

**EXCERPT FROM DECISION OF THE CONSTITUTIONAL COURT OF  
THE REPUBLIC OF INDONESIA**

Decision Number 12/PUU-VIII/2010 Concerning Judicial Review of Law Number  
36 Year 2009 concerning Health against the Constitution of the State of the  
Republic of Indonesia

**DECISION**

**Number 12/PUU-VIII/2010**

**FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD**

**THE CONSTITUTIONAL COURT OF  
THE REPUBLIC OF INDONESIA**

[1.1] Examining, hearing and deciding upon constitutional cases at the first and final level, has passed a decision in the case of petition for Judicial Review of Law Number 36 Year 2009 concerning Health against the 1945 Constitution of the State of the Republic of Indonesia Year 1945, filed by:

[1.2] 1. Name : **Misran, S.Km;**  
Occupation : Civil Servant, Nurse, Head of Kuala Samboja  
Auxiliary Community Health Center;  
Address : Jalan Raya Balikpapan Handil II RT. 04  
Number 01 Kuala Samboja Sub-District  
Samboja District, Kutai Kertanegara Regency,

East Kalimantan Province;

2. Name : **H. Mahmud, S.Km;**  
Occupation : Civil Servant, Head of Kayungu Community Health Center;  
Address : Sekuro Jaya Village, Long Ikis District, Paser Regency, East Kalimantan Province;
3. Name : **Zulkifli, Amd.Kep;**  
Occupation : Civil Servant, Head of Administration of Lolo Community Health Center;  
Address : Keluang Village, Kuaro District, Paser Regency, East Kalimantan Province;
4. Name : **Giyana, S.Km;**  
Occupation : Civil Servant, Head of Krayan Community Health Center;  
Address : Krayan Makmur Village, Neighborhood Ward 03/Neighborhood Block 1 Long Ikis, Paser Regency, East Kalimantan Province;
5. Name : **Muchlas Sudarsono, Amd.Kep;**  
Occupation : Civil Servant, Head of Padang Pangrapat Community Health Center;  
Address : Jalan Sawit, Keluang Lolo Village, Neighborhood Ward 09/03, Kuaro District,

Paser Regency, East Kalimantan Province;

6. Name : **Loging Anom Subagio;**  
Occupation : Civil Servant, Head of Argomulya Auxiliary  
Community Health Center;  
Address : Jalan KS. Tubun, Argomulyo Village, Sepaku  
District, Penajam Paser Utara Regency, East  
Kalimantan Province;
  
7. Name : **Edi Waskito;**  
Occupation : Civil Servant, Head of Bulu Minung Auxiliary  
Community Health Center;  
Address : Minung Sub-District, Neighborhood Ward 2,  
Penajam District, Penajam Paser Utara  
Regency, East Kalimantan Province;
  
8. Name : **Abdul Munif;**  
Occupation : Civil Servant, Head of Muara Jawa Ulu  
Auxiliary Community Health Center;  
Address : Jalan Delima, Neighborhood Ward 3, Muara  
Jawa Ulu Sub-District, Muara Jawa District,  
Kutai Kartanegara Regency, East Kalimantan  
Province;
  
9. Name : **Afriyanto;**

Occupation : Civil Servant, Head of Teluk Dalam Auxiliary  
Community Health Center, Teluk Dalam Sub-  
District;

Address : Jalan Swadaya, Neighborhood Ward 4, Teluk  
Dalam Sub-District, Muara Jawa District, Kutai  
Kartanegara Regency, East Kalimantan  
Province;

By virtue of a Special Power of Attorney, dated December 20, 2009, February 1, 2010 and February 8, 2010 respectively, granting power to 1). Muhammad Aidiensyah, S.H., 2). Erwin, S.H., M.H., all of whom are Advocates and Solicitors of the **Consultation and Legal Aid Agency of the Indonesian Civil Servants Corps (KORPRI) of Kutai Kartanegara**, having its address at Jalan Panji Number 40 Tenggarong;

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

[1.3] Having read the petition of the Petitioners;

Having read the testimonies of the Petitioners;

Having heard and read the affidavit of the Government;

Having read the affidavit of the People's Legislative Assembly;

Having heard the testimonies of the expert and witnesses of the  
Petitioners;

Having heard the testimonies of the witnesses of the Government;

Having heard the testimonies of the Related Parties, namely the Indonesian Pharmacists Association, the Indonesian National Nurses Association and the Indonesian Medical Association;

Having read the affidavit of the Related Party, dr. drh. Mangku Sitepoe;

Having examined the documentary evidence presented by the Petitioners;

## **2. FACT OF THE CASE**

and so forth

## **3. LEGAL CONSIDERATIONS**

**[3.1]** Whereas the purpose and objective of the petition of the Petitioners are to review the constitutionality of:

Article 108 paragraph (1) which reads, "Pharmaceutical practices comprising of production including quality control of pharmaceutical preparation, security, supply, storage and distribution of drugs, service of drugs by doctor's prescription, drugs information service as well as development of drugs, drugs raw material and traditional drugs must be performed by health workers having the expertise and authority according to the provisions of laws and regulations";

Elucidation of Article 108 paragraph (1) which reads, "Referred to as "health

workers” in this provision shall be pharmaceutical workers in accordance with their expertise and authority. In the event that no pharmaceutical worker is available, certain health workers may perform limited pharmaceutical practices, such as among others doctors and/or dentists, midwives, and nurses, conducted in accordance with the laws and regulations”;

Article 190 paragraph (1) which reads, ”The head of health service facility and/or health workers performing practice or working at the health service facility who intentionally refrain from giving first aid to a patient in an emergency situation as intended in Article 32 paragraph (2) or Article 85 paragraph (2) shall be penalized with imprisonment at the maximum of 2 (two) years and a fine at the maximum of Rp200,000,000 (two hundred million rupiah);

Law Number 36 Year 2009 concerning Health (State Gazette of the Republic of Indonesia Year 2009 Number 144, Supplement to State Gazette of the Republic of Indonesia Number 5063, hereinafter referred to as Law 36/2009) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution):

Article 27 paragraph (1) which reads, ”Without exception, all citizens shall have an equal position before the law and government and shall be obligated to uphold such law and government”.

Article 28C paragraph (2) which reads, ”Every person shall have the right to

improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state”.

Article 28D paragraph (1) which reads, “Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law”.

Article 28D paragraph (3) which reads, “Every citizen shall have the right to obtain equal opportunities in government”.

Article 28H paragraph (1) which reads, “Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain health service”.

Article 28J paragraph (1) which reads, “Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state”.

Whereas the Petitioners argued that the Law petitioned for review has created a dilemma and legal uncertainty for the Petitioners as nursing staff under the limited authority granted by law, while on the other hand, the Petitioners are required to perform health services;

**[3.2]** Whereas prior to considering the principal issue of the petition, the Constitutional Court, hereinafter referred to as the Court, shall first consider the

following matters:

The authority of the Court to examine, try and decide upon petition *a quo*;

The legal standing of the Petitioners;

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

### **The Authority of the Court**

**[3.3]** Whereas based on the provision of Article 24C paragraph (1) of the 1945 Constitution which reads, "*The Constitutional Court has the authority to hear at the first and final levels, the decisions of which shall be final, to conduct the judicial review of laws against the Constitution, to settle disputes regarding authority between state institutions whose authorities are bestowed by the Constitution, to decide upon the dissolution of political parties, and to decide upon electoral disputes*", which is restated in Article 10 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the Constitutional Court Law) which reads, "*The Constitutional Court has the authority to hear at the first and final levels, the decisions of which shall be final, to: a. Conduct the judicial review of laws against the 1945 Constitution of the State of the Republic of Indonesia*", *juncto* Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 concerning Judicial Authority (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to State Gazette of the Republic



of Indonesia Number 5076) which reads, "*The Constitutional Court has the authority to hear at the first and final levels, the decisions of which shall be final, to: a. Conduct the judicial review of laws against the 1945 Constitution of the State of the Republic of Indonesia*";

**[3.4]** Whereas the petition *a quo* is intended to review the constitutionality of the norms of Article 108 paragraph (1), Elucidation of Article 108 paragraph (1), and Article 190 paragraph (1) of Law 36/2009 against Article 27 paragraph (1), Article 28C paragraph (2), Article 28D paragraphs (1) and (3), Article 28H paragraph (1) and Article 28J paragraph (1) of the 1945 Constitution, therefore, the Court is of the opinion that it has the authority to examine, hear, and decide upon the petition *a quo*;

#### **The legal standing of the Petitioners**

**[3.5]** Whereas based on Article 51 paragraph (1) of the Constitutional Court Law along with the Elucidation thereof, the Petitioners in the judicial review of a Law against the Constitution shall be those who consider that their constitutional rights and/or authority granted by the 1945 Constitution are impaired by the coming into effect of the Law petitioned for review, namely:

individual Indonesian citizens (including a group of people having a common interest);

customary law community units insofar as they are still in existence and in accordance with the development of the communities and principles of the Unitary State of the Republic of Indonesia regulated by Law;

public or private legal entities; or  
state institutions;

**[3.6]** Considering also whereas on the impairment of constitutional rights and/or authority as intended in Article 51 paragraph (1) of the Constitutional Court Law, since 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 is of the opinion that five requirements must be met, namely:

the existence of constitutional rights and/or authority of the Petitioners granted by  
the 1945 Constitution;

the Petitioners consider that such constitutional rights and/or authority have been  
impaired by the coming into effect of the Law petitioned for review;

the impairment of such constitutional rights and/or authority must be specific and  
actual or at least potential in nature which, pursuant to logical reasoning,  
can be assured of occurring;

there is a causal relationship (*causal verband*) between the impairment of such  
constitutional rights and/or authority and the coming into effect of the Law  
petitioned for review;

the possibility that with the granting of the petition, the impairment of such  
constitutional rights and/or authority as argued by the Petitioners will not  
or will no longer occur;

**[3.7]** Whereas based on the explanation as provided in paragraphs **[3.5]** and

[3.6] above, the Court shall subsequently consider on the legal standing of the Petitioners in the petition *a quo* as follows:

[3.8] Whereas the Petitioners argued as individuals/a group of Indonesian citizens, and believe that they have the constitutional rights granted by Article 27 paragraph (1), Article 28C paragraph (2), Article 28D paragraphs (1) and (3), Article 28H paragraph (1) and Article 28J paragraph (1) of the 1945 Constitution as quoted in **paragraph [3.1]** which are impaired by the coming into effect of Article 108 paragraph (1), Elucidation of Article 108 paragraph (1), and Article 190 paragraph (1) of Law 36/2009;

[3.9] Whereas the impairment of such constitutional rights of the Petitioners is specific and actual or potential in nature by the coming into effect of the provisions of Article 108 paragraph (1), Elucidation of Article 108 paragraph (1), and Article 190 paragraph (1) of Law 36/2009, therefore, such impairment also has a causal relationship with Law 36/2009 petitioned for review and it can be assured that such impairment will not occur if the petition of the Petitioners is granted;

[3.10] Whereas therefore, the Court is of the opinion that the Petitioners *prima facie* have the legal standing to file the petition *a quo*. However, since there is a close relation between the impairment of the constitutional rights of the Petitioners and the principal issue of the petition, the existence or nonexistence of the impairment of the constitutional rights of the Petitioners as a result of the coming into effect of the Articles *a quo* will be considered along with the principal

issue of the petition;

### **The Principal Issue of the petition**

**[3.11]** Whereas the legal issue in the petition of the Petitioners is on the constitutionality of Article 108 paragraph (1), Elucidation of Article 108 paragraph (1) and Article 190 paragraph (1) of Law 36/2009 against Article 27 paragraph (1), Article 28C paragraph (2), Article 28D paragraphs (1) and (3), Article 28H paragraph (1) and Article 28J paragraph (1) of the 1945 Constitution with the reasons which are principally as follows:

Whereas the Petitioner (Misran) has been apprehended, detained and sentenced to 3 months Imprisonment subtracted the period in which the defendant was detained, with a fine in the amount of Rp2,000,000 (two million rupiah) under the accusation of violating Article 82 paragraph (1) subparagraph D and Article 63 paragraph (1) of Law Number 23 Year 1992 concerning Health;

Whereas the fact in the field is that most of the main community health centers and nearly all auxiliary community health centers in East Kalimantan Province and in fact, throughout Indonesia, is headed by a health worker nurse working in remote areas since the government has not been able to assign medical (doctors) and pharmaceutical (pharmacists/pharmaceutical technical personnel) personnel in such areas;

The Petitioners are facing a dilemma and legal uncertainty due to the limited

authority granted by law and at the same time, there is a shortage of health human resources or the unavailability of health workers having the expertise and authority in remote areas. On the other hand however, nursing staff are required to perform health service (medical and pharmaceutical services) for all parts of the community, particularly in emergency situations, and in fact, if they do not perform such services, they are subject to penalty of imprisonment or fine;

**[3.12]** Whereas in order to prove their arguments, the Petitioners have presented documentary evidence labeled as Exhibit P-1 until Exhibit P-9 and called the expert, Azrul Azwar, as well as witnesses, namely Trisno Widodo, H. Edy Sukamto, H. Abdul Jalal, Hj. Emy Dasimah and Andi Baharuddin, which are completely contained in the Fact of the Case section, principally as follows:

#### **Expert Azrul Azwar**

Whereas nurses must also be granted with the authority based on the need of the local community;

#### **Witnesses**

##### **1. Trisno Widodo**

Whereas geographically, East Kalimantan, particularly in Kutai Kartanagara Regency, there are 18 Districts, 248 Villages, the population is approximately 600,000, while the number of doctors is 75. If the Articles *a quo* prohibit nurses from helping the community in terms of health service

while the number of doctors is extremely limited, community service will not be as good as expected;

**2. H. Edy Sukamto**

Whereas the witness agrees that nurses are not supposed to perform any work other than their own duties, but in East Kalimantan, community service is performed to protect the community. Therefore, the government should also consider the nurses who are working based on a regulation which is still applicable;

**3. H. Abdul Jalal**

Whereas the Articles *a quo* cannot be implemented ideally in the field, particularly in East Kalimantan, since assistant pharmacists and pharmacists are not available in main and auxiliary community health centers;

**4. Hj. Emy Dasimah**

Whereas with the fact that there is a nurse in Kutai Kartanegara Regency being sentenced, health services in Kutai Kartanegara Regency including urban and remote areas have been inactive since all nurses are not willing to provide services for patients;

**5. Andi Baharuddin**

Whereas the witness hopes that nurses can provide services for the community again because currently, whenever someone is ill, a paramedic or a nurse is the one who is making the house call, no doctors have ever been called to provide service since all this time, the patient is the one who visits the doctor;

**[3.13]** Whereas the Court has heard the testimonies and read the affidavit given by the Government, which are principally as follows:

- Whereas Article 108 paragraph (1) of Law 36/2009 is intended to cautiously and carefully consider the danger which may arise in using drugs in a manner incompatible with their intended purpose, therefore, it is appropriate that the drugs to be used for the community must be administered by the persons having the competence, expertise and authority to administer such drugs;
- Whereas Article 1 sub-article 1 of Government Regulation Number 51 Year 2009 as further affirmed in Article 2 paragraph (2) which states that the pharmaceutical work as intended in paragraph (1) must be performed by the health workers having the expertise and authority for such purpose. The health workers having the expertise and authority for such purpose shall be the pharmaceutical workers which consist of pharmacists and pharmaceutical technical workers;
- Whereas if the petition of the Petitioners is granted, the consequences will

be as follows:

There will be a legal vacuum (*rechtsvacuum*) and disorder in the regulation of pharmaceutical practices;

It will lead to the circulation, procurement and distribution of drugs being performed by irresponsible parties;

The protection and monitoring of the community on the use of drugs cannot be guaranteed;

**[3.14]** Whereas the Government has called the witnesses, H. Agus Gusmara A and Asep Misbah Alfalah, who principally stated as follows:

**1. H. Agus Gusmara A**

Under the condition of limited number of health workers, particularly physicians and pharmaceutical workers, and by referring to the growth in Serang Regency, a decision letter has been issued for certain health workers which states that in the event that physicians are unavailable or not present, the designated health personnel, which in this case are nurses and midwives, may provide health services or medical technical services at health facilities or community health centers and their network, namely auxiliary community health centers, village health centers and *poliner*;

**2. Asep Misbah Alfalah**

In Serang City, there were 10 community health centers and 13 auxiliary



community health centers having 2 pharmaceutical workers in 2008. Drug management has been performed in a better, efficient manner, and it is expected that the community receive clearer information, since drugs are not just commodities which are merely sold or used;

**[3.15]** Whereas the Court has read the affidavit submitted by the People's Legislative Assembly, which principally stated as follows:

Whereas the provisions of Article 108 paragraph (1) of Law 36/2009 along with the Elucidation of the article has instead provided the juridical basis and legal certainty for the Petitioners to perform pharmaceutical practices;

Whereas the provisions of Article 108 paragraph (1) and the Elucidation thereof *juncto* Article 190 paragraphs (1) and (2) of Law 36/2009 are not in any way contradictory to the provisions of Article 27 paragraph (1), Article 28C paragraph (2), Article 28D paragraphs (1) and (3) as well as Article 28H paragraph (1) of the 1945 Constitution'

**[3.16]** Whereas the Court has heard the testimonies of the Related Parties, namely the Indonesian Medical Association, the Indonesian Pharmacists Association and the Indonesian National Nurses Association, and the affidavit of dr. drh. Mangku Sitepoe, which are principally as follows:

**1. The Indonesian Medical Association**

Whereas Article 108 paragraph (1) of Law 36/2009 is in accordance with or not

contradictory to the 1945 Constitution;

Whereas the elucidation of Article 108 paragraph (1) of Law 36/2009 and Government Regulation Number 51 Year 2009 does not explain the type of drugs referred to in the Article, in Indonesia, drugs are categorized into over-the-counter drugs, pharmacists' prescription drugs, doctors' prescription drugs (G list), psychotropic drugs and narcotic drugs. Health workers such as nurses and midwives are authorized to keep over-the-counter drugs and pharmacists' prescription drugs;

Whereas the Indonesian Medical Association hoped that there would be an amendment to the Elucidation of Article 108 paragraph (1) of Law 36/2009 and to Government Regulation Number 51 Year 2009 in order that the provision of health services for the community are not interrupted and the health workers performing such services can be protected by the law;

## **2. The Indonesian Pharmacists Association**

The Indonesian Pharmacists Association proposed that Article *a quo* should not be amended or supplemented;

Whereas Article 108 paragraph (1) of Law 36/2009 constitutes a guarantee for the community at large that pharmaceutical services will be performed in a more proper manner based on science and health profession;

## **3. The Indonesian National Nurses Association**

Whereas the empirical and juridical facts related to the Health Law have adversely affected nurses. The facts in the field show that most of the main community health centers and nearly all community health centers, particularly those in remote areas, is headed by a nurse;

#### **4. dr. drh. Mangku Sitepoe**

Article 108 of Law 36/2009 indicates that pharmaceutical practices are monopolized by the health workers in the field of pharmacy, namely pharmacists and pharmaceutical technical workers, by disregarding other health workers in the field of medicine;

Article 108 paragraph (1) of Law 36/2009, with the provision on pharmaceutical practices identical to that of Government Regulation Number 51 Year 2009 concerning Pharmaceutical Professions which restricts other health workers, has created controversies in its application from the aspect of implementation;

The constitutional rights of the nurses have been revoked by Article 108 of Law 36/2009. Article 108 of Law 36/2009 is therefore contradictory to Article 28H of the 1945 Constitution;

#### **Opinion of the Court**

#### **Principal Issue of the Petition**

**[3.17]** Whereas the principal issue of the Petitioners' petition is the judicial review of the constitutionality of the articles in Law 36/2009 and the elucidation thereof, namely:

Article 108 paragraph (1) reads, "Pharmaceutical practices comprising of production including quality control of pharmaceutical preparation, security, supply, storage and distribution of drugs, service of drugs by doctor's prescription, drugs information service as well as development of drugs, drugs raw material and traditional drugs must be performed by health workers having the expertise and authority according to the provisions of laws and regulations";

Elucidation of Article 108 paragraph (1) reads, "Referred to as "health workers" in this provision shall be pharmaceutical workers in accordance with their expertise and authority. In the event that no pharmaceutical worker is available, certain health workers may perform limited pharmaceutical practice, such as among others doctors and/or dentists, midwives, and nurses, conducted in accordance with the laws and regulations"; and

Article 190 paragraph (1) reads, "The head of health service facility and/or health workers performing practice or working at the health service facility who intentionally refrain from giving first aid to a patient in an emergency situation as intended in Article 32 paragraph (2) or Article 85 paragraph (2) shall be penalized with imprisonment at the maximum of 2 (two) years and a fine at the maximum of Rp200,000,000 (two hundred million rupiah)";

The articles and elucidation of Law *a quo* are contradictory to Article 27 paragraph (1), Article 28D paragraph (1), Article 28H paragraph (1), and Article 28J (1) of the 1945 Constitution;

Article 27 paragraph (1) reads, "Without exception, all citizens shall have an equal position before the law and government and shall be obligated to uphold such law and government".

Article 28D paragraph (1) reads, "Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law".

Article 28H paragraph (1) reads, "Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain health service".

Article 28J paragraph (1) reads, "Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state".

**[3.18]** Whereas Article 108 paragraph (1) of Law 36/2009 principally provides for health practices in the field of pharmacy, which may only be performed by pharmaceutical workers. Elucidation of Article 108 paragraph (1) of Law 36/2009 principally provides for the exceptions to the provision set forth in Article 108 paragraph (1) of Law 36/2009, namely in the event that Pharmaceutical Workers

are not available, limited pharmaceutical practice may be performed by certain Health Workers other than Pharmaceutical Workers, such as dentists, midwives and nurses, conducted in accordance with the laws and regulations. Article 190 paragraph (1) of Law 36/2009 principally provides for the criminal sanction threatened to the head and the health workers of a health service facility who intentionally do not administer first aid to a patient in an emergency situation;

The constitutional provisions in the 1945 Constitution argued by the Petitioners are related to the principles of: equal position before the law and government [*vide* Article 27 paragraph (1) of the 1945 Constitution], certainty before a just law [*vide* Article 28D paragraph (1) of the 1945 Constitution], the right to live in prosperity and the right to obtain health service [*vide* Article 28H paragraph (1) of the 1945 Constitution] and the duty to respect the human rights of others [*vide* Article 28J paragraph (1) of the 1945 Constitution];

**[3.19]** Whereas based on the explanation in the above considerations, the issue which must be considered by the Court is whether or not the provisions in the above-mentioned two articles and one elucidation are contradictory to the principles of: equal position before the law and government [*vide* Article 27 paragraph (1) of the 1945 Constitution], certainty before a just law [*vide* Article 28D paragraph (1) of the 1945 Constitution], the right to live in prosperity and the right to obtain health service [*vide* Article 28H paragraph (1) of the 1945 Constitution] and the duty to respect the human rights of others [*vide* Article 28J paragraph (1)]?

**[3.20]** Whereas prior to considering the principal issue of the petition, the Court needs to state the following matters first:

**[3.20.1]** Health is one of the basic needs of every man, it is therefore included in the constitution as a fundamental right of every person which must be protected, guaranteed and fulfilled. in order to fulfill such need, Health Workers are required, which include Nursing Staff and Pharmaceutical Workers, who are human resources educated in the field of health profession in order to participate in improving the life of their nation and country. In addition to the above, Health Workers have fundamental obligations and rights, both related to their profession and to their position as human being. With respect to fundamental rights, the state has the obligation to respect, protect and fulfill them [*vide* Article 28I paragraph (4) and Article 34 paragraph (3) of the 1945 Constitution];

**[3.20.2]** Pharmaceutical practices, in the context of maintaining and achieving health, in addition to helping towards reaching the objective of health maintenance, also contain risks which are counterproductive for health, such as physical disabilities -whether temporary or permanent (lifetime suffering)- and may even lead to death;

**[3.20.3]** Science and expertise in the field of health have developed progressively and lead to more focused specializations. Similarly, technology in the medical field has also lead to highly sophisticated methods and equipment. The advancement in science and technology with such specializations are truly a

determinant in the effort of avoiding any risks, however small they are, in performing pharmaceutical practices as described above. It is therefore, pharmaceutical practices must be performed by well-educated human resources having high competence and professionalism in line with the advancements in science and technology in their field. Such human resources are the output of a training and education process conducted in accordance with the science and expertise in their field, who are supported by adequate technology and equipment in performing their practice;

**[3.20.4]** Based on such fact, the state has the obligation to regulate in order to respect, protect and fulfill the community's fundamental rights in the field of health, in this case, of the patients receiving medication and of the Health Workers. In such regulation, the state must consider the legal elements which are most fundamental, namely legal justice, legal certainty and legal usefulness in relation to the actual condition in the community;

**[3.21]** Whereas the Court, having heard and read the Testimonies of the People's Legislative Assembly, the Testimonies of the Government and the Testimonies of the Related Party, the expert of the Petitioners, the witnesses of the Petitioners and the Government as well as having carefully examined the documentary evidence presented by the Petitioners, considers as follows:

**[3.22]** Whereas the Court is of the opinion that in the perspective of norm establishment, the main provision of Article 108 paragraph (1) of Law 36/2009, which prescribed that the production and management of drugs and traditional



drugs must be performed by Pharmaceutical Workers having the expertise and authority, cannot be deemed as contradictory to any constitutional provision in the 1945 Constitution as in the opinion of the Court, the provision is an implementation of the principle of putting someone in the position and function according to his/her competence and professionalism (the right man on the right place), which constitutes an implementation of the fairness principle. On the contrary, putting someone in the position and function not according to his/her competence and professionalism, especially in pharmaceutical practices which carry extremely high risks, would lead not only to health problems, but may also lead to death. Based on such consideration, the Court is of the opinion that in so far as it is concerned the main provision of Article 108 paragraph (1) of Law 36/2009 which reads, "Pharmaceutical practices comprising of production including quality control of pharmaceutical preparation, security, supply, storage and distribution of drugs, service of drugs by doctor's prescription, drugs information service as well as development of drugs, drugs raw material and traditional drugs must be performed by health workers having the expertise and authority according to the provisions of laws and regulations", is constitutional or not contradictory in particular to Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution. However, the specific sentence "**...must be performed by health workers having the expertise and authority according to the provisions of laws and regulations**" in Article a quo connected to the Elucidation of this article which reads, "Referred to as "health workers" in this provision shall be pharmaceutical workers in accordance with

their expertise and authority. In the event that no pharmaceutical worker is available, certain health workers may perform limited pharmaceutical practice, such as among others doctors and/or dentists, midwives, and nurses, conducted in accordance with the laws and regulations”, has created a constitutional problem, and therefore the Court will make a separate consideration;

**[3.23]** Whereas, concerning Article 190 paragraph (1) of Law 36/2009, the Court is of the opinion that in the perspective of norm establishment, article *a quo* which imposed a criminal sanction of imprisonment or fine on the head of health service facility and/or health workers performing practice or working at the health service facility who intentionally refrain from giving first aid to a patient in an emergency situation is a correct provision. The consideration is that the head and/or workers of a health service facility are the representation of the state in fulfilling the fundamental rights of its citizens, namely the right to live and to defend his/her life and living as stated in Article 28A of the 1945 Constitution, and the right to obtain health services as guaranteed by Article 28H paragraph (1) of the 1945 Constitution, therefore the state has the obligation to respect, protect and fulfill such rights as stipulated in Article 28I paragraph (4) of the 1945 Constitution. The head and/or workers of a health service facility who intentionally refrain from giving aid to a patient in an emergency situation have thereby intentionally disregard the obligation of the state, the government in particular, to provide health services for the citizens. Therefore, the Court is of the opinion that the provision of Article 190 paragraph (1) of Law 36/2009 is constitutional or not contradictory in particular to Article 28H paragraph (1) and

Article 28J paragraph (1) of the 1945 Constitution;

[3.24] Whereas the Petitioners argued that Article 108 paragraph (1) of Law 36/2009 along with the Elucidation thereof *juncto* Article 190 paragraph (1) of Law 36/2009 have created a dilemma, because on one hand, the provision of Article 108 paragraph (1) along with the Elucidation thereof provides a highly limited authority for health workers, other than pharmaceutical workers, with regard to pharmaceutical practices, while on the other hand, the provision of Article 190 paragraph (1) of Law 36/2009 states that if they intentionally refrain from giving aid to a patient in an emergency situation, they are subject to a criminal sanction of imprisonment or fine. According to the Petitioners, this has resulted in a just legal uncertainty which is contradictory to Article 28D paragraph (1) of the 1945 Constitution. With regard to such argument, the Court is of the opinion that in the perspective of norm establishment, Article 108 paragraph (1) of Law 36/2009 which requires the production and management of drugs and traditional drugs performed by Pharmaceutical Workers does not have any constitutionality issue, except for the sentence “**...must be performed by health workers having the expertise and authority according to the provisions of laws and regulations**”, which according to the Elucidation thereof are pharmaceutical workers in accordance with their expertise and authority, where in the event that no pharmaceutical worker is available, certain health workers may perform limited pharmaceutical practices, such as among others doctors and/or dentists, midwives, and nurses, conducted in accordance with the laws and regulations. The provision, if connected to Article 190 paragraph (1) of Law

36/2009 which imposes a criminal sanction of imprisonment or fine on the head of health service facility and/or health workers performing practice or working at the health service facility who intentionally refrain from giving first aid to a patient in an emergency situation, has an issue of constitutionality if it is connected to the condition of certain areas in Indonesia. The aforementioned norm would be appropriate and fair when health service facilities throughout Indonesia have complete infrastructure and sufficient human resources are available, in the sense that all kinds of competencies and professions needed in the requirements of a good health facility are available. The facts have shown that health facilities and human resources are in minimum condition. In addition to that, it is also highly difficult to access the existing health facilities due to various factors, such as the extensive and large territory of this country in that there are still numerous areas which are remote and difficult to reach, the difficult terrain due to topographical problems, state financial capability for the procurement of infrastructure, the limited number of human resources in the field of health with various specializations, etc., as is the case with the areas of the Petitioners. All of the above facts make the sentence ***“...must be performed by health workers having the expertise and authority according to the provisions of laws and regulations”*** in Article 108 paragraph (1) along with the Elucidation thereof when being connected to (*juncto*) Article 190 paragraph (1) of Law 36/2009 inappropriate to be applied equally in all areas throughout Indonesia;

[3.25] Whereas with regard to the sentence ***“...must be performed by health workers having the expertise and authority according to the provisions of***

**laws and regulations”** in Article 108 paragraph (1) and the Elucidation thereof, the Court is of the opinion that the formulation of such norm does not provide a just legal certainty since the article bases certainty on the subject of expertise and authority as intended in other laws and regulations. If there is indeed a legal certainty, it is only found in the Elucidation of the article which states that referred to as “health workers” in Article *a quo* shall be pharmaceutical workers. Such Elucidation would not be required if the provision of the said norm has been formulated in the article. Based on such consideration, the Court is of the opinion that the sentence “**...must be performed by health workers having the expertise and authority according to the provisions of laws and regulations”** creates a legal uncertainty, therefore it is contradictory to Article 28D paragraph (1) of the 1945 Constitution if it is not construed in a certain interpretation that provides certainty in order that the norm contained within the sentence can be applied in all areas in Indonesia under any conditions;

[3.26] Whereas with regards to the Elucidation of Article 108 paragraph (1) of Law 36/2009 which contains a provision of exclusion from the provision of the article, the Court is of the opinion that the placement of the exclusion provision in the Elucidation section is incorrect because such provision is still categorized as a norm establishment instead of merely an elucidation. Furthermore, the norm establishment contained in the elucidation may have an implication of imposition of criminal sanction on the violating party, even though the provision of such sanction is set forth in another article. A norm should be placed in an article. The Court is also of the opinion that in addition to the incorrect placement of norm,

the exclusion provision, as argued by the Petitioner, has lead to a situation of dilemma. This is because on one hand, health workers with extremely limited authority are required to save patients in emergency situations, while on the other hand, they are faced with the threat of criminal sanction if they administer drugs or provide other medical treatments. In fact, this has been experienced by the Petitioner. Meanwhile, any law and regulation are issued by the state for the people, for their lives and welfare. The Court is of the opinion that the existence of such exclusion provision which is highly restricted does not provide protection for patients in emergency situations, nor does it provide protection for health workers. Therefore, the Court can justify the above-mentioned argument of the Petitioners;

[3.27] Whereas based upon all of the explanations in the above considerations, the Court is of the opinion that the arguments in the petition of the Petitioners have no legal basis for a part and have legal basis for the other part, namely in so far as it is concerned the sentence ***“...must be performed by health workers having the expertise and authority according to the provisions of laws and regulations”*** in Article 108 paragraph (1) of Law 36/2009, it is unconstitutional in so far as it is not construed that the health workers shall be pharmaceutical workers and in the event that no pharmaceutical worker is available, certain health workers may perform limited pharmaceutical practices, among others, doctors and/or dentists, midwives, and nurses who perform their duties in an emergency situation which threatens the life of the patient and an immediate medical treatment is required in order to save the patient. The

Elucidation of Article 108 paragraph (1) of Law 36/2009 which provides an extremely limited authority is creating a situation of dilemma and resulted in the absence of a just legal certainty, and therefore it is contradictory to Article 28D paragraph (1) of the 1945 Constitution;

#### **4. CONCLUSIONS**

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

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

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

**[4.3]** The principal issue of the petition is legally proven in part;

Based on the 1945 Constitution of the State of the Republic of Indonesia and Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316) as well as Law Number 48 Year 2009 concerning Judicial Authority (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to State Gazette Number 5076).

#### **5. DECISIONS**

**Decides,**

To declare:

To grant the petition of the Petitioners in part;

Article 108 paragraph (1) of Law Number 36 Year 2009 concerning Health (State Gazette of the Republic of Indonesia Year 2009 Number 144, Supplement to State Gazette of the Republic of Indonesia Number 5063) in so far as it is concerned the sentence, "...must be performed by health workers having the expertise and authority according to the provisions of laws and regulations", is contradictory to the 1945 Constitution in so far as it is not construed that the health workers shall be pharmaceutical workers and in the event that no pharmaceutical worker is available, certain health workers may perform limited pharmaceutical practices, among others, doctors and/or dentists, midwives, and nurses who perform their duties in an emergency situation which threatens the life of the patient and an immediate medical treatment is required in order to save the patient;

Article 108 paragraph (1) of Law Number 36 Year 2009 concerning Health (State Gazette of the Republic of Indonesia Year 2009 Number 144, Supplement to State Gazette of the Republic of Indonesia Number 5063) in so far as it is concerned the sentence, "...must be performed by health workers having the expertise and authority according to the provisions of laws and regulations", does not have binding legal effect in so far as it is not construed that the health workers shall be pharmaceutical workers and in



the event that no pharmaceutical worker is available, certain health workers may perform limited pharmaceutical practices, among others, doctors and/or dentists, midwives, and nurses who perform their duties in an emergency situation which threatens the life of the patient and an immediate medical treatment is required in order to save the patient;

Elucidation of Article 108 paragraph (1) of Law Number 36 Year 2009 concerning Health (State Gazette of the Republic of Indonesia Year 2009 Number 144, Supplement to State Gazette of the Republic of Indonesia Number 5063) is contradictory to the 1945 Constitution of the State of the Republic of Indonesia;

Elucidation of Article 108 paragraph (1) of Law Number 36 Year 2009 concerning Health (State Gazette of the Republic of Indonesia Year 2009 Number 144, Supplement to State Gazette of the Republic of Indonesia Number 5063) does not have binding legal effect;

To reject the other and the remaining parts of the petition of the Petitioners;

To order the proper promulgation of this Decision in the Official Gazette of the Republic of Indonesia;

Hence this decision was made in the Consultative Meeting of Justices attended by nine Constitutional Court Justices, namely by us, Moh. Mahfud MD as the Chairperson and concurrent Member, Achmad Sodiki, Ahmad Fadlil Sumadi, Harjono, Muhammad Alim, Anwar Usman, Hamdan Zoelva, Maria

Farida Indrati and M. Akil Mochtar, respectively as Members on Thursday, the sixteenth of June two thousand and eleven, and was pronounced in the Plenary Session of the Constitutional Court open for the public on Monday, the twenty-seventh of June two thousand and eleven, by nine Constitutional Court Justices, namely by us, Moh. Mahfud MD as the Chairperson and concurrent Member, Achmad Sodiki, Ahmad Fadlil Sumadi, Harjono, Muhammad Alim, Anwar Usman, Hamdan Zoelva, Maria Farida Indrati and M. Akil Mochtar, respectively as Members, assisted by Ida Ria Tambunan as the Substitute Registrar, in the presence of the Petitioners/their Attorneys, the Government or its representative, the People's Legislative Assembly or its representative and the Related Parties.

**CHIEF JUSTICE,**

**Sgd.**

**Moh. Mahfud MD.**

**JUSTICES,**

**Achmad Sodiki**

**Ahmad Fadlil Sumadi**

**Harjono**

**Muhammad Alim**

**Anwar Usman**

**Hamdan Zoelva**

**Maria Farida Indrati**

**M. Akil Mochtar,**

**SUBSTITUTE REGISTRAR,**

**Sgd.**

**Ida Ria Tambunan**

The certified true Copy of this Decision is announced to the public pursuant to Article 14 of Law Number 24 Year 2003 concerning the Constitutional Court.

Jakarta, June 27, 2011

Registrar,

The image shows the official seal of the Constitutional Court of the Republic of Indonesia. The seal is circular with the text "MAHKAMAH KONSTITUSI" at the top and "REPUBLIK INDONESIA" at the bottom. In the center is a Garuda, the national emblem of Indonesia. Overlaid on the seal is a handwritten signature in black ink.

**Kasianur Sidauruk**