regulation of the Minister of Health/*Permenkes a quo* shall have no reference and therefore, there shall be no prohibition of the Ministry of Health so that the Petitioner will no longer suffer any impairment;

- 7. Whereas based on the Petitioner's arguments above, the Petitioner

has met the provisions of Article 51 paragraph (1) of the Constitutional Court Law and has met the requirements of the Court's standpoint under Decision Number 006/PUU-III/2005, so that the Petitioner has legal standing to act as the Petitioner in this judicial review petition;

C. Reasons of the Petition

Whereas the basis of judicial review of the petition in this case is the provision of Article 73 paragraph (2) of the Medical Practice Law which completely reads *"Any person shall be prohibited from using tools, methods, or any other means in providing service to the community which gives the impression as if the person concerned were a doctor or dentist having possessed a registration certificate and/or practicing permit."* It is subsequently asserted by a criminal sanction based on the provisions of Article 78 of the Medical Practice Law asserting that *"Any person intentionally using tools, methods, or any other means in providing services to the community which give the impression as if the person concerned were a doctor or a dentist having possessed a doctor's registration certificate and/or a dentist's registration certificate or a practicing permit as intended in Article 73 paragraph (2) shall be subject to a criminal sanction of maximum imprisonment of 5 (five) years or maximum pecuniary sanction of Rp150,000,000.00 (one hundred and fifty million rupiah)";*

The reasons of the Petitioner are as follows:

1. Whereas Article 73 paragraph (2) of the Medical Practice Law is inconsistent with the Petitioner's constitutional rights as set out in Article 27 paragraph (2) of the 1945 Constitution "*Every citizen shall have the right to work and to a living befitting human beings*". The existence of prohibition for the Petitioner to perform his occupation which based on Article 73 paragraph (2) of the Medical Practice Law is an action that will extinguish business of dental artisan. In fact, the Petitioner's occupation as a dental artisan prior to the existence of the Medical Practice Law was a lawful occupation;

2. As a result of the coming into effect of the provisions of Article 73 paragraph (1), the Petitioner does not obtain legal certainty of just laws because the norms in Article 73 paragraph (1) and Article 78 of the Medical Practice Law lead to multiple interpretations and they can be interpreted very broadly. The norms in these articles are intended for prohibiting the practice of fake doctors/dentists, but because the formulation is not rigid/uncertain (having a broad spectrum), all activities in the areas of work/profession which actually are not intended or targeted by this law are also affected, namely, among other things, the occupation of dental artisan which, prior to the coming into effect of the Medical Practice Law was a legal and lawful occupation;

3. Whereas this prohibition is criminal in nature accompanied by the extremely severe criminal sanction of maximum imprisonment of 5 (five) years or maximum pecuniary sanction of Rp150,000,000.00 (one hundred and fifty million rupiah)", while such formulation of norms of criminal acts is not clear or decisive, so that they are not in accordance with the principle of *lex certa* which becomes the principle of criminal law, and also they do not provide legal certainty of just laws as guaranteed by the Constitution;
4. Whereas prior to the coming into effect of the Medical Practice Law, the Petitioner had legal authority as a dental artisan, whereas following the issuance of the Medical Practice Law, the Petitioner has been no longer authorized to perform his activities as a dental artisan. The evidence of this authority is the recognition from the Government through Regulation of the Minister of Health Number 339 / MENKES/PER/V/1989 concerning the Occupation of Dental Artisan, where Dental Artisan shall have authority as intended in paragraph (9) including: *a. to make partial/complete dentures from acrylic; and b. to fit removable dentures.* The authority of dental artisans is not inconsistent with the work of dentists, because a dental artisan does not perform actions which should be performed by a dentist;
5. Whereas the services performed by dental artisans do not harm the community using their services. The community needs dental artisan's services for dentures to be made at an affordable price, and generally, the

- dental artisan's service users are middle to lower class community. The cost will be relatively more expensive when going to the dentist for dentures to be made;
6. Whereas the needs of the community for the existence of dental artisans are proven by the large number of dental artisans in Indonesia which currently reaches 75,000 people. This number indicates that the profession of dental artisan is needed by the community. Whereas as a result of the prohibition from performing the activities of a dental artisan, the middle lower class community as service users cannot obtain the service of denture fitting at an affordable price;
 7. Whereas as information, dental artisans in Indonesia have existed since the Dutch colonial era. In fact, it can be said that dental artisan (the so-called *dukun gigi* at that time) encouraged the Dutch colonial to establish the dentistry educational institution of STOVIT (*School tot Opleiding van Indische Tandartsen*) in Surabaya in 1928. At that time, practice of *tandmeester* or dental artisan had existed and dominated the market. Dentists did exist, but only to serve Europeans who settled here, and they were very limited in number;

On May 5, 1943, in Surabaya, Japan established *Ika Daigaku Sika Senmenbu* or Dentistry School to fulfill the need for qualified dentists in such a short time. This school was managed by Dr Takeda, before

replaced by Prof. Dr. Imagawa. Among the Japanese teaching staffs, there were Indonesian teaching staffs. They were, among others, Prof Dr Sjaaf, Dr Zainal, Dr M Salih, Darmawan Mangoenkoesoemo Ir, Ir Soemono, Dr S Mertodidjojo, Dr M Soetojo, Dr Azil Widjojokoesoemo, Dr RG Indrajana, and Dr R Moestopo;

In 1952, Dr. Moestopo opened the dental artisan course in Jakarta aimed at improving the capabilities and skills of dental artisans throughout Indonesia, reaching the number of nearly 2,000 people at that time. In 1958, after returning from the United States, Dr Moestopo established the Dental College of Dr Moestopo which received the official recognition from the Ministry of Health. For his work, Bung Karno gave special credit to Dr Moestopo who was considered successful in educating and creating dental health professionals affordable to the common people. From the description above, it is clear that dental artisans have existed since long ago and have been needed by the community;

8. Whereas based on the audience held by dental artisans with the ministry of health which was also attended by the Petitioner and the chairperson of the Indonesian Dental Association (*Persatuan Dokter Gigi Indonesia/PDGI*), indicated the urge of the Ministry of Health to make dental artisan as subordination (subcontractors) of dentists, who shall not communicate directly with the community;

9. Whereas, based on the whole description above, the provisions of Article 73 paragraph (2) and Article 78 of the Medical Practice Law are inconsistent with the provisions of Article 27 paragraph (2) and Article 28D paragraph (2) of the 1945 Constitution, and therefore, we request the Court to declare that the Articles have no binding legal force;
10. Or we request for the provisions of Article 73 paragraph (2) and Article 78 of the Medical Practice Law Act to be declared conditionally unconstitutional under the provision of Article 27 paragraph (2) of the 1945 Constitution, unless insofar the said tools, methods, or any other means are interpreted as being traditional in nature, or recognized from generation to generation, and/or common to be generally accepted, it can be performed by people having particular expertise in addition to doctors and dentists. In short, dental artisans can still perform their profession such as making partial or complete dentures from acrylic, fitting removable dentures which used to be commonly performed as guaranteed by the Constitution, insofar they do not perform medical practices such as pulling teeth or patching cavities caused by dental disease related to the nerve which is the sole domain of dentists;
11. Whereas therefore, we also request for all the laws and regulations as the implementation of the Law *a quo* in the legal considerations which are inconsistent with this decision to be declared without any binding legal force because they have lost their juridical ground;

12. Whereas since the prohibition against the dental artisans from performing their profession has occurred, if the chance of dental artisans throughout Indonesia does not obtain legal certainty of just laws as to whether their occupation in this country is legal or illegal, it will certainly cause a greater constitutional impairment to the Petitioner because the Petitioner and all dental artisans cannot work to earn a living for their wives and children in addition to the losses due to rent of place for practice et cetera, we request for this examination to be prioritized and immediately conducted within a not-too-long period of time;

D. The Petition

Whereas based on the legal reasons described above, the Petitioner requests for the Constitutional Court to grant the matters as follows:

1. To grant the petition of the Petitioner in its entirety;
2. To declare Article 73 paragraph (2) and Article 78 of the Law Number 29 Year 2004 concerning Medical Practice (State Gazette of the Republic of Indonesia Year 2004 Number 116, Supplement to the State Gazette of the Republic of Indonesia Number 4431) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;

3. To declare that Article 73 paragraph (2) and Article 78 of the Law Number 29 Year 2004 concerning Medical Practice (State Gazette of the Republic of Indonesia Year 2004 Number 116, Supplement to the State Gazette of the Republic of Indonesia Number 4431) do not have any binding legal force;

Or

4. To declare Article 73 paragraph (2) and Article 78 of the Law Number 29 Year 2004 concerning Medical Practice (State Gazette of the Republic of Indonesia Year 2004 Number 116, Supplement to the State Gazette of the Republic of Indonesia Number 4431) conditionally unconstitutional under the 1945 Constitution of the State of the Republic of Indonesia, except to the extent that they do not ban dental artisans.
5. To declare that Article 73 paragraph (2) and Article 78 of the Law Number 29 Year 2004 concerning Medical Practice (State Gazette of the Republic of Indonesia Year 2004 Number 116, Supplement to the State Gazette of the Republic of Indonesia Number 4431) do not have any binding legal force conditionally, unless insofar it does not prohibit the dental artisan.

6. To order the promulgation of this decision properly in the Official Gazette of the Republic of Indonesia;

Should the Panel of Constitutional Court Justices be of another opinion, we request for a decision to be passed by principles of what is fair and just (*ex aequo et bono*).

[2.2] Whereas to prove his arguments, the Petitioner presents evidence in the form of letters or writings marked as exhibit P-1 up to exhibit P-9 as follows:

1. Exhibit P-1 : Photocopy of Decree of the Minister of Law and Human Rights Number AHU-44.AH.01.06 Year 2009 concerning the Ratification of the Association, dated April 16, 2009;
2. Exhibit P-2 : Photocopy of Identity Card in the name of H. Hamdani Prayogo;
3. Exhibit P-3 : Photocopy of Law Number 29 Year 2004 concerning Medical Practice;
4. Exhibit P-4 : Photocopy of Regulation of the Minister of Health Number 1871/Menkes/Per/IX/2011 concerning Revocation of Regulation of the Minister of Health Number 339/Menkes/Per/V/1989 concerning the Occupation of Dental Artisan, dated May 24, 1989;

5. Exhibit P-5 : Photocopy of Regulation of the Minister of Health Number 339/Menkes/Per/V/1989 concerning the Occupation of Dental Artisan, dated May 24, 1989;
6. Exhibit P-6 : Photocopy of Registered Traditional Healer Certificate Number 30315-310-28/07/2007.0, dated July 28, 2005;
7. Exhibit P-7 : Photocopy of Traditional Treatment Facility Registration Certificate Number 30179-310-7041-28/07/2007.0, dated July 28, 2005;
8. Exhibit P-8 : Photocopy of Circular Letter of Service Office of Health Services of Bandung Number 445/2082-Dinkes, concerning Dental Artisan's Practice, dated February 27, 2012;
9. Exhibit P-9 : Photocopy of Circular Letter of Service Office of Health Services of Bandung dated March 3, 2012;

[2.3] In addition to presenting the evidence in the form of letters/writings, the Petitioner presented 4 (four) witnesses in the name of Dwi Waris Supriyono, Muhammad Jufri, Sahat Sibarani, S.E., S.H., and Tony Effendi, as well as 2 (two) experts in the name of Prof. Dr. Siti Chamamah and Dr. M. Arif Setiawaan, S.H., MH who presented their written/oral statements on June 12, 2012, and June 27, 2012, as follows:

Statements of the witnesses of the Petitioner

1. Dwi Waris Supriyono

- The witness has the expertise as a dental artisan having learned from his parents and uncle;
- The witness' occupation is making and fitting removable dentures in accordance with the authority and expertise of the witness;
- The witness' income is approximately 2 to 3 million every month, so that the witness can support his family with such income;
- The number of dental artisans associated in associations of *ASTAGIRI, ITGI, PTGI, HITGI, FTGI, and FPG* is approximately 75 thousand people;
- The profession of dental artisan is regulated in Regulation of the Minister of Health/*Permenkes* Number 53/DPK/II/K/1969 concerning the Registration and Granting of the Permit to Work as a Dental Artisan Number 339/MENKES/PER/V/1989 concerning the Occupation of Dental Artisan. Subsequently, the Regulation of the Minister of Health/*Permenkes a quo* was revoked by Regulation of the Minister of Health/*Permenkes* Number 1871/MENKES/PER/IX / 2011 concerning the Revocation of Ministerial Regulation Number 339 Year 1989, so that the coming into effect of such Regulation of

the Minister of Health/*Permenkes* will potentially eliminate the witness' occupation;

2. **Muhammad Jufri**

- The witness has the expertise as a dental artisan having learned from his relatives;
- The witness' income as a dental artisan is approximately 3 to 4 million rupiah every month;
- The witness attended dental *tekniker* course at Usman Dental in Tangerang to develop the expertise as a dental artisan;
- The witness knew the existence of Regulation of the Minister of Health/*Permenkes* Number 1871/MENKES/PER/IX/ 2011 concerning the prohibition of dental artisan's practice about three months ago. The aforementioned Regulation of the Minister of Health/*Permenkes* was followed-up by the Service Office of Health Services of Bandung with the Circular Letter stating that the Medical Practice Law imposes a criminal sanction of imprisonment of five years and/or pecuniary sanction of Rp150,000,000.00;
- The witnesses cannot understand why the government prohibited the dental artisan's practice, since in fact, the witness is not troublesome and even helps the government to create jobs;

- According to the witness, the middle to lower community really needs dental artisan;

3. Sahat Sibarani, S.E., S.H.

- In 2000, the witness came to a dental artisan near his home (Cilandak) to fit dentures. At first, the witness came to a dentist, but because of the price, the witness came to the dental artisan instead. The cost of teeth fitting at the dental artisan was much cheaper than teeth fitting at the dentist;
- The witnesses felt comfortable and there was no problem with the dentures. If experiencing problems with the dentures, the witness would come back to the dental artisan to repair the dentures at no charge;

4. Tony Effendi,

- The witness has been using the services of a dental artisan in Bendungan Hilir since 2003 up to the present;
- The reason why the witness has chosen the dental artisan is it's the inexpensive cost and quick service;
- When wearing the dentures, the witness has never experienced any problem or disturbance;

Experts of the Petitioner:**1. Prof. Dr. Siti Chamamah**

The linguistic Overview of articles of the Medical Practice Law, particularly Article 73 paragraph (2), namely *"Any person shall be prohibited from using tools, methods, or any other means in providing service to the community which gives the impression as if the person concerned were a doctor or a dentist having possessed a registration certificate and/or practicing permit"*;

A linguistic review of an article of a Law needs to consider the following matters:

A. Language and Legal Language

Language is a means of communication communicating the results of humans' thoughts, feelings, and will. The communicated materials include all aspects of life, including the fields of science, such as science of law, social science, and political science. In this matter, the language appears as a symbol of something that will be communicated to ensure that what is to be communicated reaches it's the recipient through a text in the form of language. In other words, language is a symbol of something (the communicated material in the form of the sender's thoughts, feelings, and will) reached by the recipient through a text in the form of language;

Language - in this matter the Indonesian language - is used in various types. In relation to its linguistic forms, legal language is categorized as 'technical discourse'. In relation to the 'formal usage', there are two types of Indonesian language, namely formal language and informal language. The formal language uses normative forms which subsequently uses the term of 'standard register'. The standard register is characterized by the use of complete linguistic rules. These rules can be viewed in the book of Standard Grammar of Indonesian Language (*Tata Bahasa Baku Bahasa Indonesia*). The formal language is used for formal interests, namely, among other things, the law-making interest. Thus, the legal language, including a Law, is a 'technical discourse' and 'formal language' so that the register used is the standard register;

Law, as a means of enforcement of provisions for everyone, can be reached, known, understood, and accepted by the parties receiving the legal provisions in a clear, express, and explicit manner, without raising any double interpretation through its form of language;

Thus, for the users of law, language is the media to understand the law. There is no law without language. Therefore, the 'law' cannot be separated from 'language'. 'Law' and 'language' constitute one integral part. Legal dimension is a means to create legal provisions for everyone; the provisions that guarantee the certainty, regularity, and order of provisions - in the form of regulation - in the life of society;

To maintain its legal certainty, language as the means to communicate law must potentially provide clarity, certainty, and shall not be open for double reception. The characteristics of law shall be clear (understandable in accordance with the intended message), solid (all words used to function, no redundant words), neutral (shall not open to be accepted as partial), explicit (not using idiomatic words), and shall not use meaningless words (found in words conveyed with feelings);

If the media of linguistic expression may be both in oral form and in written form, the linguistic characteristics of the legal language require a concretely readable media. This means that the legal language uses written media. As a form of expression in the written media, the legal language must meet the provisions as a written language (the means of communicating language function is completely used, and is received within an unlimited time);

In the form of the use of formal register as the use of language for other interests, the legal language often encounter errors. Such errors of language usage are caused, among other things, by non-compliance in applying the rules and by the influence of spoken language. The indications are ambiguous language, unclear meaning, and giving rise to the reading not intended by the sender. Among the examples is this Article 79 of the Medical Practice Law (page 23), which reads in the following excerpt:

Article 79

Shall be subject to a criminal sanction of maximum imprisonment of 1 (one) year or maximum pecuniary sanction of Rp50,000,000.00 (fifty million) any doctor or dentist namely...

Such excerpt is not standard because it has no subject, an indispensable element of a sentence, so that this utterance is not a sentence. The article raises a question, "Who is subject to a criminal sanction?". The language of Law shall use the standard register, namely that a sentence must have a subject;

B Context of Whole Text of the Medical Practice Law

The aforementioned Article 73 paragraph (2) of the Medical Practice Law is within all the Chapters, articles, and legislations of the Medical Practice Law Number 29 Year 2009;

Article 73 paragraph (2) of the Medical Practice Law filed to the Constitutional Court reads:

- (2) "Any person shall be prohibited from using tools, methods, or any other means in providing service to the community which gives the impression as if the person concerned were a doctor or a dentist having possessed a registration certificate and/or practicing permit."

The aforementioned Article 73 paragraph (2) needs to be observed by taking account of its existence:

- (a) as the paragraph of Article 73 following paragraph (1) which reads:

"Any person shall be prohibited from using any identity in the form of a title or any other form which gives the impression to the community as if the person concerned were a doctor or a dentist having possessed a registration certificate and/or practicing permit."

- (b) as an article of Chapter IX, entitled the development and supervision. Under the title of such Chapter, the preceding article of Article 73 is Article 72 which reads:

"The Development and Supervision as intended in Article 71 shall be directed to:

- a. Improve the quality of health services provided by doctors and dentists;
- b. Protect the community from actions performed by doctors and dentists,
and
- c. Provide legal certainty for the community, doctors, and dentists:"

Article 72 is preceded by Article 71 which reads *"The Central Government, the Indonesian Medical Council, regional governments, professional organizations shall develop and supervise medical practices in accordance with their respective functions"*. The chronology or placement order of such articles is not

purposeless. The placement of Article 71, Article 72, Article 73 consecutively indicates sequential reasoning;

It is known from the chorological order of such articles, that Chapter IX regulates “medical practice”, in accordance with the contents of the said the Medical Practice Law Number 29 Year 2004.

In this matter, the word "medical practice" needs clarification. Its elucidation is read in Chapter I Article 1 paragraph (1) which reads *"Medical practice shall be a series of activities performed by doctors and dentists to patients in the course of providing health services."*

Thus, the article indicates that the Law regulates doctors and dentists in performing their series of activities. According to the level of language, it is know that this Law, which is read in the chapters, articles, and paragraphs regulates “doctors and dentists” in performing their series of activities. This is read explicitly;

In the Law explicitly stated to regulate 'doctors' and 'dentists', suddenly Article 73 paragraph (1) and paragraph (2), and the following chapters, namely Article 77 and Article 78 set out "any person". The object of this rule becomes unsynchronized with materials of the Law, with inconsistent clarity as the General Provisions;

C. Issues of Interpretation of Article 73

- (1) "Any person shall be prohibited from using any identity in the form of title or any other form which gives the impression to the community as if the person concerned were a doctor or a dentist having possessed a registration certificate and/or practicing permit."
- (2) "Any person shall be prohibited from using tools, methods, or any other means in providing service to the community which gives the impression as if the person concerned were a doctor or a dentist having possessed a registration certificate and/or practicing permit."

The paragraphs contain ambiguous words, which can cause multiple interpretations, namely as follows:

1. "impression"

This word originates from someone's acceptance of the phenomenon she/he faces, using various knowledge and feelings existing in a person (the storage theory). This acceptance tends to be subjective, and therefore, it will not provide neutral, measurable, and unambiguous information.

2. "as if"

"As if" are words which do not provide certainty, which tend to raise different interpretations between one reader and another.

3. The vagueness of meaning of the words "any other form" followed by the words "which gives the impression" is worsened by the words "to the community [which means many individuals] as if..." These words carry uncertain meanings, depending on the interpreter.

The issues which emerge are:

- Why does Article 73, which is followed by Articles 77 and 78, change the objects into "any person", instead of being in accordance with certain materials? The objects of the messages of the lawmaker of this Law are "doctors" and "dentists" in conducting a series of activities as stakeholders of their profession as doctors and dentists, which will be developed and regulated by the spirit of this Law and which will protect the community from the actions and activities conducted by the "doctors" and "dentists ";
- Why is the Law regulating legal provisions not drafted in the formulation, editorial, and grammar which are accurate, clear, unambiguous, and which do not lead to multiple interpretations, not allowing for vulnerability to the emergence of impacts of the implementation of the Law? It is stated that there is an Elucidation of this Law, stating the Elucidation of that Article 73:
- Article 73, paragraph (1) is self-explanatory. Paragraph (2) is self-explanatory. The subsequent Articles, Articles 78 and 79, are also self-

explanatory. Even Article 79, which does not have a subject, which has been incorrect as a formal language and standard language, and although the one being a subject to the 'criminal sanction' is unclear, it is also stated to be "Self-explanatory".

Conclusion

- (1) From the aspect of grammar, this the Medical Practice Law does not consider the linguistic aspect (the rules of formal language and standard register);
- (2) As a result of (1), this Law, particularly Article 73 paragraph (2), has created vagueness of meaning and multiple acceptances, and all of them will cause inaccurate formulation of elucidation and implementation of the Law.

Suggestions

- There are some matters should be taken into account in law-making:
- The awareness that legal expression is read through the medium of 'language'. As various styles of language may exist in the use of language, legal language, according to its function, shall use formal register, which uses consistent and complete rules of language.
- As a medium of communication of substance of materials, the language

for Law needs to take the characteristics of the substance into account, in this case, the legal materials having clear, express, neutral, not leading to multiple interpretations, measurable, which communicate thoughts rather than feelings.

- Whereas the language for Law applicable for Indonesian community shall comply with the rules of Indonesian Language;
- Logical flow becomes the key followed by acceptance and understanding;
- It is expected that Laws in Indonesia are formulated in an accurate, communicative and effective manner, so as to ensure the application of the legal essence which protects and guarantees justice in Indonesia for all the people of Indonesia;

2. Dr. M. Arif Setiawan, SH, MH.

Factors Affecting the Development of Criminal Law in Indonesia

- Rapid social changes require adjustments in the field of (criminal) law, because non-supporting codified criminal law will trigger temporary development of criminal law;
- The development of laws outside the criminal law (civil law, state system and state administration) often includes the threat of the norms of criminal sanctions to reinforce the application of the aforementioned laws;

Criminal Politics as a Part of Criminal Law Politics:

- Criminal Politics is a rational effort of the community to handle crimes;
- March Ancel defines criminal politics as: "the rational organization of the control of crime by society";
- G. Peter Hoefnagels: "the rational organization of the social reaction to crime". (Muladi and Barda Nawawi, *Bunga Rampai Hukum Pidana* (Anthology of Criminal Law) (Bandung: Alumni, 2007), p. 9)

Central Issues of Criminal Law Policies are:

- Criminalization policies: Formulating what acts should be considered as criminal acts and.
- Penalization policies: Formulating what threat of (criminal) sanction should be imposed to the offender;

Scope of Criminal Law Politics:

- Including formulated, applicable, and executive policies;
- The core of the criminal law politics:
 - how to formulate a proper criminal law;

- providing formulation guidelines:
 - Criminal Law Policies at the legislation/formulation level concerning which acts shall be established as criminal acts;
 - Criminal Law Policies at the Judiciary/application level, and
 - Criminal Law Policies at the executive Level/Phase of execution (of the decision) of criminal law

(Amrullah, *Politik Hukum Pidana Dalam Perlindungan Korban Kejahatan Ekonomi di Bidang Perbankan* (Criminal Law Politics in the Protection of the Victims of Banking Crimes), Bayumedia Publishing, 2007), p. 21)

Crime Handling Policies:

- Penal means (of criminal law politics): Repressive use of penal means in criminal law politics is also known as criminal justice system;
- Non-penal means is executed by preventive efforts without using criminal law (prevention without punishment).

(See True Prasetyo and Abdul Halim Barakatullah. *Politik Hukum Pidana; Kajian Kebijakan Kriminalisasi dan Dekriminalisasi* (Criminal Law Politics; A Study on Criminalization and Decriminalization Policies) (Yogyakarta: Pustaka Pelajar, 2005). p. 3)

Formulated Criminalization Policies:

- Formulated Policy is a part of criminal law politics or criminal law policies;
- Formulated policy begins with criminalization, namely determining an act which originally is not considered as a criminal act to become a criminal act. This process ends with the formulation of Law threatening that act with a criminal sanction.

[Sudarto, *Hukum dan Hukum Pidana* (Law and Criminal Law) (Bandung: Alumni, 1981), pp. 31-32]

Principles of Criminalization:

1. supporting the achievement of national goals,
2. criminalized acts cause harm or victims (*subsosialiteit*),
3. considering the cost and benefit principle,
4. must be enforceable.
5. considering the principle of criminal law as the last remedy (*ultimum remidium*), subsidiarity is not *primum remidium*;
6. avoiding vague or general formulation (precision principle), and
7. criminalized acts must be clearly delineated in the provisions of criminal

law (clearness principle);

The subsidiarity doctrine of *ultimum remedium*:

- a. Limited capacity of the Criminal Law: It is only able to settle criminal problems in a symptomatic manner instead of settling the causes;
- b. The norms of threat of criminal sanction are the more severe compared to the norms of threat of other legal sanctions, and therefore, they should be used only when the other (legal) norms cannot settle the problems (ultimate weapon);
- c. The use of the norms of criminal law norms leads to social stigmatization;

Administrative Criminal Law:

- Expansion of the function of criminal law shall not be used only as a means of enforcing the application of the norms of criminal law which are purely criminal, because criminal law is also used as a means of coercion so that the community comply with the norms (outside the Criminal law);
- There is a term known as administrative penal law (Muladi), *ordeningsstrafrecht* (Roeslan Saleh), or administrative criminal law (Barda);

Issues of Criminal Law

Administration:

- Being imitative: There is a tendency for the increase in the formulation of various laws and regulations which are actually included in the scope of administrative law while including the provisions of criminal law;
- Often inconsistent with the criminalization principle;
- Not considering the subsidiarity principle;
- The use of criminal law in administrative law is an issue of criminal law policy.

The Medical Practice Law:

- From the aspect of the substance, it can be categorized as a regulation in the field of administrative law concerning the implementation of health service provision by health personnel especially doctors and dentists;
- One of the issues arising from the Law is the existence of threat of criminal sanction included, which can be seen in Article 78;
- In relation to that matter, it is necessary to view the principle of the formulation of the laws and regulations and the principle of criminalization which adheres to the subsidiary principle.

The principle of the formulation of laws and regulations of Article 5 of Law Number 12 Year 2011

- clarity of purpose;
- proper formulating institution or official;
- conformity between the type, hierarchy, and substance;
- enforceability; efficiency and effectiveness;
- clarity of formulation; and
- transparency;

Article 6

Substance of Laws and Regulations

- (1) The substance of the laws and regulations must reflect the principles of:
 - a. guardianship;
 - b. humanity;
 - c. nationalism;
 - d. family system;
 - e. archipelagic aspect;

- f. unity in diversity (*bhinneka tunggal ika*);
 - g. justice;
 - h. equal position before the law and government;
 - i. legal order and certainty; and/or
 - j. balance, harmony, and conformity.
- (2) In addition to reflecting the principles as intended in paragraph (1), certain laws and regulations may contain other principles in accordance with the fields of the relevant Laws and Regulations;

[2.4] Whereas with respect to the petition of the Petitioner, the Government at the hearing on June 12, 2012 presented its oral and written statements which, among other things, describe the following matters:

I. Legal Standing of the Petitioner

According to the Government, it is necessary to question the interest of the Petitioners, whether or not he has been in the right position to consider that their constitutional right and/or authority is impaired by the coming into effect of Article 73 paragraph (2) and Article 78 of the Law *a quo*, and whether or not the existing constitutional impairment of the Petitioners is specific (special) and actual, or at least potential in nature which, pursuant to logical reasoning, can be

assured of occurring, and whether or not there is a causal relationship (*causal verband*) between the impairment and the coming into effect of the Law petitioned for judicial review;

According to the Government, the Petitioner cannot argue about the constitutional impairment he suffers due to the coming into effect of Article 73 paragraph (2) and Article 78 of the Law *a quo*. Whereas according to the Government, based on the Petitioner's description of the petition, the basis of the impairment suffered and argued by the Petitioners is due to the stipulation of the Regulation of the Minister of Health Number 1871/Menkes/Per/IX/2011 concerning the Revocation of Regulation of the Minister of Health Number 339/Menkes/PerN/1989 concerning the Occupation of Dental Artisan, which causes the Petitioner to be unable to perform his work as a dental artisan so that in the event that the Petitioner believes to be impaired by the stipulation of the Regulation of the Minister of Health Number 1871/Menkes/Per/IX/2011, he should have filed the petition for judicial review of the substance of the Regulation of the Minister of Health with the Supreme Court rather than filing the petition for judicial review of the Law *a quo* with the Constitutional Court;

Furthermore, in relation to the legal standing of the Petitioner claiming to be a Dental Artisan whose constitutional rights are impaired, we can state that the Government, through the Ministry of Health, has given clear limitation and definition of "Dental Artisan (*Tukang Gigi*)", being an individual who has worked as a dental artisan before the issuance of Regulation of the Minister of Health

Number 53/DPK/I/K/1969 concerning the Registration and Granting of the Permit to Work as a Dental Artisan, who is given the opportunity to register in order to obtain a permit from the Government. Furthermore, under Regulation of the Minister of Health Number 339/Menkes/PerN/1989 concerning the Occupation of Dental Artisan, the government renews and extends the permit for dental artisans who have obtained the permit under Regulation of the Minister of Health Number 53/DPK/I/K/1969 with the maximum age limit of 65 (sixty five) years. Therefore, the government has never granted any permit for new permit application for dental artisans since 1969;

Based on the statement, it can be concluded that the dental artisans recognized by the Government are those having obtained the permit under Regulation of the Minister of Health Number 53/DPK/I/K/1969 and extended under Regulation of the Minister of Health Number 339/Menkes/PerN/1989. Therefore, the legality of the legal standing of the Petitioner claiming as to be a dental artisan is questionable, considering that the Government has no longer issued any new permit for dental artisans since 1969;

Even if it is true that the Petitioner possessed the permit under Regulation of the Minister of Health Number 53/DPK/I/K/1969 and extended under Regulation of the Minister of Health Number 339/Menkes/PerN/1989, pursuant to Article 2 paragraph (1) of Regulation of the Minister of Health Number 1871/Menkes/Per/1X/2011, he could still perform his job as a Dental Artisan up to the coming into effect of this Regulation or until the expiry of the relevant

permit, and it may not be extended. Based on the explanation, according to the Government, the Petitioner does not have legal standing to file the petition for judicial review of the Law *a quo*;

However, the Government fully leaves it to the Chief Justice/Panel of Constitutional Court Justices to consider and assess whether the Petitioner has legal standing or not, as set forth by Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court, as amended by Law Number 8 Year 2011 and under the previous decisions of the Constitutional Court (*vide* Decisions Number 006/PUU-III/2005 and Number 11/PUU-V/2007);

II. Government's Explanation on the Substance Petitioned by the Petitioners.

With respect to the substance petitioned for judicial review by the Petitioners above, the Government may give an explanation from the philosophical, sociological and juridical perspective regarding the existence of the provisions petitioned for judicial review, as follows:

1. Whereas Article 28H of the 1945 Constitution states "*Every person shall have the right to live a physically and mentally prosperous life, to have residence, and to obtain a proper and healthy living environment as well as to obtain health services.*" The provision of the 1945 Constitution mandates that medical service, as a human right, must be realized in the form of provision of various health efforts to the entire community

- performed by health professionals having expertise and authority to do so, the quality of which must be continuously improved through continuous education and training, certification, registration, licensing and guidance, supervision, and monitoring for the health services to be in accordance with the development of science and technology, including the implementation of dental health services;
2. The regulation of dental health services as specified in the Law *a quo* is aimed at protecting the community from practices of health services performed by persons not having the competence and authority to do so. The provision is the real implementation of the Government's responsibility to give guaranteed protection of public health as mandated by the Preamble and Article 28H Paragraph (1) of the 1945 Constitution;
 3. Dentistry work must be based on *Pancasila*, based on values of science, benefit, justice, humanity, balance and protection as well as safety of patients. Dentistry work is a risky job that can only be performed by competent and authorized professionals under the laws and regulations except in the event of delegation of authority while still referring to the applicable regulations. The implementation of dentistry work by those who are not determined under the laws and regulations may not be allowed because there is no guarantee of the expertise and competence being possessed, while the public have the right to receive good health service from qualified health personnel who have gone through formal education

- which is structured and which has a clear curriculum which dental artisans obviously do not have because their expertise is inherited from generation to generation;
4. In principle, the provisions of Article 73 paragraph (2) and Article 78 of Law *a quo* are applicable to any person who is not a doctor or dentist who deliberately uses tools, methods or other means of providing services to the community, not being his/her authority and competence which may harm public health;
 5. In essence, the provisions of Article paragraph (2) and Article 78 of Law *a quo* give a guarantee of legal certainty for the enforcement of health services, for having protected the public from practices of health service performed by incompetent persons. Practices of health services, including dental health services shall only be performed by professionals who have the competence and authority which have been recognized by the laws and regulations and evidenced by the registration certificate and practicing permit pursuant to the provisions of Article 29 to Article 42 of the Law *a quo*;
 6. Doctors and dentists who do not have a registration certificate and practicing permit as stipulated in the Law *a quo* cannot perform practices of health services, even though they have the competence and authority to do so. Doctors and dentists who still perform practices of health

services without having registration certificate and practicing permit will be subject to criminal sanctions under Articles 75 and 76 of the Law *a quo*. As the provisions concerning registration certificate and practicing permit have in fact limited the room for doctors and dentists graduating from college, the same provisions should also apply to dental artisans whose expertise has been obtained from generation to generation without any guarantee of quality for their expertise;

In this case, justice will not be enforceable if the same treatment given to doctors and dentists do not apply to dental artisans. Doctors and dentists who practice but do not have any registration certificate and practicing permit shall be subject to a criminal sanction even though they have the relevant knowledge and competence, much less dental artisans who have no formal education and skills/competencies, only through the knowledge passed on from generation to generation;

Based on the explanation, *according to the Government, the provisions of Article 73 paragraph (2) and Article 78 of the Law a quo* are in fact aimed at providing general protection to any person from the practice of doctors / dentists who do not have the quality, capability or competence in using the tools, methods or other means to provide services to the community or to perform medical practices and therefore, such provisions are not inconsistent with the provisions of Article 27 paragraph (2) and Article 28D of the 1945 Constitutions and they have fulfilled the principle of *lex certa*

(principle of legal certainty) and the principle of *lex certain* (the principle of specificity which means that no other interpretation other than that what is stated in the text is required);

III. Conclusion

Based on the explanation above, the Government requests for the Chief Justice/Panel of Justices of the Constitutional Court examining, deciding upon and hearing the petition for judicial review of Law Number 29 Year 2004 concerning Medical Practice against the 1945 Constitutions to pass the following decisions:

1. Declaring that the Petitioner has no legal standing;
2. Rejecting the Petitioner's judicial review petition in its entirety or at least declaring that the petition for judicial review cannot be accepted (*niet ontvankelijk verklaard*);
3. Accepting the Statement of the Government in its entirety;
4. Declaring that the provisions of Article 73 paragraph (2) and Article 78 of Law Number 29 Year 2004 concerning Medical Practice do not require re-interpretation by Constitutional Court;
5. Declaring the provisions of Article 73 paragraph (2) and Article 78 of Law Number 29 Year 2004 concerning Medical Practice not inconsistent with

the provisions of Article 27 paragraph (2) and Article 28D paragraph (2) of the 1945 Constitution of the Republic of Indonesia;

However, if the Chief Justice/Panel of Justices of the Constitutional Court of Indonesia is of another opinion, it is requested for the decision to be passed by principles of what is fair and just (*ex aequo et bono*);

In addition giving the statement, the Government at the hearing on June 27, 2012 also presented 4 (four) experts named drg. Bambang Kusnandar, Sp, Pros, drg. Ben Rintoko, SKO, Sp. Pros, drg. Andreas Adiyatmaka, MSc, and Suroto, AMTG, S, Pd who explained as follows:

1. drg. Bambang Kusnandar, Sp, Pros

Competency standards (authority standards) must be possessed by every practicing dentist and specialist dentists. Prosthodontics specialist dentists should also have the competence as a prosthodontics specialist dentist. Such requirements must be met by all dentists, both those who have become professors and those who have recently graduated. The requirements that must be met by a dentist before they obtain the "specialist dental" title are:

1. Having supporting competencies and main competencies;
2. Mastering the medicine and dentistry science. A doctor must be able to integrate relevant biomedical knowledge as a scientific source and a

- variety of supporting data to diagnose a disease and medical procedures to be performed;
3. Understanding medicine, namely the relevant clinical dentistry science as the consideration in performing oral and dental care on compromised medical patients which can be adjusted;
 4. Understanding the basic principles of dentistry related to oral biology, material biology, and dentistry technology to support pre-clinic, clinic and research skills where necessary. In the examination of the patient, dentists should perform the general physical examination and *stomatognathic* systems by recording clinical, laboratorial, radiological, psychological, and social information, to evaluate the patient's medical condition;
 5. Knowing or recognizing and managing the behavior of a patient professionally;
 6. Using medical records that may become instruments of evidence as the basic reference for performing basic dental and oral care;
 7. Being able to diagnose a disease, determine disease prognosis, dental and oral abnormalities, through the interpretation of analysis and synthesis of the results of the relevant examination;

8. Being able to develop a treatment plan for the patient, so that he/she is able to develop, present, and discuss the treatment plan based on the condition of interests and abilities of the patient;

In the event that the dentist is not able to handle the patient, he/she has to make a reference;

2. **drg. Ben Rintoko, SKO, Sp. Pros**

Experts tell the fact experienced by a patient, namely a woman aged 74 years, self-employed, living in Surabaya, who lost some maxillary teeth and all mandibular teeth;

The patient came to the dental clinic and complained that her mandibular dentures were uncomfortable, as they were loose and they kept moving to the right and to the left, making it uncomfortable for her to chew food;

The patient said that about a year before, her maxillary and mandibular dentures were made by a dental artisan. The patient came to an expert for new dentures to be made for her;

The intra-oral overview of the patient revealed that clinically, porous dental abutments were found because they were used as retentions (*klamer*) of GTSL, and alveolar bone resorption occurred in her right and left posteriors of the mandible. The form of prosthesis in the mandible did not fit the anatomical form, so that the alveolar bone in the mandible experienced flat condition or resorption.

The Expert discovered that the form of the prosthesis mandible is not in accordance with the prosthodontic principles;

The expert presented the statement at the hearing, using images (X-ray photograph) of the patient, as follows:

1. In the black-circled area, the wing of the mandibular dentures on the lingual posterior part was not placed in *retromylohyoid fossa*, and the right part, the wing of the dentures was not placed in *mucobuccal* fold and was too short, so that the mandibular dentures were loose and moving to the right and to the left and they made the patients feel uncomfortable;
2. The intra-oral image when the patient used the old dentures can be seen on the left side, where the full dentures do not stick firmly to each other. So that it is not good for chewing and for the stomatognathic system to chew food;
3. In the radiographic study, it can be seen that there is a resorption in the mandible posterior due to the improper making of GTP of the mandibles. In the anterior part, protruding or prominent bones are found;
4. Diagnostic model of the patient after initial printing;
5. Front, right and left side of the diagnostic model;

Conclusion

The making of prosthesis or dentures, both full and partial removable dentures should be based on the understanding of:

1. Anatomical structure of the oral cavity;
2. Form of prosthesis which fits the oral cavity.
3. Molding method according to the case;
4. Selection of appropriate and structured materials of the shape;
5. Understanding the properties of materials to be used to the patient;
6. Dental care must be performed by competent medical personnel, namely dentists who have undergone the stages of structured formal education, and who must pass a competency test for becoming registered dentists in the Indonesian Medical Council and who must have STR and SIP to perform medical practices. Dental artisans have not undergone the stages of structured formal education, while the work performed by dental artisans is applied to the oral cavity of humans;

3. drg. Andreas Adiyatmaka, MSc

Dental artisans who fit *ortho* dentures, *ortho* fixed, brackets, fixed crown et cetera have deviated from the applicable provisions. Such acts of the dental artisans emphasize that Article 73 paragraph (2) and Article 78 of Law of 29/2004

prohibit medical activities improperly conducted. The conduct of improper medical activities violate the right to live a prosperous life and the right to obtain health service. A patient came to the expert in a state of excruciating pain. The patient told the expert that he had pain in all parts of the teeth but did not know where the exact pain was. Then the expert tried to examine the patient's teeth and found some problems as follows:

1. There was a fixed denture which fitted using a self-curing acrylic material and it leaked. A fixed denture should only be fitted by a dentist related to anatomy and physiology. Therefore, a dentist should pay attention not only to the anatomy or mechanism of tooth fitting, but also to the physiology of the mouth;
2. When x-rayed, the teeth were found to have connected with braces, with acrylic being put on the braces, and the teeth were fitted on the acrylic. Therefore, three bridges were fitted to one person;
3. The leak occurred, causing very painful *pulpitis* (inflammation);
4. Elsewhere, a resorption also occurred resulting in *pocket*. A resorption occurs causing the roots which should be two to become only one left;

The expert made various diagnoses to the patient, namely the very painful *pulpitis totalis acuta*, gangrene, granuloma, gingivitis. The expert did not directly handle the patient, but he suggested the patient that to return to the dental

artisan who had fitted the teeth and to ask the dental artisan to be responsible for it, but the patient said, "oh, that would not be necessary". The expert offered to the patient to remove the dentures and the patient agreed. After being removed, it was found that there were pieces of the denture removed from the self-curing acrylic materials, braces, a tooth, lots of carries, tooth plaque and foul odors. The patient told the expert that at the time the dentures were fitted, they were good and comfortable and he asked the dental artisan to fit the dentures to his wife as well. However, after two years, the husband and wife (the patient and his wife) felt great pain, so that they came to the expert, and the expert removed the dentures;

Conclusion

1. The making of fixed dentures not according to the rules of dentistry, at a time, will cause tremendous pain;
2. The fitting of dentures will feel good and comfortable the first time, but the patients will feel the pain later, so that patients need protection;
3. The medical activities improperly conducted violate the right to live a prosperous life and the right to obtain health service;

4. **Suroto, AMTG, S, Pd**

The state shall be obliged to provide health services to the entire community performed by health personnel having the expertise and authority, the quality of

which must be continuously improved through continuous education and training, provision of certification, registration, license, as well as development, supervision, and monitoring as set out in Article 28H and Article 37 of the 1945 Constitution. This is intended for health services in accordance with the development of health science and technology;

The derivatives of health education consist of medicine education, including general medicine education and dentistry education. Nowadays, there are two faculties of medicine, namely general medicine and dentistry. In the field of dentistry, there is a health polytechnic which is a diploma program being aimed at producing skilled health personnel having competence in the field of dental techniques who are able to follow the development of science and technology in the field of dental techniques which advance rapidly along with the technological inventions in various developed countries. Dental health technology has remarkably improved as a result of engineering developed by foreign manufacturers and is able to provide convenience for consumers who need it;

The hi-tech advancements are anticipated in the provision of skilled personnel having solid basic knowledge so that they are able to operate the intended tools. To give you an overview, we try to describe matters related to dental techniques as follows:

- Figure 1 is a laboratory which manufactures acrylic removable partial dentures, anatomical dental removable partial dentures, crown and bracket, crown, fixed ceramics, and acrylic fixed crown;
- Figure 2 is a dental laboratory constituting a facility of dental health care which cannot support the course of dental prostheses manufacturing services. In this figure, we can see university students manufacturing removable complete prostheses;
- Figure 3 is a removable orthodontic device and maxillofacial prostheses constituting prosthesis to be applied to post-surgery patients, especially after cancer surgery and so forth. Dental prostheses are tools attached in a patient's mouth to restore the aesthetic, mastication, and speech organ functions, while removable orthodontic device prostheses are tools used to repair malocclusion or abnormal position of teeth, for a better arrangement between the teeth in the maxilla and mandible. In addition, maxillofacial prostheses are tools related to the rehabilitation of maxilla and mandible following a cancer surgery or other surgeries;
- Figure 5 is small tools of dentures manufacturing which can be obtained from the dental supply and dentistry equipment stores;
- Figure 6 is various drills used for a dental prosthesis manufacturing;

- Figure 7 is a milling machine used for higher technology in the dental prosthesis manufacturing;
- Figure 8 is the Oven Preheating Furnish where the metal will be melted at a certain temperature. In addition, figure 9 is for a dental ceramics manufacturing, in this case, one of them is a ceramics machine;
- Figure 10 is Casting Induction machine, where the casting is performed by using induction constituting a technology in the field of dental technique technology. From those figures, we can say that the profession of dental techniques of the technique diploma (D3) graduates are as follows:
 - a. The profession of dental techniques requires at least the aforementioned equipment in order to practice independently;
 - b. Dental technique tools and equipment do not use the common equipment of a dentist performing medical practice at all;
 - c. The profession of dental techniques is a complementary working partner of dentists insofar as related to dentures manufacturing, orthodontic and maxillofacial tools, which is completely unrelated to matters concerning both disease and health which become the domain of a dentist;
 - d. By reason of such separation, it is agreed that a dentist will not perform the manufacturing which becomes the domain of

profession of dental techniques and accordingly, the practice of dentists is also not allowed to manage the laboratory which becomes the professional domain of dental techniques;

- e. Although the profession of dental techniques is stated to be health personnel by laws and regulations, in performing the work, it does not use tools, methods, or any other means commonly used by doctors or dentists as intended in Article 73 paragraph (2) of the Medical Practice Law;

The details of dental technique activities are divided into the executive, advanced, and supervisory levels. The professional practice of dental techniques has stages that must be passed in accordance with the level of education, expertise, and term of service. The executive level includes: (i) preparing equipment and dentures manufacturing materials with one difficulty level; (ii) making grip removable partial dentures with one to three elements of missing teeth, (iii) making grip removable partial dentures with one, two, or three missing elements; (iv) making an individual molding spoon; (v) making occlusal bite rim using wax, making a single crown acrylic; (vi) making acrylic; (vii) to make a bracket acrylic with three or more elements; (viii) making inlay and uplay from acrylic materials; (ix) making a spring occlusal, (x) making a *bionator*; (xi) repairing acrylic mould dentures; (xii) repairing broken dentures; (xiii) repairing acrylic teeth and adding grip; (xiv) repairing an orthodontics;

The advance level includes: (i) preparing tools and materials with one and two difficulty level; (ii) making prosthesis combination of metal framework on the two sides of the jaw, bilateral; (iii) making upper and lower removable complete metal framework dentures; (iv) making single crowns from metallic materials; (v) making brackets from metallic materials, (vi) making inlay and onlay from metallic materials; (vii) making cotter pins; (viii) making copying metals; (ix) making simple plate retention, labial bow, and comprehensive screen retention; (x) making plate retention, labial bow and arrow head; (xi) making activators with an added spring; (xii) repairing activators and others;

The supervisory level includes: (i) preparing tools for dentures manufacturing with one, two, and three difficulty level; (ii) making implant crowns; (iii) making copying porcelain; and (iv) making single crowns;

The aforementioned levels are solely at a relevant dentist's request after communicating with the patient. The intellectual level of a dentist and a patient's stability make dental techniques need to obtain attention, expansion, insights in the field of science technology. On this basis, a dental technique diploma graduate can be distinguished expressly and clearly from those who claim to be dental experts while they are actually dental artisans. If traced from the history of the existence of dental artisans, their existence has been indeed recognized in Indonesia as described by the Petitioner or based on the Government's explanation. However, from the perspective of science, dental artisans completely do not have the basic knowledge of dental techniques based on the

applicable curriculum of Dental Technique diploma (D3) education. There is no reason at all to claim that those who have self-taught knowledge perform the work of science since, if this work is closely related to human health issues, it is very difficult to be recognized as science. It is very difficult to account for the claim of being one of health personnel;

Health issues are closely related to the responsibility for someone's life, making it difficult for this issue to be left to those having scientific basis. Failure to deal with dental problems has an impact on humans' life both physically and mentally. For example, the negligence in paying attention to hygiene may result in infection or the negligence in cleaning the tools may transmit a disease to others. The mistake in creating the dentures will have an impact on facial aesthetics and so forth. Therefore, the expert who has been in a health circle is very concerned with maintaining the dignity of the profession. The profession allows for every person engaging in this profession to obtain benefit and will maintain their professionalism;

There is a new development in health care, both in Indonesia and internationally, namely the health paradigm, where at first in the early development, health was based on the effort of treatment of diseases and health recovery, while now the point of view has shifted to the implementation of comprehensive health efforts with an emphasis on the health efforts towards the diseases and improvement of health;

This paradigm is known in medical circles as the health paradigm. As a consequence of the acceptance of such health paradigm, any activity oriented toward the field of health shall be conducted through maintenance and improvement of the quality of a person, family, and the community;

All laws and regulations in the field of health refer to the Law Number 29 Year 2004 concerning Medical Practice, Law Number 36 Year 2009 concerning Health, and their derivative regulations. The laws and regulations enacted following the issuance of both Laws are interrelated. Therefore, this regulation is an order confirming the position of each entity and has been built in a connection and interdependence among the elements having a particular structure or composition because they are in a system, then each process occurring in each of the entities is able to change any input into the output performed by a particular and controlled method, in order to reach what is mandated in the Health Law;

[2.5] Whereas the Petitioner has filed the petition, at the hearing on June 12, 2012, the People's Legislative Assembly presented oral and written statements dated June, 2012, which, among other things, describe the following matters:

With regard to the Petitioner's arguments as described in the petition *a quo*, the People's Legislative Assembly in its opinion, first describes the legal standing which can be explained as follows:

1. Legal Standing of the Petitioner

The qualification which must be fulfilled by the Petitioner as parties has been regulated in the provision of Article 51 paragraph (1) of the Constitutional Court Law which states that “the Petitioners shall be the parties considering that their constitutional rights and/or authority are impaired by the coming into effect of a Law, namely:

- a. individual Indonesian citizens;
- b. customary law community groups insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of Republic of Indonesia as regulated in Law;
- c. public or private legal entities; or
- d. state institutions.”

The constitutional rights and/or authority as intended in the aforementioned Article 51 paragraph (1) are confirmed in the elucidation thereof, namely that “referred to as “constitutional rights” shall be the rights regulated in the 1945 Constitution of the State of the Republic of Indonesia. “The provision of the Elucidation of Article 51 paragraph (1) confirms that only the rights explicitly set forth in the 1945 Constitution of

the State of the Republic of Indonesia are included in “constitutional rights”.

Therefore, pursuant to the Constitutional Court Law, for persons or parties to be eligible as Petitioners with legal standing in the petition for review of a Law against the 1945 Constitution, they must first explain and substantiate:

- a. Their qualification as Petitioners in the petition *a quo* as referred to in Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court;
- b. Their constitutional rights and/or authority as referred to in the “Elucidation of Article 51 paragraph (1)” considered to have been impaired by the coming into effect of the Law.

With regard to the parameters of such constitutional impairment, the Constitutional Court has provided the definition and limitations of constitutional impairment caused by the coming into effect of Law, which must fulfill 5 (five) requirements (*vide* Decisions on Case Number 006/PUU-III/2005 and Case Number 011/PUU-V/2007), namely as follows:

- a. existence of constitutional rights/authority of the Petitioners granted by the 1945 Constitution of the State of the Republic of Indonesia;

- b. the Petitioners consider that such constitutional rights and/or authority have been impaired by a Law under review;
- c. the relevant impairment of such constitutional rights and/or authority of the Petitioners is specific and actual in nature or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
- d. there is a causal relationship (*causal verband*) between the impairment and the coming into effect of the Law petitioned for review;
- e. there is possibility that with the granting of the petition, the argued impairment of such constitutional rights and/or authority will not or will no longer occur;

If such five requirements are not fulfilled by the Petitioner in the case of Judicial Review *a quo*, then the Petitioner does not have the qualification of legal standing as Petitioner.

In response to the petition of the Petitioner *a quo*, the People's Legislative Assembly views that the Petitioner must be able to first prove that he is truly the party who considers that his constitutional rights and/or authority have been impaired by the coming into effect of the provisions petitioned for review, particularly in constructing the existence of

impairment of his constitutional rights and/or authority as an impact of the coming into effect of the provisions petitioned for review.

With regard to the legal standing of the Petitioners, the People's Legislative Assembly leaves it entirely to the honorable Chief Justice/Panel of Constitutional Justices of the Constitutional Court to consider and assess whether the Petitioner has legal standing or not as regulated in Article 51 paragraph (1) of the Constitutional Court Law and the Constitutional Court's Decisions on Case Number 006/PUU-III/2005 and Case Number 011/PUU-V/ 2007, and the People's Legislative Assembly leaves it entirely to the honorable Chief/Panel of Constitutional Justices of the Constitutional Court to consider and assess, whether the Petitioner has the legal standing or not as regulated in Article 51 paragraph (1) of the Constitutional Court Law and the Constitutional Court's Decisions on Case Number 006/PUU-III/2005 and Case Number 011/PUU-V/ 2007.

II. Review of the Medical Practice Law

- a. With regard to the petition for judicial review of Article 73 paragraph (2) and Article 78 of the Medical Practice Law, the People's Legislative Assembly first presents the general statement as follows:

- 1) Article 28H paragraph (1) of the 1945 Constitution explicitly states that *“Every person shall have the right to live a physically and mentally prosperous life, to have residence, and to obtain a proper and healthy living environment as well as to obtain health services”*;

Subsequently Article 34 paragraph (3) also states that *“The state shall be responsible for the provision of adequate health service facilities and public service facilities”*. The 1945 Constitution of the State of the Republic of Indonesia clearly describes that health is one of human rights that must be realized in the form of provision of various health efforts to the entire community through the implementation of health development with quality and affordable to the community. Every activity in an effort to maintain and improve the community's health shall to the greatest extent be conducted based on the principles of non-discrimination, participation, and sustainability in order to achieve one of the state constitutional goals namely to "advance general welfare."

- 2) Article 1 sub-article 11 of Law Number 36 Year 2009 concerning Health also states the definition of health effort namely "any activity and/or series of activities conducted in a unified, integrated and sustainable manner to maintain and

improve the level of community's health in the form of prevention of diseases, health improvement, treatment of diseases, and health recovery by the Government and/or the community";

- 3) To implement the mandate of the 1945 Constitution in the field of health, the Government along with the People's Legislative Assembly formulated the Law Number 29 Year 2004 concerning Medical Practice which was based on the consideration that the implementation of medical practice was at the core of various activities in the implementation of health efforts and should be conducted by doctors and dentists having high ethical and moral values, expertise and authority, whose quality must be continuously improved through continuous education and training, certification, registration, license, as well as development, supervision, and monitoring for health services to be in accordance with the development of health science and technology;
- 4) Whereas currently, the number of medical health personnel from among doctors and dentists is rapidly increasing, with an estimated number of doctors currently practicing of more than 50,000 people with the addition of approximately 3500 - 4000 people each year as the result of faculty of medicine

and the faculty of dentistry. However, the increasing number of doctors and dentists is not accompanied by an improvement in the quality of doctors and dentists. This is proven by an increasing trend of community complaints about the services of doctors and dentists, both the complaints coming from the mass media (reader's column) and the community complaint reports through the honorary council of medical ethics, complaints in courts and community complaint institutions (consumer protection foundations, legal aid foundations, and so forth). (source: minutes of process of discussion on the Medical Practice Draft Law);

- 5) There is an increasing number of personnel who are not doctors or dentists performing actions of treatment or medical interventions on the patients and the safety and benefits of such actions cannot be accounted for. Several forms of medical personnel's actions can be categorized as violations of the medicine law which adversely affect the patients, namely, among other things:
 - a) committing immoral actions in performing their medical practices;

- b) improper physical and mental conditions of medical personnel to perform medical practices;
 - c) receiving commission remuneration affecting their professional considerations;
 - d) falsification of certificate of registration and practicing permit;
 - e) dependency on alcohol, narcotics and psychotropic substances;
 - f) having no adequate professional skills or having adequate skills but committing negligence which adversely affect the patients;
 - g) performing abortion without any medical indication;
 - h) providing or issuing an incorrect medical certificate;
 - i) practicing without practicing permit; and
 - j) refusing to help patients without any risk which may threaten their safety.
- b. In relation to the Petitioner's arguments stating that the provisions of Article 73 paragraph (2) *juncto* the provision of Article 78 of the

Medical Practice Law have been inconsistent with the Petitioner's constitutional rights as regulated in Article 27 paragraph (2) of the 1945 Constitution, the People's Legislative Assembly needs to explain that:

- 1) The provision of Article 73 paragraph (2) of the Medical Practice Law which read *"Any person shall be prohibited from using tools, methods, or any other means in providing service to the community which gives the impression as if the person concerned were a doctor or a dentist having possessed a registration certificate and/or practicing permit"*, is aimed at providing protection and legal certainty to the community as recipients of health services. As described earlier, malpractice cases committed by medical health personnel which adversely affect the patients are increasingly rampant day by day, especially from among doctors and dentists. Whereas the ethical institutions in the existing professional organizations are intended only for handling violations of medical ethics and are not authorized to handle legal malpractice cases. On the other hand, the general judiciary cannot resolve cases of violations of the medicine law. This consideration which later has been accommodated explicitly in Law Number 29 Year 2004 on

Medical Practice, particularly in Article 3 which states that "The regulation concerning medical practice shall be aimed at providing protection to patients, maintaining and improving the quality of health services provided by doctors and dentists, and providing legal certainty to the community, doctors, and dentists";

- 2) The Petitioner's argument stating that due to the coming into effect of the provision of Article 73 paragraph (1) of the Medical Practice Law, the Petitioner does not obtain legal certainty of just laws because the norm contained in Article 73 paragraph (1) leads to multiple interpretations and can be interpreted very broadly as a result of the formulation which is not rigid/uncertain (having a broad spectrum) so as to also affect all activities in the areas of work/profession which actually are not designated or targeted by this law, in the view of the People's Legislative Assembly, does not have a strong legal basis;

As described earlier, the Medical Practice Law expressly regulates the activity/series of activities performed by doctors and dentists;

The provision regulated in Article 73 paragraph (2) is completely not intended for professions other than the profession of a doctor or dentist. It is explicitly proven and has been in accordance with the provision of Article 1 sub-article 1 of Law Number 29 Year 2004 which states that "Medical practice shall be a series of activities performed by doctors and dentists to patients in the course of implementing health efforts". Article 73 paragraph (2) also cannot be completely construed as an article giving limitations to certain parties to perform activities or work related to the efforts of maintaining and improving the community's health to the greatest extent because philosophically, the efforts of health service may be performed by anyone based on the principles of non-discrimination, participation, and sustainability in accordance with the provisions of laws and regulations;

If the Petitioner comprehensively re-reads the content of Article 73 of Law Number 29 Year 2004 on Medical Practice, paragraph (3) expressly states that "The provisions as intended in paragraph (1) and paragraph (2) shall not be applicable to health personnel authorized by laws and regulations". This paragraph is an exception to the two

previous paragraphs. Therefore, the Petitioner's argument stating that Article 73 paragraph (2) leads to multiple interpretations becomes groundless because the clear regulation of Article 73 paragraph (2) is intended only for the profession of doctors and dentists except for those (other professions) authorized by laws and regulations.

- 3) Article 28 paragraph (1) of the Medical Practice Law states that "Any practicing doctor or dentist shall be obliged to attend continuous education and training in the field of medicine or dentistry organized by professional organizations or other institutions accredited by professional organizations in the context of absorption of the development of science and technology in the field of medicine or dentistry". Furthermore, Article 35 paragraph (1) also states that doctors or dentists having the registration certificate shall have authority to perform medical practices in accordance with their education and competency, which consist of:
 - a. interviewing patients;
 - b. examining physical and mental conditions of patients;
 - c. determining supporting examination;

- d. establishing diagnoses;
- e. determining the management and treatment of patients;
- f. performing actions of medicine or dentistry;
- g. prescribing drugs and medical tools;
- h. issuing the certificate of a doctor or dentist;
- i. storing drugs in the permitted quantity and types; and
- j. compounding and delivering drugs to patients, for those practicing in remote areas having no drugstore.

When compared to the work and authority granted to dental artisans prior to the revocation of Regulation of the Minister of Health Number 339/MENKES/PERK/1989 concerning the Occupation of Dental Artisan, Article 1 sub-article a states that *"Dental artisans shall be those performing works in the field of healing and recovery of dental health and having no scientific education of dentistry and having obtained the license from the Minister of Health to perform their work"*. Furthermore, Article 7 paragraph (1) also refers to the authority of dental artisan, namely:

- a) to make partial/complete dentures from acrylic;
- b) to fit removable dentures.

In view of the educational background, occupation, and authority granted by the respective provisions of laws and regulations, it is clearly described that dentists and dental artisans are two different professions so that overlapping between one and another is impossible. Based on the authority granted by the laws and regulations, dentists and dental artisans are supposed to be in synergy and to support each other in the efforts of improving health, particularly the community's dental health;

Based on the statements in point 2, point 3, and point 4, it can be concluded that Article 73 paragraph (2) does not at all prohibit, eliminate, or even extinguish the livelihood of other professions (including dental artisans) to participate through activities or works related to the efforts of maintaining and improving the community's health to the greatest extent insofar as the authority granted through such activities or works is exercised under the provisions of laws and regulations. Therefore, the Petitioner's argument stating that the provision of Article 73 paragraph (2) is inconsistent

with the provision of Article 27 paragraph (2) of the 1945 Constitution does not have a strong basis of thought.

- 4) The Petitioner's argument stating that the formulation of norms of criminal acts as set out in Article 78 of the Law Number 29 Year 2004 concerning Medical Practice is not clear and firm, so as to be inconsistent with the *lex certa* principle, the principles of criminal law, and also it as well as not providing legal certainty of just laws as guaranteed by the Constitution, in the view of the People's Legislative Assembly, is groundless. This is because the formulation of penal provisions regulated in Article 78 has explicitly referred to restrictive norms or directive norms which are violated and has referred to an article or several articles (namely *juncto* Article 73 paragraph (2)) which contains the norms. In addition, as described earlier, the regulation of the Medical Practice Law is intended for providing protection to patients, maintaining and improving the quality of health services provided by doctors and dentists, and providing the legal certainty to the community, doctors, and dentists". The form of protection and provision of legal certainty is expressly stated in Article 78 which mentions the phrase "any person" as the subject of the penal provisions which means that it is

applicable to anyone acting in such a way which gives the impression as if the person were a doctor or a dentist having possessed a registration certificate and/or practicing permit as well as criminal qualifications imposed (cumulative, alternative, or alternative cumulative) by considering the impact of criminal acts on the community as well as the element of fault of the person;

- 5) The Petitioner's argument states that the Medical Practice Law as the legal basis for the Ministry of Health to issue Regulation of the Minister of Health of the Republic of Indonesia Number 1871/MENKES/PER/2011 ("Regulation of the Minister of Health/*Permenkes* 1871/2011") concerning the Revocation of Regulation of the Minister of Health of the Republic of Indonesia Number 339/MENKES/PER/V/1989 ("Regulation of the Minister of Health/*Permenkes* 339/1989") concerning the Occupation of Dental Artisan. Hierarchically in laws and regulations, the position of Ministerial Regulations is under the Law. Therefore, the substance regulated in a Ministerial Regulation are supposed to be the substance ordered or to be implemented based on the Law or other laws and regulations above it. This means that a Ministerial Regulation must not be inconsistent with the Law

(the principle of *lex superior derogat legi inferiori*). In relation to such matter as explained earlier, the Medical Practice Law only regulates a series of activities performed by doctors and dentists to patients in the course of implementing health efforts (Article 1 paragraph 1 of the Medical Practice Law), and is not at all intended for professions other than doctors and dentists. The aforementioned Petitioner's argument is supposed to be addressed to the Ministry of Health of the Republic of Indonesia construing dental artisans as part of health medical personnel. Therefore, the petitioner is supposed to reasonably conduct a judicial review of Regulation of the Minister of Health/*Permenkes* 1871/2011 against the Medical Practice Law which is the scope of duties and authority of the Supreme Court;

- 6) Whereas based on the aforementioned statements, Article 73 paragraph (2) and Article 78 of the Medical Practice Law are not inconsistent with the 1945 Constitution, particularly the provision of Article 27 paragraph (2) and the provision of Article 28D paragraph (1) of the 1945 Constitution.

Thus this written statement is presented for consideration by the Panel of Justices of the Constitutional Court in order to pass the following decision:

- 1) Rejecting the petition *a quo* in its entirety or at least declaring that the petition *a quo* cannot be accepted;
- 2) Declaring Article 73 paragraph (2) and Article 78 of Law Number 29 Year 2004 concerning Medical Practice not inconsistent with Article 27 paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution;
- 3) Declaring that Article 73 paragraph (2) and Article 78 of Law Number 29 Year 2004 concerning Medical Practice continues to have binding legal force;

[2.6] Whereas the Petitioner has submitted written conclusions dated July 11, 2012, and the Government has submitted its written conclusions dated July 10, 2012, received at the Registrar's Office of the Court on July 12, 2012, and July 24, 2012 respectively, in which they remain consistent with their standpoint;

[2.7] Whereas to shorten the description of this decision, all those included in the minutes of hearing have been included in and shall constitute an inseparable part of this decision;

3. LEGAL CONSIDERATIONS

[3.1] Whereas the purpose and objective of the petition of the Petitioner is to review the constitutionality of Article 73 paragraph (1) and Article 78 of Law

Number 29 Year 2004 concerning Medical Practice (State Gazette of the Republic of Indonesia Year 2004 Number 116, Supplement to the State Gazette of the Republic Indonesia Number 4431, hereinafter referred to as Law 29/2004) against Article 27 paragraph (2) and Article 28D paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.2] Whereas prior to considering the Substance of the Petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider the following matters:

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

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

Authority of the Court

[3.3] Whereas pursuant to Article 24C paragraph (1) of the 1945 Constitution, Article 10 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereinafter

referred to as the Constitutional Court Law), Article 29 paragraph (1) subparagraph a of Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076), one of the Court's constitutional authorities is to review Laws against the Constitution;

[3.4] Whereas the petition of the Petitioner is concerned with constitutionality review of the Law *in casu* Article 73 paragraph (1) and Article 78 of Law 29/2004 against the 1945 Constitution, and therefore, the Court has the authority to examine, hear and decide upon the petition *a quo*;

Legal standing of the Petitioner

[3.5] Whereas pursuant to Article 51 paragraph (1) of the Constitutional Court Law and the Elucidation thereof, the parties eligible to file a petition for review of Laws against the 1945 Constitution shall be those considering that their constitutional rights and/or authority are impaired by the coming into effect of a Law being petitioned for review, namely:

- a. individual Indonesian citizens (including groups of people having a common interest);
- b. customary law community groups insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of Republic of Indonesia as regulated in Law;

- c. public or private legal entities; or
- d. state institutions;

Hence, in the review of a Law against the 1945 Constitution, the Petitioner must first explain and substantiate:

- a. his position as a Petitioner as intended in Article 51 paragraph (1) of the Constitutional Court Law;
- b. the impairment of constitutional rights and/or authority granted by the 1945 Constitution due to the coming into effect of the law being petitioned for review;

Whereas the Petitioner in the petition *a quo* qualifies himself as an individual Indonesian citizen in accordance with Identity Card Number 317501211072007 (*vide* Exhibit P-2), and therefore, pursuant to Article 51 paragraph (1) of the Constitutional Court Law, the Petitioner *a quo* may file a petition for review of the Law *a quo* against the 1945 Constitution;

[3.6] Whereas in addition to having to fulfill the aforementioned qualification, the Petitioner also has to describe clearly his constitutional rights and/or authority which have been impaired by the coming into effect of the Law being petitioned for review. Following the issuance of Decision Number 006/PUU-III/2005, dated May 31, 2005 and Decision Number 11/PUU-V/2007, dated September 20, 2007,

as well as subsequent decisions, the Court has been of the opinion that the impairment of constitutional rights and/or authority intended in Article 51 paragraph (1) of the Constitutional Court Law must fulfill five requirements, namely:

- a. the existence of constitutional rights and/or authority of the Petitioner granted by the 1945 Constitution;
- b. the Petitioner considers that such constitutional rights and/or authority have been impaired by the coming into effect of the Law being petitioned for review;
- c. the impairment of such constitutional rights and/or authority must be specific (special) and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
- d. there is a causal relationship (*causal verband*) between the relevant impairment and the Law being petitioned for review;
- e. there is a possibility that with the granting of the petition, the impairment of such constitutional rights and/or authority as argued will not or will no longer occur;

[3.7] Whereas the Petitioner has the profession of dental artisan registered in the list of Traditional Therapists with the Central Jakarta Health Service Office under Number 1558.2005, dated July 28, 2005 (*vide* Exhibit P-6). In the petition a

quo, the Petitioner considers that his constitutional right has been impaired by the coming into effect of Article 73 paragraph (2) and Article 78 of Law 29/2004 which states:

Article 73

(2) *“Any person shall be prohibited from using tools, methods, or any other means in providing service to the community which gives the impression as if the person concerned were a doctor or a dentist having possessed a registration certificate and/or practicing permit”.*

Article 78

“Any person deliberately using tools, methods, or any other means in providing service to the community which gives the impression as if the person concerned were a doctor or a dentist having possessed a doctor’s registration certificate or a dentist’s registration certificate or practicing permit as intended in Article 73 paragraph (2) shall be subject to a criminal maximum imprisonment of 5 (five) years or maximum pecuniary sanction of Rp.150,000,000.00 (one hundred and fifty million rupiah)”;

In the Petitioner’s opinion, these articles in the Law *a quo* are used as the basis by the Minister of Health for issuing Regulation of the Minister Number 1871/MENKES/PERIX/2011 concerning Revocation of Regulation of the Minister of Health Number 339/MENKES/PER/V/1989 concerning Occupation of Dental

Artisan, dated September 5, 2011. Initially, the legality of the profession of Dental Artisan is regulated in Regulation of the Minister of Health Number 339/MENKES/PER/V/1989 concerning the Occupation of Dental Artisan, dated May 24, 1989, however, following the coming into effect of the Law *a quo*, the Petitioner cannot work as a Dental Artisan anymore because the Petitioner's profession has been revoked by Regulation of the Minister of Health Number 1871/MENKES/PERIX/2011. Based on the argument on such constitutional impairment of the Petitioner, the Court is of the opinion that although such constitutional impairment of the Petitioner is directly caused by the issuance of Regulation of the Minister of Health Number 1871/MENKES/PERIX/2011 concerning Revocation of Regulation of the Minister of Health Number 339/MENKES/PER/V/1989 concerning the Occupation of Dental Artisan, dated September 5, 2011, in the Court's opinion, the Regulation of the Minister of Health *a quo* was issued based on Law 29/2004, particularly Article 73 paragraph (2) [*vide* exhibit P-4]. The Regulation of the Minister of Health *a quo* was followed up with Circular Letter of the Head of Health Service Office of Bandung Municipality Number 445/2082-Dinkes, concerning Dental Artisan's Practice and Circular Letter of the Head of Kujangsari Community Health Center, dated February 27, 2012 which in substance state that dental and oral healthcare can only be conducted by health personnel, while Dental Artisans do not have authority anymore to provide dental health services to the community as provided for in Article 73 paragraph (2) of Law 29/2004 and any person violating this article shall be threatened with a criminal sanction of maximum imprisonment of

5 (five) years or maximum pecuniary sanction of Rp. 150,000,000.00 (one hundred and fifty million rupiah). Based on the aforementioned legal assessment, the Court is of the opinion that there is a causal relationship (*causal verband*) between the Petitioner's impairment and the coming into effect of the Law *a quo*, where such constitutional impairment of the Petitioner has occurred, and there is a possibility that with the granting of the petition, such constitutional impairment of the Petitioner will not or will no longer occur. Therefore, the Petitioner has legal standing to file the petition for judicial review of the articles of the Law *a quo*;

[3.8] Whereas since the Court has authority to examine, hear and decide upon the petition *a quo* and the Petitioner has legal standing to file the petition *a quo*, the Court shall subsequently consider the substance of the petition;

Substance of the Petition

[3.9] Whereas in the substance of his petition, the Petitioner has petitioned for substantive review of Article 73 paragraph (2) and Article 78 of Law 29/2004 which are inconsistent and/or conditionally inconsistent with Article 27 paragraph (2) and Article 28D paragraph (2) of the 1945 Constitution for the following reasons:

1. Article 73 paragraph (2) and Article 78 of the Law *a quo* have multiple interpretations and can be construed in an extremely broad manner. In the Petitioner's opinion, the norms contained in the articles *a quo* are actually intended for prohibiting fake doctors/dentals, while the formulation of the

- articles *a quo* has an impact on all fields of professional activities which are actually not addressed or targeted by the Law, namely, among other things, the profession of Dental Artisan which, prior to the coming into effect of the Law *a quo*, was a legal profession but, following the coming into effect of the Law *a quo*, the Ministry of Health issued Regulation Number 1871/MENKES/PERIX/2011 concerning Revocation of Regulation of the Minister of Health Number 339/1989 which neither renew nor grant permit to the Petitioner to perform his job as a Dental Artisan;
2. The threat of criminal sanction of maximum imprisonment of 5 years or maximum pecuniary sanction of Rp. 150,000,000.00 set forth in Article 78 of the Law *a quo* contains an obscure and inexplicit formulation, and therefore it is inconsistent with the *lex certa* principle which becomes the principle of criminal law, and does not provide just legal certainty as guaranteed by the constitution;
 3. Based on the aforementioned reasons, the Petitioner has requested for the Court to declare Article 73 paragraph (2) and Article 78 of the Law *a quo* inconsistent and/or conditionally inconsistent with Article 27 paragraph (2) and Article 28D paragraph (2) of the 1945 Constitution, unless it is construed that such tools, methods, and any other means are traditional in nature, or recognized from generation to generation, and/or have been generally and commonly accepted, it can be performed by a person having specific expertise besides doctors and dentists. Therefore,

Dental Artisans shall remain able to carry out their profession, namely making some or all dental prostheses from acrylic and implanting removable dental prostheses, but not performing practices of medical treatment such as pulling out teeth or filling dental cavities because dental diseases related to nerves fall exclusively under the domain of dentists;

Opinion of the Court

[3.10] Whereas the Petitioner argues that Article 73 paragraph (2) of Law 29/2004 which states, *“Any person shall be prohibited from using tools, methods, or any other means in providing service to the community which gives the impression as if the person concerned were a doctor or a dentist having possessed a registration certificate and/or practicing permit”* is inconsistent with Article 27 paragraph (2) and Article 28D paragraph (2) of the 1945 Constitution because the coming into effect of the article *a quo* does not provide just legal certainty to the Petitioner in order to be able to perform his profession as a Dental Artisan. In addition to that, the norm contained in Article 73 paragraph (2) of the Law *a quo* has multiple interpretations since it does not merely prohibit fake doctors/dentists from opening illegal practice, but the formulation of the article *a quo* actually has an impact on all fields of profession, particularly the profession of Dental Artisan. With regard to such argument of the Petitioner, the Court is of the opinion that Article 27 paragraph (2) of the 1945 Constitution explicitly states that every citizen shall have the right to work befitting and livelihood befitting human beings. Therefore, it means that the state protects the

right to work for each of its citizens in the context of obtaining livelihood befitting human beings. The philosophical basis of the state's protection of the rights of its citizens is stated in the preamble to the 1945 Constitution which states, "*...protect the entire Indonesian nation and the entire Indonesian native land, and in order to advance general welfare, to develop the intellectual life of the nation, and to partake in implementing world order based upon independence, eternal peace and social justice...*". The state's protection of an occupation and for obtaining livelihood befitting human beings is an implementation of every person's human right to work and to receive remuneration as well as fair and appropriate treatment in employment. Therefore, the state's protection of an occupation and the right to receive remuneration is not applied discriminatively in the sense of granting special treatment to certain professions only and ignoring or eliminating other types of profession without any clear solution or settlement provided by the state;

[3.11] Whereas the profession of Dental Artisan is a profession which has been acquired from generation to generation before dentistry existed in Indonesia, and even, the profession of Dental Artisan became the inspiration for the establishment of dentistry education institute in Indonesia, namely Stavit (*School tot Opleiding van Indische Tandartsen*) in Surabaya in 1928. In the context of improving the capability and skill of Dental Artisans in Indonesia, Dr. Moestopo established the Dental Health Course in Jakarta in 1952 which was further developed to become DR. Moestopo Intellectual Dental Artisan Course in

1957. Subsequently, in 1958, Dr. Moestopo established Dr. Moestopo Dental College, which received accreditation from the government. The profession of Dental Artisan in Indonesia already existed and its existence was recognized by the Government in accordance with Regulation of the Minister of Health Number 339/MENKES/PER/1989 concerning Occupation of Dental Artisan, dated May 24, 1989, in which based on Article 7 of the Regulation of the Minister of Health *a quo*, Dental Artisans are granted authority to make some or all removable dental prostheses from *karilik (sic.)* and to fit removable dental prostheses. In fitting dental prostheses, Dental Artisans are prohibited from covering the sides of the tooth root. However, following the coming into effect of the Law *a quo*, particularly Article 73 paragraph (2) of Law 29/2004, the Government has eliminated the profession of Dental Artisan, as included in the consideration section of Regulation of the Minister of Health Number 1871/MENKES/PER/IX/2011 concerning Revocation of Regulation of the Minister of Health Number 339/MENKES/PER/V/1989 concerning the Occupation of Dental Artisan, dated September 5, 2011, which explicitly states “*whereas dental and oral health service can only be performed by authorized health personnel, and does not fall under the authority of Dental Artisans*”. The provision is reconfirmed in Regulation of the Head of Health Service Office of Bandung Municipality Number 445/2082-Dinkes, concerning Dental Artisan’s Practice, dated February 27, 2012 which in substance states that practicing permit for Dental Artisans because dental and oral health service can only be provided by authorized health personnel, and does not fall under the authority of Dental

Artisans. Based on the abovementioned regulations, it can be concluded that the elimination of the Occupation of Dental Artisan by Regulation of the Minister of Health Number 1871/ MENKES/PER/IX/2011, dated September 5, 2011 is because there is other profession which can replace Dental Artisans in carrying out their job and such other profession is equipped with expertise in their own field, so that their work is medically accountable. This is in accordance with the statement of the Government which that *“The implementation of dentistry job by personnel other than those provided for by laws and regulations shall be unjustifiable because there is no guarantee with regard to the expertise and competence they possess, while the community has the right to obtain proper health service from highly qualified health personnel who have undergone formal education which is structured and which has a clear curriculum, which is not possessed by Dental Artisans because their expertise has been obtained from generation to generation”*;

[3.12] Whereas the elimination of the Occupation of Dental Artisan for the reason that the profession is risky so that it can only be performed by competent personnel as stated in the statement of the Government, in the Court’s opinion, is not the appropriate solution, because in addition to the fact that the Occupation of Dental Artisan already existed prior to the existence of dentistry in Indonesia, the existence of Dental Artisans can serve as another alternative for the community to obtain affordable dental health services. This is based on the idea that until now, the government cannot provide affordable dental services for the

whole community. Deviations or violations by Dental Artisans, also due to the limited capability they possess in performing their job, can be solved through development, licensing, and supervision. The development has the purpose that Dental Artisans have basic knowledge of dentistry in order to perform their job in accordance with applicable provisions, as conducted by the Government with regard to traditional midwives who help with births. The supervision is aimed at controlling the work of Dental Artisans in order that they perform their job in accordance with the standards stipulated by the Government and at imposing sanctions to Dental Artisans violating or abusing their profession. The licensing serves as legalization of Dental Artisans to perform their job in accordance with the capability and expertise they possess. The Court's opinion *a quo* is in line with the opinion of the People's Legislative Assembly which states that actually, based on the authority granted by laws and regulations, dentists and Dental Artisans should have mutual synergy and support each other in the efforts of improving the community's health, particularly the community's dental health. Therefore, in the Court's opinion, the profession of Dental Artisan can be included in/categorized as a type of Indonesian traditional health service which must be protected by the state in a separate regulation. Based on the legal assessment above, the Court is of the opinion that Article 73 paragraph (2) of Law 29/2004 is conditionally inconsistent with the 1945 Constitution, namely that it is inconsistent with the constitution if the prohibition contained in the article is applied to Dental Artisans who have possessed the permit from the Government;

[3.13] Whereas the Petitioner argues that Article 78 of the Law *a quo* is inconsistent and/or conditionally inconsistent with Article 27 paragraph (2) and Article 28 paragraph (2) of the 1945 Constitution because the threat of criminal sanction of maximum imprisonment of 5 (five) years or maximum pecuniary sanction of Rp. 150,000,000.00 (one hundred and fifty million) included in the article *a quo* contains obscure and inexplicit formulation, which makes it inconsistent with the *lex certa* principle which becomes one of the principles of criminal law, and not providing just legal certainty as guaranteed by the constitution. In the Court's opinion, since Article 78 of Law 29/2004 provides for the norms of sanction against violations of Article 73 paragraph (2) of the Law *a quo*, the norm contained in Article 78 of Law 29/2004 constitutes an inseparable part of Article 73 paragraph (2) of the Law *a quo*. Therefore, Article 78 of Law 29/2004 must be declared conditionally constitutional, namely that it is constitutional to the extent that the norm of Article 78 of Law 29/2004 does not include Dental Artisans having obtained the permit from the Government;

[3.14] Whereas based on all the considerations above, the Court is of the opinion that the petition of the Petitioner has legal grounds.

4. CONCLUSION

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

- [4.1] The Court has authority to examine, hear, and decide upon the petition of the Petitioner;
- [4.2] The Petitioner has legal standing to file the petition *a quo*;
- [4.3] The Petitioner's arguments have legal grounds;

Pursuant to the 1945 Constitution of the State of the Republic of Indonesia, Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226) and Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076);

5. INJUNCTIONS OF DECISION

Passing the Decision,

To declare:

1. To grant the petition of the Petitioner in its entirety;
 - 1.1. Article 73 paragraph (2) of Law Number 29 Year 2004 concerning Medical Practice (State Gazette of the Republic of Indonesia Year

2004 Number 116, Supplement to the State Gazette of the Republic Indonesia Number 4431) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia to the extent it is not construed as, *“Any person shall be prohibited from using tools, methods, or any other means in providing service to the community which gives the impression as if the person concerned were a doctor or a dentist having possessed a registration certificate and/or practicing permit, except for Dental Artisans who have obtained the practicing permit from the Government”*;

- 1.2. That Article 73 paragraph (2) of Law Number 29 Year 2004 concerning Medical Practice (State Gazette of the Republic of Indonesia Year 2004 Number 116, Supplement to the State Gazette of the Republic Indonesia Number 4431) does not have any binding legal force to the extent it is not construed as, *“Any person shall be prohibited from using tools, methods, or any other means in providing service to the community which gives the impression as if the person concerned were a doctor or a dentist having possessed a registration certificate and/or practicing permit, except for Dental Artisans who have obtained the practicing permit from the Government”*;
- 1.3. Article 78 of Law Number 29 Year 2004 concerning Medical Practice (State Gazette of the Republic of Indonesia Year 2004

Number 116, Supplement to the State Gazette of the Republic Indonesia Number 4431) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia to the extent it is not construed as, *“Any person shall be prohibited from using tools, methods, or any other means in providing service to the community which gives the impression as if the person concerned were a doctor or a dentist having possessed a registration certificate and/or practicing permit, except for Dental Artisans who have obtained the practicing permit from the Government”*;

- 1.4. Article 78 of Law Number 29 Year 2004 concerning Medical Practice (State Gazette of the Republic of Indonesia Year 2004 Number 116, Supplement to the State Gazette of the Republic Indonesia Number 4431) does not have any binding legal force to the extent not construed as, *“Any person shall be prohibited from using tools, methods, or any other means in providing service to the community which gives the impression as if the person concerned were a doctor or a dentist having possessed a registration certificate and/or practicing permit, except for Dental Artisans who have obtained the practicing permit from the Government”*;
2. To order the promulgation of this decision properly in the Official Gazette of the Republic of Indonesia;

Hence this decision was passed in the Consultative Meeting of Justices attended by nine Constitutional Court Justices, namely Moh. Mahfud MD as the Chairperson and concurrent Member, Achmad Sodiki, Ahmad Fadlil Sumadi, Hamdan Zoelva, M. Akil Mochtar, Harjono, Anwar Usman, Muhammad Alim, and Maria Farida Indrati, respectively as Members, on **Wednesday the second of January two thousand and thirteen**, and was pronounced in the Plenary Session of the Constitutional Court open for the public on **Tuesday, the fifteenth of January two thousand and thirteen**, pronounced completely at **10.54 West Indonesia Time**, by nine Constitutional Court Justices, namely Moh. Mahfud MD as the Chairperson and concurrent Member, Achmad Sodiki, Ahmad Fadlil Sumadi, Hamdan Zoelva, M. Akil Mochtar, Harjono, Anwar Usman, Muhammad Alim, and Maria Farida Indrati, respectively as Members, assisted by Sunardi as the Substitute Registrar, in the presence of the Petitioner/his attorney, the Government or its representative, and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

Sgd.

Moh. Mahfud MD.

JUSTICES,

Sgd.

Achmad Sodiki

Sgd.

Ahmad Fadlil Sumadi

Sgd.

Hamdan Zoelva

Sgd.

M. Akil Mochtar

Sgd.

Harjono

Sgd.

Anwar Usman

Sgd.

Muhammad Alim

Sgd.

Maria Farida Indrati

SUBSTITUTE REGISTRAR,

Sgd.

Sunardi