D E C I S I O N

Case Number 007/PUU-III/2005

FOR THE SAKE OF JUSTICE UNDER THE ONE ALIMGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing and deciding upon constitutional cases at the first and final level, has passed a decision in the case of petition for of judicial review of the Law of the Republic of Indonesia Number 40 Year 2004 regarding the National Social Security System against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

I. 1. Name : Drs. H. Fathorrasjid, M.Si.

Occupation : Chairperson of the Regional People's Legislative Assembly of East Java Province

Address : Jl. Margo Rejo Indah Blok C-438 Surabaya

2. Name : Saleh Mukaddar, S.H.

Occupation : Chairperson of the E Commission of the Regional People's Legislative Assembly of East Java Province

Address : Jl. Indrapura No. 1 Surabaya

Acting for and on behalf of the Regional People's Legislative Assembly of the East Java Province, (hereinafter referred to as the East Java Province DPRD) domiciled at Jl. Indrapura No. 1 Surabaya, with telephone number (031) 3538750 Based on a Special Power-of-Attorney dated February 1, 2005, both of whom gave power to:

1. Name : Sri Kusmini, S.KM.
   Occupation : Administrator for the East Java Province Community Healthcare Security Organizing Body
   Address : Jl. Pahlawan No. 102-108, Surabaya

2. Name : Anton Hardianto, S.H., S.Psi.
   Occupation : Administrator for the East Java Province Community Healthcare Security Organizing Body
   Address : Jl. Pahlawan No. 102-108, Surabaya

Hereinafter referred to as **PETITIONERS I;**

II. Name : Edy Heriyanto, S.H.
   Occupation : Chairperson of the Community Healthcare Security for a Healthy Rembang Implementing Unit
   Address : Gedongmulyo RT. 004 RW. 03, Gedongmulyo Village, Lasem, Rembang

Acting for and on behalf of the East Java Province Community Healthcare Security Implementing Unit (hereinafter referred to as SATPEL JPKM), domiciled at Jl. Gatot Subroto, Rembang, hereinafter referred to as; **PETITIONER II;**

III. Name : Dra. Nurhayati Aminullah, MHP., HIA.

Occupation : Chairperson of the Community Healthcare Security Organizing Body Association

Address : Komp. Saung Gintung C4/6 RT. 02/RW. 05, Cireundeu, Ciputat, Tangerang Regency,

Acting for and behalf of the Community Healthcare Security Organizing Body Association (hereinafter referred to as PERBAPEL JPKM), domiciled at Golden Plaza G 17-18, Jl. Fatmawati No. 15 South Jakarta, hereinafter referred to as; **PETITIONER III;**

Having read the petition of the Petitioners;

Having heard the statement of the Petitioners;

Having heard the statement of the Government and the Regional Representative Assembly of the Republic of Indonesia;

Having heard the statement of the Related Parties;

Having read the written statements of the Government and the People's Legislative Assembly of the Republic of Indonesia, as well as the Regional People's Legislative Assembly of the Republic of Indonesia;

Having read the written statement of the Related Parties;

Having heard the statements of the Experts and Witnesses presented by the Petitioners and the Government;

Having read the written statements of the Experts and Witnesses presented by the Government;

Having read the written statements of the Experts presented by the Petitioners;

Having examined the evidence;

LEGAL CONSIDERATIONS

Considering whereas the purpose and objective of the Petitioners' petition are as described above;

Considering whereas prior to taking into further consideration the substance of the Petitioner's petition, the Constitutional Court (hereinafter referred to as the **Court**) must first take the following matters into account:

1. Whether the Court is authorized to examining, hear and decide upon the *a quo* petition;

2. Whether the Petitioners have the legal standing to act as Petitioners in the *a quo* petition;

With regard to the abovementioned two issues, the Court is of following the opinion:

1. Authority of the Court

Considering whereas Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as **the 1945 Constitution**) stated, "*The Constitutional Court shall have the authority to hear cases at the first and final level the decisions of which shall be final, in conducting judicial review on laws against the Constitution, to decide disputes concerning to the authorities of state institutions whose authorities are granted by the Constitution, to make decisions on the dissolution of political parties, and to decide disputes concerning the results of general elections*". Similar provisions are reaffirmed in the Law of the Republic of Indonesia Number 24 Year 2003 regarding the Constitutional Court (hereinafter referred to as **the Constitutional Court Law**). Article 10 Paragraph (1) of the Constitutional Court Law reads, "*the Constitutional Court is authorized to adjudicate at the first and final level the decisions of which are final for:*

(a) Conducting Judicial review of laws against the 1945 Constitution of the State of the Republic of Indonesia;

(b) Deciding on authority disputes between state institutions whose authorities are granted by the 1945 Constitution of the State of the Republic of Indonesia;

(c) Deciding on the dissolution of a political parties;

(d) Deciding on disputes concerning the results of general elections".

Considering whereas the *a quo* petition is a petition for judicial review of the Law of the Republic of Indonesia Number 40 regarding the National Social Security System (hereinafter referred to as the **Social Security Law**) against the 1945 Constitution, and therefore the Court is authorized to hear and decide upon the petition;

2. Legal Standing of the Petitioner

Considering whereas Article 51 Paragraph (1) of the Constitutional Court Law states, "*Petitioners are those who deem their constitutional rights and/or authorities have been impaired by the coming into effect of a law, namely:*

a. *individual Indonesian Citizens;*

b. *units of customary law communities insofar as they are still in existence and in accordance with the development of the community 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"*;

Accordingly, for a person or a party to be accepted as a Petitioner in a petition for judicial review of a law against the 1945 Constitution, the person or party must first explain the following:

a. his/her/its qualifications in the *a quo* petition, whether as an individual Indonesian citizen, a unit of customary law community [which meets the requirements as intended in Article 51 Paragraph (1) Sub-Paragraph (b) above], a legal entity (public or private), or a state institution;

b. his/her/its constitutional rights and/or authorities in the intended qualification deemed to have been impaired by the coming into effect of the law petitioned for judicial review;

Considering whereas the constitutional impairment as the consequence of the coming into effect of a particular law pursuant to Article 51 Paragraph (1) of the Constitutional Court Law, the Court has stated its position, as reflected in a number of its decisions, among others Decision in Case Number 006/PUU-III/2005, namely that such an impairment must meet five criteria:

a. The Petitioner must have constitutional rights and/or authorities granted by the 1945 Constitution;

b. The Petitioner deems that such constitutional rights and/or authorities have been impaired by the coming into effect of the law petitioned for review;

c. Whereas such impairment of the constitutional right is of specific and actual nature or at least potential in nature which, based on logical reasoning, will surely occur;

d. There is a causal relationship (*causal verband*) between the intended impairment and the law petitioned for review;

e. If the petition is granted, it is expected that such constitutional right impairment will not or will no longer occur;

Considering whereas Petitioners I, namely Drs. H. Fathorrasjid, M.Si. and Saleh Mukaddar, S.H., are respectively the Chairperson of the Regional People's Legislative Assembly and the Chairperson of the E Commission of the East Java Province DPRD, who in the *a quo* petition argue that they act for and on behalf of the East Java Province DPRD, then to determine the legal standing of the intended Petitioners I, the court shall consider as follows:

- Whereas the *a quo* petition is a petition for judicial review of the Social Security Law where Petitioners I deem that the authority to regulate social security, in accordance with the maximum autonomy granted by the 1945 Constitution, specifically Article 18 Paragraphs (2) and (5), shall be the authority of the Region – as evident from the provisions of the Law of the Republic of Indonesia Number 32 Year 2004 regarding Regional Government (the **Regional Government Law**) particularly Article 22 Sub-Article (h) and Article 167 Paragraphs (1) and (2);

- Whereas, pursuant to the provisions of Article 40 of the Regional Government Law, the Regional People's Legislative Assembly is a regional people's representative institution and has the status as an element of the Regional Government administration, in the meantime, pursuant to the provisions of Article 46 Paragraphs (1) and (2) of the Regional Government Law, the Regional People's Legislative Assembly has some organs namely, among others, Chairpersons and commissions, whose establishment, structure, duties and authorities are regulated in the Regional People's Legislative Assembly Rules of Procedure under the guidance of laws and regulations;

- Whereas, pursuant to Article 36 Paragraph (1) of the East Java Province DPRD Decree Number 11 Year 2004 regarding the East Java Province DPRD, the Chairpersons of Regional People's Legislative Assembly have duties, among others, to represent the Regional People's Legislative Assembly and/or its organs in court (Exhibit P-15);

- Whereas, pursuant to Article 58 Sub-Article (f) of the Law of the Republic of Indonesia Number 22 Year 2003 regarding the Organizational Structure and Status of the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly, one of the duties of the Chairpersons of the Regional People's Legislative Assembly is to represent the Regional People's Legislative Assembly and/or its organs before the court;

- Whereas, based on the East Java Province DPRD Chairpersons Letter of Assignment Number 160/3228/050/2005 dated March 10, 2005 signed by the Chairpersons of the East Java Province DPRD, Petitioners I (Drs. H. Fathorrasjid, M.Si. and Saleh Mukaddar, S.H.) are appointed/assigned to act for and on behalf of the East Java Province DPRD as Petitioner in the judicial review of the *a quo* law (Exhibit P-42); meanwhile, based on the Minutes of the East Java Regional People's Legislative Assembly E Committee Meeting, on Thursday dated January the Twenty-Seventh Two Thousand and Five, the East Java Regional People's Legislative Assembly E Committee have decided and appointed Saleh Ismail Mukaddar, S.H. (one of the Petitioners I), as the Chairperson of the East Java Regional People's Legislative Assembly E Committee (*Kesra*) to file a legal remedy of judicial review of the Social Security Law (Exhibit P-38);

Considering, with the considerations as described above, regardless of whether or not the Petitioners' arguments are proven in the examination on the substance of the *a quo* petition, it has been clear for the Court that Petitioners I have sufficiently fulfilled the requirements as intended in Article 51 Paragraph (1) of the Constitutional Court Law, thus having the legal standing to act as Petitioner in the *a quo* petition;

Considering whereas Petitioner II, Edy Heriyanto, S.H., the Chairperson of the Community Healthcare Guarantee Implementing Unit, who stated, in the *a quo* petition, that he is acting for and on behalf of the Community

Healthcare Guarantee Implementing Unit (abbreviated as *SATPEL JPKM*), then in determining the legal standing of Petitioner II, the Court will consider as follows:

- Whereas Petitioner II, in his petition, claimed to be a legal entity whose constitutional rights/authorities to execute SATPEL JPKM duties and responsibilities in order to organize, coordinate, and develop the JPKM program as regulated in the Regional Regulation Number 08 Year 2003 have been by the coming into effect of Article 5 Paragraphs (1), (3), and (4) of the Social Security Law on account of not having equal opportunities within the government and not acquiring the rights to the acknowledgement, guarantee, protection, and legal certainty, while also receiving discriminatory treatment, and not getting the protection against the said discriminatory treatment from the Central Government *c.q* the Health Department (please refer to petition, pages 7-8);

- Whereas Petitioner II also deemed that the provisions of Articles 18, 18A, and 34 of the 1945 Constitution – where the aforementioned rights/authorities are set forth, according to Petitioner II, have been regulated further in the Regional Government Law Article 14 Paragraph (1) Sub-Paragraph (a), Article 21 Sub-Article (a), Article 22, and Article 136 – as his constitutional rights/authorities and such constitutional rights/authorities are deemed by Petitioner II as having been impaired by the coming into effect of Article 5

Paragraphs (1), (3), and (4) of the Social Security Law (please refer to petition, pages 8-10);

- Whereas the establishment of SATPEL JPKM has been based on the Rembang Regent Decision which refers, among others, to the Regional Regulation of Rembang Regency Year 2003 regarding the Organization of the Healthcare Community Guarantee Program, Joint Decree of the Minister of Home Affairs and Regional Autonomy and the Minister of Health and Social Security of the Republic of Indonesia Number 400-048 and Number 140/Menkes.Kesos/SKB/II/2001 regarding Socialization and Development and Management of Healthcare Community Guarantee (JPKM), and the Law of the Republic of Indonesia Number 23 Year 1992 regarding Health (Exhibit P-29);

- Whereas Petitioner II did not explain in his case whether in his status as the Chairperson of the Healthy Rembang Community Healthcare Guarantee Implementing Unit, he has the right to act for and on behalf of the SATPEL JPKM in accordance with the prevailing provisions;

- Whereas Petitioner II clearly has different qualifications from Petitioners I, however in his petition, Petitioner II has used arguments which are partly similar to those of Petitioners I in explaining the constitutional rights impaired as a result of the law petitioned for judicial review;

Considering, based on the foregoing description, it is evident that Petitioner II has met neither the requirements as intended by Article 51 Paragraph (1) of the Constitutional Court nor the criteria of constitutional impairment which have become the Court's stance as described above, therefore the Court is of the opinion that Petitioner II does not have the legal standing in the *a quo* petition;

Considering whereas Petitioner III, namely, Dra. Nurhayati Aminullah, MHP, HIA, is the Chairperson of the Community Healthcare Guarantee Organizing Body Association (PERBAPEL JKPM), whose members consist of Community Healthcare Guarantee Organizing Bodies (Bapel JPKM). In examining the legal standing of Petitioner III, the Court will consider as follows:

- Whereas Petitioner III, in her petition, explained her qualifications in the *a quo* petition as an individual Indonesian citizen, claiming that her constitutional rights have been impaired by the coming into effect of Article 5 Paragraphs (1), (3), and (4) of the Social Security Law due to, according to Petitioner III, not receiving equal opportunities in the government and not receiving the rights to the acknowledgement, guarantee, protection, and legal certainty with justice and equal treatment before the law, as well as receiving discriminatory treatment while also not getting protection from the Government *c.q*. the Health Department (please refer to the petition, pages 10-11);

- Whereas Petitioner III also deemed that the provisions of Article 18 Paragraph (6) of the 1945 Constitution which reads, "*The Regional*

Governments shall have the right to stipulate regional regulations and other regulations to implement autonomy and duty of assistance", and Paragraph (7) which reads, "*The structure of and procedures for the administration of Regional Government shall be regulated in law*" contain her constitutional rights. Petitioner III deemed that such constitutional rights have been regulated further in Article 139 Paragraph (1) of the Regional Government Law which regulates that the community has the right to give input in the context of preparation or discussion of the Draft Regional Regulation. Petitioner III deemed that it is these very rights that have been impaired by the coming into effect of Article 5 Paragraphs (1), (3) and (4) of the Social Security Law (please refer to petition, page 11);

Considering, based on the foregoing description, it is evident that on the one hand, Petitioner III explained her qualifications as an individual Indonesian citizen. In such qualifications, none of her constitutional rights have been impaired by the coming into effect of Article 5 Paragraphs (1), (3), and (4) of the Social Security Law. On the other hand, Article 18 Paragraphs (6) and (7) of the 1945 Constitution, even if they contain the substance of such rights, such rights are not the constitutional rights of Petitioner III in her qualification as an individual Indonesian citizen. Furthermore, referring to the rights of the community to give input in the context of preparation or discussion of the Draft Regional Regulation Law and claiming it to be an impairment of the constitutional rights of Petitioner III as an individual Indonesian citizen due to the coming into effect of Article 5 Paragraphs (1), (3), and (4) of the Social Security Law, is an

inaccurate construction of thought. Therefore, the Court is of the opinion that Petitioner III whether as an individual Indonesian citizen or on behalf of the PERBAPEL JPKM, does not meet the requirements as intended in Article 51 Paragraph (1) of the Constitutional Court Law and accordingly must be declared as not having the legal standing in the *a quo* petition;

Considering whereas since the Court is authorized to hear the *a quo* petition which was filed by the Petitioners, one of which has the legal standing as Petitioner, then the Court will further consider the substance or principal case of the petition;

3. Principal Issue of the Petition

Considering whereas the law petitioned for judicial review in the *a quo* petition is the law concerning the national Social Security system, which therefore is directly connected to one of the state's ideals (*staatsidee*) underlying the formulation of the 1945 Constitution in the context of realizing the objectives of the state, as asserted in the 1945 Constitution Preamble fourth Paragraph which states, among others, "*Furthermore, in order to form a Government of the State of Indonesia which shall protect the entire Indonesian nation and the entire Indonesian native land, and in order to advance general welfare …., Indonesia's National Independence shall be enshrined in the Constitution of the State of the Republic of Indonesia…*";

Considering whereas the aforementioned state's ideals (*staatside*) "*to advance general welfare*" is asserted further among others in Article 34 of the 1945 constitution. In relation to the *a quo* petition, Article 34 Paragraph (2) of the 1945 Constitution states, "*The state shall develop a social security system for all of the people and shall empower the weak and underprivileged people in accordance with the human dignity*". Furthermore, Paragraph (4) from Article 34 of the 1945 Constitution states, "*Further provisions concerning the implementation of this Article shall be regulated in law*". The question is – while also becoming the principal issue of the *a quo* petition – is how a law should elaborate on the definition of "State" in implementing the mandate of Article 34 of the 1945 Constitution, particularly Article 34 Paragraph (2), so that it will clarify who truly has the authority to develop the aforementioned Social Security system, whether it is the Central or Regional Government or both. The clarification on this issue is extremely important considering that the right to the Social Security is said to be a part of human rights in the 1945 Constitution, as asserted in Article 28H Paragraph (3) of the 1945 Constitution which states, "*Every person shall have the right to social security allowing him/her to develop completely as a dignified human being*". Such an acknowledgement creates a duty for the State to respect, protect, and fulfill the intended rights;

Considering whereas towards such a question, based on the elaboration in the petition and the Petitioners' statement in court, it can be concluded that the Petitioners deemed that such authority is in the hands of the Regional Government, as evident from the provisions of Article 13 Paragraph (1), Article

21, Article 22, Article 167, Article 136, Article 140 Paragraph (1) of Law Number 32 Year 2004 concerning Regional Government, with the intended Law Number 32 Year 2004 being deemed by the Petitioners as a further regulation of the provisions in Article 18, Article 18A, Article 18B, and Article 34 of the 1945 Constitution (please refer to the petition pages 4-6);

Considering whereas in examining this petition, the Court have heard the statement and read the written statement of the Government, read the written statement of the People's Legislative Assembly, heard the statement and read the written statement of the Regional Representative Council, heard the statement of experts presented both by the Government and the Petitioner, heard the statement of the witnesses, from the side of both the Government and the Petitioner, as well as the related parties – as completely described in the Principal Issue section of this decision – which principally state as follows:

1. The Government's Statements

The Government, in this case represented by the Minister of Law and Human Rights, Minister of Health, Minister of Home affairs, and Minister of Social Affairs, in its written statement received at the Court's Registry Office on May 12, 2005 and the Supplement to the Government's Written statement which signed by the substitution attorney of the Government, A.A. Oka Mahendra, S.H., received at the Court's Registry Office on July 4, 2005, as well as oral statements presented in the hearing, which principally state as follows:

- Whereas the National Social Security System (SJSN) is basically a government program that has the objective of providing certainty on Social Security and protection for the all the Indonesian people. Through the SJSN, it is expected that every resident's basic necessities to live adequately can be fulfilled, which can be missing or diminished at any time due to, among others, decreased income, illness, accidents, termination of employment (PHK), expiration of work period (pension), and even of old age.

- Whereas thus far the Social Security program in Indonesia has remained partial and not integrated in accordance with the function and regulation basis and objective of each program, namely the Social Security for private manpower program established based on the Law of the Republic of Indonesia Number 3 Year 1992 regarding Manpower Social Security (JAMSOSTEK) which covers health implementation security, work accident security, old-age security and death security for manpower in the private sector, which is managed centrally to ensure portability due to the constantly changing assignment locations, work locations and domiciles of the participants; social security programs for civil servants namely the Savings Fund program and Civil Servants Insurance (*Taspen*) established based on Government Regulation Number 26 Year 1981 regarding Savings Fund and Civil Servants Insurance, while there's also Health Insurance (*Askes*) whose

membership is obligatory for civil servants, pension-recipients, independence pioneers, veterans and members of their families, whose the management is also centralized to ensure portability since the participants whose domiciles often change; the Armed Forces of the Republic of Indonesia Social Insurance Program for the members of the National Armed Forces (TNI), members of the Police Force of the Republic of Indonesia (POLRI), and civil servants under the Department of Defense/TNI/POLRI along with their families, established based on Government Regulation Number 67 Year 1991 regarding Social Insurance for the Armed Forces of the Republic of Indonesia, having a centralized management due to the change in assignment and domicile locations;

- Whereas, in reality, the aforementioned programs encompass only a small part of the community, whereas most of the Indonesian community have not obtained adequate social security protection, meanwhile such existing social security programs have not been able to provide adequate protection, benefit or justice;

- Whereas in relation to the foregoing description, it is deemed necessary to arrange a National Social Security System to realize a synchronized implementation of various forms of social security provided by several organizers in order to cover a wider range of community as well as to provide bigger benefits for the participants;

- Whereas with the coming into effect of the Social Security Law, which is, among others, intended to provide greater security for all the Indonesian people, in accordance with Article 34 Paragraph (2) of the 1945 Constitution which reads, "*The state shall develop a social security system for all of the people and shall empower the weak and underprivileged people in accordance with the human dignity*". Therefore, a similar system must be established through the National Social Security System (which is fair and equal for all the people) to regulate the implementation of a social security system which is consistent with universal principles (as regulated in Article 4 of the Social Security Law), which is to be followed up by the determination of a social security organizing body;

- Whereas, universally, the implementation of a social security program is within the authority of the central government, even in federal nations. Therefore, it shall become peculiar should Indonesia as a unitary state, have its social security programs organized by each region, and therefore it is already proper that the implementation of social security becomes the authority of the Central Government;

- Whereas since the nature of social security funding originates from tax collections (Social Security Tax) which is obligatory, the amount would be proportional to the income, and the income/salary would be the basis for calculating the fees/contributions, then the implementation of

social security would be a fiscal affair (domain) which pursuant to the provisions of Article 10 of the Regional Government Law is authority that cannot be surrendered to Regional Governments;

- Whereas since the social security fees are obligatory, as is the tax collections, it must be regulated in accordance with Article 23A of the 1945 Constitution. Therefore, if the authority to regulate social security and establishment of its organizing body is given to the region, as demanded by the Petitioners that will actually constitute a violation of and is contradictory to Article 23A of the 1945 Constitution.

2. **The Statement of the People's Legislative Assembly**

The People's Legislative Assembly, through its written statement received at the Court Registry Office on June 1, 2005, have given statements which is essentially similar to the Government's statement. The intended statement states as follows:

- The background to Article 5 Paragraph (1) of the Social Security Law which states, "The Social Security Organizing Body must be established by law", is as follows:

    1. Various existing social security implementing bodies have not been able to provide a fair and adequate protection for the participants in accordance with the program benefits which are the participants' rights;

2. The National Social Security System must be able to synchronize the implementation of various forms of social securities provided by several organizers to reach greater participation, for example, not only in protecting workers in the informal sector (such as farmers, fishermen, independent daily laborers and those who work independently, but also for all of the Government assistance or compensation beneficiaries, namely the poor and the incapable);

3. The implementation of social security involves the rights of the people at large, and Article 33 of the 1945 Constitution implies that every regulation concerning the people's rights must be made by law;

- Whereas the regulation as intended in Article 5 Paragraph (3) of the Social Security Law regulates the Social Security Organizing Body in a limited manner because:

    1. The national social security system currently developed is a system which serves as the basis for the implementation of the national social security system. This means that every social security within the scope of this law must be in accordance with the Social Security Law;

2. The Social Security Organizing Body must have a wide scope with its branches that being distributed in various regions to facilitate the provision of social security;

3. The Social security Organizing Body has been recognized by the general public;

4. The Social security Organizing Body have had a good management so that it is deemed capable of organizing various social security systems;

5. If the number of Social Security Organizing Bodies has been determined, then it will help the Government in exercising supervision;

6. The number of Social Security Organizing Bodies even in capitalist nations is restricted by law. Moreover, there is a tendency toward a single body (single player), such as in South Korea, the Philippines, and Taiwan;

7. Countries that already have too many social security organizing bodies (multi-player system) have started to conduct the federation as well as merger approach, for example in Germany and Japan. The objective is to ensure the maximum level of efficiency that can provide greater benefit for the participants;

- In its connection with Article 5 Paragraph (4) of the Social Security Law, it is said that although in Article (3) the Social Security Organizing Body said to be limited, Article (4) still allows the existence of a Social Security organizing Body other than those intended in Article (3) insofar as still needed, and that new ones can be established by law;

- With regard to the existence of Community Healthcare security Organizing Bodies (Bapel JPKM) and Healthcare Security Implementing Unit (Satpel JPKM), there is no relationship between the Social Security Law, considering that Bapel JPKM and Satpel JPKM are different institutions (which have not been established under strong laws), whether in form or objective, with the ones regulated by the Social Security Law;

3. **The Statement of the Regional Representative Council**

The Regional representative Council, verbally in the hearing on Wednesday, June 1, 2005, as well as in writing, gave among others the following statements:

- Whereas the Social Security Law provides the certainty of social protection and welfare for all the Indonesian people;

- Whereas in essence, the Regional Representative Council is similar opinion that if the regions are given the authority to manage and handle every government affair other than government affairs

stipulated by law, including the social security system, in accordance with the principle of a true and greatest autonomy;

4. **Expert Statement of Prof. Hasbullah Thabrany, Dr., MPH, dr. PH**

Expert Prof. Hasbullah Thabrany, Dr., MPH, dr. PH, has provided his statement which confirms the statements of the Government as well as the People's Legislative assembly. The oral statements of this expert as well as of the people's legislative assembly on June 1-5 2005 and also their written statements, contain several issues, among others as follows:

- Whereas in the concept of social security, people are obligated to pay a fee based on specific proportions out of his income. Since it is obligatory, then it is not different from taxes, so that it is within the public domain, not private domain.

- Whereas, after conducting a thorough discussion for more than three years, the decision to broaden the national social security program, in terms of the types of the program as well as the benefits to be provided, and to synchronize various social security programs, in terms of the amount of fees, the extent of social security benefit, as well as the implementation procedures have been taken to ensure social justice for all the people all over the motherland, without having to differentiate in terms of occupation, domicile, or other socio-economic characteristics;

- Whereas in the Social Security Law, the national social security system in Indonesia is established on the basis of obligations of the Indonesian People (workers that have income in the form of wages, non-wages for workers in the informal sector), employers, and the Government to give contributions in order to face the risks of the future. The aforementioned contribution funds are collected by the Social Security Organizing Body (BPJS) and can only be used for the greatest interest of the people (all the people, with the assumption that all the people have become participants), and the nature of the management must be non-profit, accountable, transparent, and so forth as regulated in Article 4 of the Social Security Law;

- Whereas the system established by the Social Security Law does not actually provide protection or special rights to the *Satpel* or *Bapel JPKM* which have not been long since their establishment and does not have a strong legal foundation (since it was formed only upon the permit of the Provincial Government). The Social Security Law absolutely does not intend to establish an organizing body or a business legal entity to organize a social security program. Since the social security program which ensures the basic rights of the residents is actually a Government program, because of its natural monopoly characteristic, which forces and which must accommodate all the people, the rich and the poor, the healthy and the sick, those who have

jobs and those who are jobless, in a rich or poor region – can not be conducted by a private entity;

- Whereas the initial concept of the Social Security Law is to integrate all of the existing organizing bodies (ASABRI, Askes, Jamsostek, and Taspen) into one National Social Security Institution, on a par with the Social Security Administration in the United States of America, which manages all of the social security programs for all of the residents. However, this idea was vehemently opposed by the leaders of each of the abovementioned organizing bodies, so that eventually they took the middle courts namely by not changing the existing organizing bodies but rather by establishing the National Social Security Council with the task of conducting studies and synchronizing the implementation of social security currently separate and not providing the same security for the same groups towards the implementation of the same social security for all groups of residents (people). Gradually, existing organizing bodies must adapt to the provision of Article 4 of the Social Security Law;

- Whereas in fact, it is unpermitted and unnecessary for the Regions to establish social security organizing body which is exactly similar and organizes the same social security programs with those regulated by the Social Security Law. The Social Security Law is an instrument of law that ensures the rights of all the people to fulfill their basic and

adequate living needs, regardless of which Indonesian territory he lives in. The decentralized and independent organizations will result in a gap between rich and poor regions and will not always ensure that every person will receive the uniform and standard services wherever he/she may reside or whether he/she change his/her addresses from year to year for the rest of his/her life. However, the Regional Government may establish a body (for example, a Region -Owned Enterprise) or program (which is implemented by the regional government officials/organs such as the health services or social services) to provide additional security which is not regulated or ensured by the Social Security Law. This is in accordance with the complementarity or subsidiarity principle (like in Germany);

- Whereas the expert pointed out that the petition for judicial review filed by the Petitioners is motivated by money factor because the appointment of PT. Askes based on Minister of Health Decree Number 1241/2004 as the manager of health security funds for the poor, has caused Bapel JPKM (including the two Bapels which became the Petitioners) to no longer receive any aid grants from the Government. This, according to expert, was brought up in a panel discussion held in December 2004 at the Le Meridien Hotel Jakarta which discussed the intended Minister of health Decree;

- Regarding the existence of Bapel JPKM, at first Bapel JPKM was established based on Law Number 23 Year 1992, whose Article 66 mentions that the government shall develop, promote healthcare security for the community. That Article also says that the organizing body of such healthcare security is regulated by the government. However, in reality, the government regulation has not existed with the Department of Health making a Minister of Health Regulation to regulate the aforementioned implementing bodies. Thus, the establishment of the implementing bodies were legally flawed. Previously, according to the Regulation of the Minister of Health, Bapel can be in the form of a Limited Liability (PT) legal entity, a cooperative which, with the permission of the Minister of Health, could sell the health insurance product called JPKM. It is not actually called insurance. In addition, the nature of JPKM Implementing Bodies is the organization of commercial insurance which should actually abide by the Insurance Law. This mistake was corrected with the Social Security Law;

5. **Expert Statement of Dr. Sulastomo, MPH**

Expert Dr. Sulastomo, MPH, in a hearing on June 1, 2005 explained the issues which are essentially in line with the statement of the Government as well as the written statement of the People's Legislative Assembly. He also stated as follows:

- With regard to the social security organizing body, it is in fact true that in many states, social security was first established out of many bodies, however in its development then the tendency has led to become a federation or merger, even becoming single, to be more efficient;

- The impression of monopoly in the implementation of social security is due to the fact that the social security organizing body must not – like private entities – only request for the participation of parties that will definitely bring profit. Those who apparently suffer from an illness can not be rejected as participants, while it would be different if the implementation is organized by private parties.

6. **Expert Statement of Prof. dr. Ali Ghufron Mukti, M.Sc., Ph.D.**

Expert Prof. dr. Ali Ghufron Mukti, M.Sc., Ph.D., has given his oral statement in the hearing on Wednesday, June 1 and July 5, 2005, and also his written statement which principally state as follows:

- Whereas the mandate of the constitution to the state to develop a social security system for all the people and to empower the weaker and incapable communities in accordance with human dignity may be implemented in the national system order, insofar as such system has the capability to fulfill the principal prerequisites therefor, among others:

- Fulfilling the basic needs of every people of Indonesia, whether in the city or remote villages, in a rich region or poor region, in center or in the regions evenly and still prioritizing a pluralist approach in organizing social security to fulfill the basic needs of the people in various regions;

- Enabling every Indonesian people individual to completely develop as a dignified person;

- Settling social problems preventively and thoroughly which is one of the functions of developing the social security system from the socio-economic approach;

- Empowering the Regional Government as the community's representative in the region by facilitating and developing the regional community to grow and develop the commitment of autonomous regions towards capacity building efforts in their regions in developing social security system as its obligation;

- Developing the coordinated financing and public service as well as its development as an integral and holistic system that fulfills the basic service needs which are close and accessible to the community in an independent and complete manner;

- Arranging and laying the foundation for the social security system development based on economic with the principles intended in Article 33 Paragraph (4) of the 1945 Constitution;

- Whereas since the underlying thought and principles used in determining the substance of the provisions of Article 5 Paragraphs (1), (3), and (4) and Article 52 of the Social Security Law are different from, even contradictory to, the concept of social security implementation within the national system, then for the smooth implementation of social security with a perspective of decentralized approach, pluralism, oligo-player, subsidiarity, and the risk equalization system in the national system, people with a wise attitude, care and a high and strong commitment are needed to guard and encourage the realization of a perspective-directed social security implementation as intended by the aforementioned expert (decentralization, pluralism, subsidiarity, and the risk equalization system). For that purpose, the existence of a national Social Security Council (DSJN) as regulated in Chapter IV of the Social Security Law becomes extremely important in materializing and conducting the national system in organizing the social security guided by the perspective of decentralization, pluralism, oligo-payer, subsidiarity, and risk equalization);

- Whereas in order that the development of the social security system, whether in terms of the program, participation, and investments can be

conducted without having to be gripped by the national system as the minimum standard for social security system development, which could extinguish the regional innovation and creativity in the development of social security, then it is necessary to establish a Regional Social Security Council as the trustee or the representatives of the funds entrusted by the participants/ community with the task being more or less similar to that of the DSJN but with the authority being limited to the scope of the region only..

7. **Expert Statement of Prof. Dr. Benjamin Hoessein, S.H.**

Expert Prof. Dr. Benjamin Hoessein, S.H. in the hearing on June 1, 2005 stated, among others:

- Social security is a “spare-part” of government affairs, which in other words, is only a part of government affairs. In the context of a unitary state, anywhere in the world, there are certain issues which could never be decentralized to autonomous regions or Regional Governments, or which, in other words, would definitely be implemented by centralization. However, on the other hand, outside of the decentralized affairs, it would not be possible for there to be an affair of any kind which would be 100% being exclusively an affair of the Regional Government;

- Social security in the Social Security Law, which was expressly stated as national social security, at least, requires a uniformity in policy, but could also be a uniformity in implementation. Therefore, it seems that it would not be a full and complete decentralization. Small parts of the social security may be implemented by autonomous regions, perhaps in the form *medebewind*, perhaps in the form of de-concentration towards the governor, and so forth, depending on the implementing regulation in the future;

8. Expert Statement of Dr. H. Hotbonar Sinaga

Expert Dr. H. Hotbonar Sinaga in the hearing on June 1 and July 5, 2005 provided his statements, among others, as follows:

- In insurance business, an important principle is applied which is known as the “large quantity law” namely , the more participants or insured are, the more secure company’s position will be compared to that if the amount of the insured was smaller, so that this is suitable for social security since the number of participants are great and the number of risks insured are great as well. Greater number of participants or insured will create or approach the cross-subsidies which could come near perfection;

- Social security can be implemented with a single provider or multi-provider system. However, the greatest risks faced are similar, namely

risks that are related with solvability, namely the level of financial health or fund adequacy to fulfill all of its obligations. The single provider system will also face risks, however such risks will only get bigger with the multi-provider system, especially if the organizer is a private entity;

- In many countries, the implementation of the social security system is in fact centralized, because such method will strengthen the bargaining position of the organizer in conducting negotiations for example with the farming sector, health equipment company sector, and so forth;

- Social insurance program is subject to the provisions in the insurance law and pursuant to the insurance law, the social insurance program is an insurance program whose implementation is obligatory and it was also said that only state-owned enterprises could organize it, so that it has been suitable to the Social Security Law;

9. Expert Statement of Didi Achdijat, M.Sc., FSAI, AAIJ (Actuary)

Expert Didi Achdijat, in the hearing on June 1, 2005, explained that the existence of the social security program must actually be organized by the state. However, the implementation can be delegated to the regions. Concerning the organizing body, any new law is not necessary. The law merely stipulates how to establish social security system or social insurance system.

10. **Written statement of the Related Party PT Askes (*Persero)***

The related party PT Askes (*Persero)*, in its written statement received at the Court's Registry Office on May 27, 2005, has provided statements which are essentially in line with the statements of the Government and the People's Legislative Assembly. At the closing part of its statements, it is said that the implementation of health security as a part of the people's welfare will be more effective toward universal coverage by it is based on the principles of social security referred to in the Social Security Law;

11. **Written Statement of the Related Party PT ASABRI (*Persero*)**

The concerned party PT ASABRI (*Persero*), in their written statement received at the Court's Registry Office on May 25, 2005, has given its statement which basically accepted the presence of the Social Security Law and has given its aspiration during the formulation of the Draft Law which essentially desired that whatever form of the legal entity or its organization was, the amount (nominal) and the type of benefit to be received in the future by the ASABRI participants would not be reduced, In fact it was even expected to increase at the moment of adjustment of PT ASABRI (*Persero*) to the Social Security Law in accordance with the mandate of Article 52 of the Social Security Law;

12. **Written Statement of the Related Party PT JAMSOSTEK (*Persero*)**

The related party PT Jamsostek (*Persero)*, in its written statement received at the Court's Registry Office on May 25, 2005, gave its statement which basically states that the overall implementation of the Manpower Social security has applied the mandate of the Social Security Law, namely its foundation, as well as its principles, and therefore all that remains required is an adjustment of the status of legal entity from PT *Persero* to become a non-profit legal entity;

13. **Written Statement of PT. TASPEN (*Persero*)**

The related party concerning PT. TASPEN (*Persero*), in its written statement received at the Court's Registry Office on May 25, 2005, gave its statement which basically explained the existence of PT TASPEN (*Persero*), and at its concluding part. stated that PT TASPEN (*Persero*) which, based on Article 52 Paragraph (2) of the Social Security Law is obligated to accommodate itself, has not been able to implement the pension program as intended in Chapter VI Articles 18 through 46 of the Social Security Law since there have been no implementing regulations, so that up to the present time PT TASPEN (*Persero*) still organizes pension and old age savings programs as mandated by Law Number 11 Year 1969, Article 32 of Law Number 43 Year 1999, and Government Regulation Number 25 Year 1982 regarding Civil Servants' Social Insurance;

14. Statement of the Indonesian Actuary Union

The Indonesian Actuary Union presented its statement before the court on May 12, 2005 and gave its written statement received at the Court's Registry Office on May 19, 2005, which principally stated that although they support the government to develop a national Social security system, they gave the following notes concerning the Social Security Law:

- There is a confusion in the principle of portability in the Social Security Law which only guarantees the continuation of social security when the participant changes their occupations or addresses, while actually the principle of portability should have guaranteed the social security of the participants even though the participants merely change their organizing bodies because the participants' rights to choose must remain ensured to obtain good service through the principle of portability which applies among organizing bodies;

- Maintaining Article 5 Paragraph (3) of the Social Security Law, whereas the provision of Article 15 Paragraph (1) is maintained, will result in the emergence the identity of social security participants to be no longer single, since every social security organizing body (BPJS) is obligated to issue an identity number for social security program participants, not being supported by the principle of portability applied among BPJS;

- There is a confusion in the management of social security funds where in the case of the social security fund, a separation between the operational funds of BPJS and the funds used for the participants' welfare has not been regulated. However, Article 50 of the Social Security Law has regulated BPJS' obligation to establish a technical reserve fund in accordance with the generally practiced standard actuarial applied to the public, so that the calculation of said technical reserve fund is questioned. Therefore, a trust fund law is needed to regulate on everything related to trust fund and trustee before the BPJS is established or appointed so that the social security fund managed by trust funds principle can be truly realized for the welfare of the participants, not for the welfare of the BPJS administrators.

15. **Written Statement of the Indonesian Insurance Management Experts' Association**

The Indonesian Insurance Management experts' Association has given its written statement received at the Court's Registry Office on May 18, 2005 which basically responds positively to the Social Security Law. However, it gives a note that the appointment of fourth Social Security Organizing Business Entities is a discriminatory treatment against as well as threatening the existence of insurance companies, especially life insurance and pension fund businesses, so that it creates a threat to the

field of employment for hundreds of thousands of people working in such business;

16. **Statement of Witness Ir. Bambang Susanto Priyohadi, MPA (Regional Secretary of the Yogyakarta Special Province)**

Witness Ir. Bambang Susanto Priyohadi, MPA, in the hearing on June 1, 2005, presented gave his statement, among others, that based on the Minister of Health Decree Number 781/Menkes/SK/VI/2003, the Government of the Special Province of Yogyakarta (DIY) established a body that manages funds with the approach of insurance in order to serve 909 thousand (30%) poor residents in the DIY which could actually provide service not only to the hospitals and community health center, but could also reach street children and orphanages. However, as a result of the existence of the Social Security Law, the aforementioned program was discontinued;

17. Statement of Witness dr. Suratimah Wiyono (Chairperson of the Social security Organizing Body of the DIY Province)

Witness dr. Suratimah Wiyono, in the hearing on June 1, 2005, gave her statement which principally stated as follows::

- In 2003, through a Governor Decree, a Social Health Security Organizing Body for the DIY Province was established. Its duties, were to manage the poor families health security funds, to develop and

organize social health security, to elaborate and implement general policy stipulated by the Trustee Council (which was also established through the Decree of the DIY Governor, consisting of various elements, namely Non-Governmental Organizations, the Government, and professional element). The Source funding came from the Fuel Subsidies Compensation Reduction program (PKPS BBM) for health sector plus provincial funds through the Regional Revenues and Expenditures Budget (APBD);

- In its implementation, the Health Social Security Implementing Body, also applied principles as applied to the social security which, based on the examination results of Inspector general's team assigned by the Minister of Health, was considered successful;

- With the existence of the Social Security Law, all of the aforementioned programs were discontinued since the Organizing Body was no longer allowed to exist;

18. **Statement of Witness Drg. Moeryono Aladin, SIP, MM (Former Member of the Social Security Draft Law Special Committee)**

Witness Drg. Moeryono Aladin, SIP, MM, in the hearing on June 1, 2005, provided his statement which is principally as follows:

- Whereas the discussion on the Social Security Draft Law has followed the correct procedures and in the process has already gone through the accommodation of the people's aspirations;

- The witness acknowledged that, at the moment when it was still a draft, the discussion on Article 5 of the Social Security Law was very tough before coming to the decision that the establishment of the social security organizing body must be made by law;

- During the discussion on the Social Security Draft Law, there were no talks regarding Organizing Bodies, even the witness confessed he never heard about the existence of an Implementing Body (*Bapel*);

19. **Statements of other Witnesses**

In the hearing on July 5, 2005, statements of other witnesses were also heard, namely from I Made Suda Arsana (Bapel JPKM of Jembrana regency), Edy Suwarno (Chairperson of Bapel JPKM of Pati Regency), George Juan Marantika (Bapel Jamkesos of the special Province of Yogyakarta), all of whom explained that in essence, the healthcare security program implemented thus far (prior to the formulation of the Social Security Law) had been in accordance with the intention of Article 34 Paragraph (2) of the 1945 Constitution;

Considering whereas, after the Court thoroughly heard, read, and observed all of the statements of the Government, the People's legislative

Assembly, the Regional Representative Council, experts, witnesses, and the related parties as elaborated above, Court will further consider the following:

- whereas although the 1945 Constitution has explicitly obligated the state to develop a social security system, the 1945 Constitution, however, does not obligate the state to follow or choose a specific system in the development of the intended social security system. The 1945 constitution, in this case Article 34 Paragraph (2), only provides for the constitutional criteria – which also serve as the objectives – of a social security system which must be developed by the state, namely that the intended system must cover all the people with the intention of empowering the weak and the incapable in accordance with human dignity. Therefore, whichever system is chosen in the development of the aforementioned social security system must be deemed as constitutional, in the sense that it is in accordance with Article 34 Paragraph (2) of the 1945 Constitution, insofar as such a system covers all the people and is intended to increase the capacity of the weak and incapable communities in accordance with human dignity;

- whereas social security can be conducted both through a social insurance system financed by insurance premiums and social assistance with funding acquired from tax revenues, with all its advantages and shortcomings, and since Article 34 Paragraph (2) of the 1945 Constitution only determines that the social security system obligated to be developed by the state must encompass all the people and must increase the capacity of the weak and

incapable communities in accordance with human dignity, where the *a quo* law has chosen a social insurance system which also contains the element of social assistance, then the issue to be addressed is whether the Social Security Law has fulfilled the requirements determined in the aforementioned 1945 Constitution;

- whereas Article 2 of the Social Security Law states, “The National Social Security System shall be organized based on the principle of humanity, principle of benefit, and the principle of justice for all the Indonesian people”, whose objective is “to provide guarantee of the fulfillment of adequate basic needs for all of its participants and/or family members”, as stated in Article 3, and organized based on the principles as regulated in Article 4, namely:

    a. principle of mutual aid (*gotong royong*), which is the principle of togetherness among participants in bearing the burden of social security costs, which is implemented in the obligation of each participant to pay fees in accordance with the level of salary, wages and income;

    b. non-profit, namely the principle of business management that prioritizes the use of fund-development proceeds to provide the greatest benefit for the all participants;

    c. transparency, which is the principle of giving easy access to complete, correct, and clear information for every participant;

d. carefulness, which is the principle of careful, accurate, secure and orderly fund management;

e. accountability, which is the principle of accurate and accountable program implementation and money management;

f. portability, which is the principle of providing continuous guarantee despite participants' change of occupations or addresses within the territory of the Unitary State of the Republic of Indonesia;

g. mandatory participation, which is the principle that requires all residents to become social security participants, which is implemented in stages;

h. trust funds, namely that the fees and development proceeds thereof constitute entrusted funds of the participants to be used for the greatest interests of the social security participants; and

i. The proceeds from the Social Security Fund management shall be used entirely for the development of the program and for the greatest interest of the people;

- Whereas meanwhile, the participation of the poor and incapable people is conducted by registering them as the beneficiary of assistance fees to the

Social Security Organizing Body by the Government, as regulated in Article 14;

- Whereas the social security regulated in the Social Security Law consists of health security, work accidents security, old-age security, pension security, and death security, as stated in Article 18, so that with the aforementioned securities, adequate basic necessities of every person will be fulfilled and protected against circumstances which may result in the loss or reduced income due to illness, accidents, loss of jobs, old-age or retirement;

- Whereas Article 48 of the Social Security Law states, “The Government shall take special actions in order to guarantee the preservation of the Social Security Implementing Body’s financial health level”, which therefore means that the certainty regarding the people’s rights to all types of social security referred to in the aforementioned Article 18 of the Social Security Law is guaranteed in its continuation by the *a quo* law without the necessity to worry about the financial solvability of the Social Security Implementing Body;

- Whereas based on the above and having read the entire Elucidation of the *a quo* law, the Court is of the opinion that, **insofar as it is related to the chosen social security system, the Social Security Law has sufficiently fulfilled the intention of Article 34 Paragraph (2) of the 1945 Constitution**, namely that the chosen system shall cover all the people entire people for the purpose of increasing the empowerment of the weak and incapable communities in accordance with human dignity;

- Whereas since the chosen social security system, according to the Court, has fulfilled the intention of Article 34 Paragraph (2) of the 1945 Constitution, the Social Security Law accordingly constitutes an affirmation of state's obligation with respect to the rights to social security as part of human rights, as intended by Article 28H Paragraph (3) of the 1945 Constitution, which obligates the state to respect, protect and guarantee the fulfillment thereof;

Considering, that even though the Court is of the opinion that, insofar it relates to the chosen system, the Social Security Law has fulfilled the provisions of Article 34 Paragraph (2) of the 1945 Constitution, the Court must still consider further whether the *a quo* law has appropriately implemented the definition of "State" in Article 34 Paragraph (2) of the 1945 Constitution. With regard to the aforementioned question, the Court shall consider as follows:

- Whereas, historically, the ideal of the state set forth in the fourth Paragraph of the Preamble to the 1945 Constitution is not separate from the mainstream thought that developed during the formulation of the 1945 Constitution, namely the idea known as the welfare state (*welvaart staat*) concept, which obligates the state to assume responsibility for the welfare of its people, which include, among other things, the function of the state to develop Social Security for its people;

- Whereas the welfare state concept is also reflected in the title of Chapter XIV of the 1945 Constitution which reads "SOCIAL SECURITY" which after the

Fourth Amendment became “NATIONAL ECONOMY AND SOCIAL SECURITY”. Thereafter, in the opinion of the People’s Consultative Assembly (MPR), as the institution authorized to make or amend the constitution, the function of the state to develop the intended social security is not only considered as still relevant but rather affirmed in order to bring about the general welfare ideal as mentioned in the Preamble to the 1945 Constitution Paragraph four; which is realized by the addition of three Paragraphs to Article 34 of the 1945 Constitution when the People’s Consultative Assembly made the fourth amendment to the 1945 Constitution;

- Whereas, therefore, the term “state” in Article 34 Paragraph (2) of the 1945 Constitution, in its relation to the welfare state concept, actually refers more to the implementation of the function of social service of the state for its people or citizens, so that, the aforementioned function can become part of the functions of the state as government authority holder in accordance with the 1945 Constitution. For said function to operate, the state government authority holder needs authority;

- Whereas, according to the 1945 Constitution, the authority of the state government is conducted by the (Central) Government and the Regional Government, such that the intended social service function is also attached to the Regional Government. Accordingly, the Regional Government also has the authority to implement the intended function. Such is a logical consequence of following the autonomy principle, as regulated especially in

Article 18 Paragraph (2) which reads “The provincial, regency, and municipal governments shall regulate and administer their own governmental affairs in accordance with the principle of autonomy and duty of assistance”, while Paragraph (5) explicitly states that the intended Regional Governments shall exercise autonomy to the broadest possible extent, with the exception of governmental affairs determined by law as affairs of the Central Government;

- Whereas the Regional Government also has the authority in the context of serving the social service function of the state to a further extent, as set forth in the Regional Government Law, and as evident in Article 22 Sub-Article (h) of the Regional Government Law that even explicitly states that the development of the social security system is the obligation of the regions. Meanwhile, according to Article 167 Paragraphs (1) and (2) of the Regional Government Law, the development of the social security system is included in the sector whose budget must be prioritized as a part of the efforts to protect and increase the quality of the people’s life in order to fulfill the regional obligations as intended in Article 22 Sub-Article (h) of the Regional Government Law;

Considering whereas, based on the foregoing considerations, even though the Court is of the opinion that the Social Security Law has sufficiently fulfilled the intention of Article 34 Paragraph (2) of the 1945 Constitution, meaning that the social security system chosen by the Social Security Law has sufficiently described the intention of the Constitution requiring the developed

social security system to cover all the people with the objective to empower the weak and incapable community in accordance with human dignity, the Court, however, disagrees with the stance of the Government and the People's Legislative Assembly stating that the authority to organize the aforementioned social security system shall be the exclusive authority of the (Central) Government, as reflected in the provision of Article 5, particularly Paragraph (4), of the Social Security Law. The reason is that, if so understood, it will contradict the definition of the state which consists of the (Central) Government and Regional Governments as intended in Article 18 Paragraph (5) of the 1945 Constitution, which is further elaborated in the Regional Government Law. On the basis of Article 22 Sub-Article (h) of the Regional Government Law, the Regional Government has the obligation to develop a social security system. However, the Court also disagrees with the Petitioners' argument that the authority to develop a social security system is the exclusive authority of the Regional Government with the argument that in accordance with the broadest autonomy principle, which according to the Petitioner is in accordance with Article 18 Paragraph (5) of the 1945 Constitution as elaborated further in the Regional Government Law, particularly Article 22 and Article 167 Paragraphs (1) and (2), then insofar as an affair is not determined by law as an affair or authority of the (Central) Government, the affair shall be the affair or authority of the regions.

The Court disagrees with the aforementioned argument of the Petitioners because if such a way of thinking is followed, then on the one hand, the possibility would be high where only certain regions would be capable of

organizing a social security system and even that will not guarantee that the social security provided will sufficiently meet the standard living necessities between one region to another. On the other hand, if for a certain reason, someone is forced to move to another region, then there is no guarantee for the person to continue benefiting from the rights to social security after the said person has been in another region. Such a situation would be contradictory to the intention of Article 34 Paragraph (2) of the 1945 Constitution which requires that the rights to social security shall benefit every person or all the people;

Considering, in line with the Court's opinion that the development of the social security system is a part of the implementation of the state function to provide social services where the authority to organize it lies in the hands of the state government authority holder, where the authority to implement the aforementioned social security system, in accordance with Article 18 Paragraph (5) of the 1945 Constitution as elaborated further in Regional Government Law, particularly Article 22 Sub-Article (h), shall not only be with the Central Government but can also be with the Regional Government, then the Social Security Law may not close the opportunity for Regional Governments to also take part in developing a social security system. The Regional Government has lost the opportunity to develop a social security system because of the provisions in Article 5 of the Social Security Law which reads:

(1) The Social Security Organizing Body must be regulated by law;

(2) *Since the enactment of this law, existing social security organizing bodies shall be declared as Social Security Organizing Bodies pursuant to this law;*

(3) Social Security Organizing Bodies as intended in Paragraph (1) are:

a. *Labor Social Security Company (JAMSOSTEK);*

b. *Civil Servants Savings and Insurance Funds Company (TASPEN);*

c. *Indonesian Armed Forces Social Insurance Company (ASABRI);*

d. *Indonesian Health Insurance Company (ASKES);*

(4) *In the event a Social Security Organizing Body other than those referred to in Paragraph (3) is required, a new one may be established by law".*

Considering, by carefully reading and understanding the entire provisions in Article 5 of the Social Security Law above, it is noticeable that, on the one hand, the formulation of the aforementioned Article 5 closes the opportunity for Regional Governments to take part the development of a social security sub-system in the framework of a national social security system in accordance with the authority derived from the provisions in Article 18 Paragraphs (2) and (5) of the 1945 constitution. On the other hand, the provisions of Article 5 itself contains formulations which contradict each other while also being extremely possible for multi-interpretation which leads to legal uncertainty (*rechtsonzekerheid*) and therefore such provisions are contradictory to Article 28D Paragraph (1) of the 1945 Constitution.

It has been referred to as closing the opportunities for Regional Governments because with the existence of Article 5 Paragraph (4) and its relation to Article 5 Paragraph (1) of the Social Security Law, it would not be possible for the Regional Government to establish a regional social security organizing body. In fact, as elaborated in the foregoing considerations, the Regional Government is in fact obligated to develop a social security system. Therefore, Article 5 Paragraph (1) of the Social Security Law must be interpreted in such a way that the provisions are intended for the establishment of an organizing body at the national namely the central government level, whereas the establishment of an organizing body at the regional level can be carried out by meeting the provisions concerning the national social security as regulated in the Social Security Law.;

Meanwhile, it has been said that there are formulations which contradict each other as well as having the possibility to give rise to legal uncertainty (*rechtsonzekerheid*) because Paragraph (1) states that the Social Security Organizing Body must be established **by** law, whereas Paragraph (3) states that the JAMSOSTEK Company (*Persero*), TASPEN Company (*Persero*), ASABRI Company (*Persero*), and ASKES Company (*Persero*) are each a Social security Organizing Body as intended in Paragraph (1), while in fact not all of the aforementioned bodies are established by law. Even if the legislators intended to declare that before the establishment of a Social Security Organizing Body referred to in Paragraph (1), the abovementioned bodies mentioned in Paragraph

(3) would have the right to act as social security organizing bodies, then this matter has been sufficiently included in the Transitional Provisions in Article 52 of the Social Security Law. Or, if the legislators, with the formulation in Article 5 Paragraph (1) of the Social Security Law above, intended to declare that a social security organizing body must meet the requirements determined by law – namely the *a quo* Social Security Law – then it would be impossible if the use of the word "by" in the said Paragraph (1) be interpreted in that way. The reason is that the meaning of the phrase **"by law"** is different from the phrase **"in law"**. The phrase "by law" refers to the understanding that the establishment of a social security organizing body must be by law, while the phrase "in law" refers to the understanding that the establishment of a social security organizing body must meet the provisions of law. The provision of Article 5 Paragraph (4), further strengthens the conclusion that actually the legislators intended to declare that social security organizing bodies must be established by a separate law.

The other possible interpretation is that with the aforementioned formulation in Article 5 Paragraphs (2) and (3) of the Social Security Law, it is therefore no longer necessary to meet the provisions in Article 5 Paragraph (1), because the bodies referred to in Paragraphs (2) and (3) are the ones mentioned in Paragraph (1) and at the same time, there is actually no more need for the formulation as set forth in Paragraph (4). Therefore, in relation to the provisions in Paragraphs (1), (2), (3), and (4) of the aforementioned Article 5 of the Social Security Law, there could be no other conclusions except that it has been actually the will of the legislators to declare that only JAMSOSTEK, TASPEN,

ASABRI, and ASKES can be regarded as social security organizing bodies as mentioned in Paragraph (1) while no other social security organizing bodies could be established. Such a conclusion is also reflected in the Government's statement, DPR's statements, as well as the statements of Experts presented by the Government as elaborated above.

Considering, because on the one hand, it is evident that Article 5 Paragraphs (1), (2), (3), and (4) of the Social Security Law is interrelated with the consequence that the regions do not have the opportunity to develop a social security system or to establish a social organizing body, while on the other hand, the existence of a law that regulates the establishment of a national social security organizing body at the central level is a necessity, then Article 5 Paragraph (1) of the Social Security Law is sufficient in meeting the intended requirements and not contradictory to the Constitution insofar as the provision of Article 5 Paragraph (1) of the Social Security Law is interpreted solely for the purpose of establishment of a national social security organizing body at the central level.

Considering whereas, based on the elaborations in the foregoing considerations, parts of the Petitioners' arguments concerning the closing down of the opportunities for the Regional Government to take part in developing a social security system based on the authorities derived from Article 18 Paragraphs (2) and (5) of the 1945 constitution, as elaborated further particularly in Article 22 Sub-Article (h) of the Regional Government Law, are sufficiently

grounded. Whereas, with respect to Article 52 of the Social Security Law which was also petitioned for judicial review by the Petitioners, the Court is of the opinion that the provision in the said Article 52 of the Social Security Law is in fact needed to fill the legal vacuum (*rechtsvacuum*) and to ensure legal certainty (*rechtszekerheid*) since no existing social security organizing body have fulfilled the requirements in order that the Social Security Law can be implemented. Accordingly, the Petitioners' petition insofar as it relates to Article 52 of the Social Security Law, is not sufficiently grounded.

Considering whereas, based on all the above considerations, the Court is of opinion that the Petitioners' petition can be partly granted namely:

- Article 5 Paragraph (3), which reads "*The Social Security Organizing Bodies as intended in Paragraph (1) are:*

    a. *Labor Social Security Company (JAMSOSTEK);*

    b. *Civil Servants Savings and Insurance Funds Company (TASPEN);*

    c. *Indonesian Armed Forces Social Insurance Company (ASABRI);*

    d. *Indonesian Health Insurance Company (ASKES)"*

    Since the substance contained therein have been set forth in Article 52 which, if maintained, will cause multi-interpretation and legal uncertainty.

- Article 5 Paragraph (2) which reads "*Since the enactment of this law, existing social security implementing bodies shall be declared as Social Security Organizing Bodies pursuant to this law",* since, even though it is not petitioned in the *petitum*, this Article is however considered as an inseparable part of Paragraph (3) so that if maintained it will cause multi-interpretation and legal uncertainty as it this the case with Article 5 Paragraph (3).

- Article 5 Paragraph (4) which reads "*In the event a Social Security Organizing Body other than those referred to in Paragraph (3) is required, a new one may be established by law";* because it actually closes the opportunity for Regional Government to establish and develop a social security organizing body at the regional level within the framework of a national social security system.

Whereas Article 5 Paragraph (1) which reads "*The Social Security Organizing Body must be established by law*" is not contradictory to the 1945 Constitution provided that it is interpreted the provision refers to the establishment of a social security organizing body at the national level with the Central Government. Consequently, the Petitioners' petition insofar as it relates to Article 5 Paragraph (1), as it is the case with Article 52 of the Social Security Law, is not sufficiently grounded either.

In view of Article 56 Paragraphs (2) and (5) along with Article 57 Paragraphs (1) and (3) of the Law of the Republic of Indonesia Number 24 Year 2003 regarding the Constitutional Court;

PASSING THE DECISION

To grant the Petitioners' petition partly;

To declare Article 5 Paragraphs (2), (3), and (4) of the Law of the Republic of Indonesia Number 40 Year 2004 regarding the National Social Security System (State Gazette of the Republic of Indonesia Year 140 Number 150, Supplement to State Gazette of the Republic of Indonesia Number 4456) contradictory to the 1945 Constitution of the State of the Republic of Indonesia;

To declaring that Article 5 Paragraphs (2), (3), and (4) of the Law of the Republic of Indonesia Number 40 Year 2004 regarding the National Social Security System (State Gazette of the Republic of Indonesia Year 2004 Number 150, Supplement to State Gazette of the Republic of Indonesia Number 4456) has no binding legal effect;

To reject the rest of the Petitioners' petition;

To order this Decision to be properly included in the Official Gazette;

Hence the decision was made in the Consultative Meeting of Justices attended by 9 (nine) Constitutional Court Justices on **Thursday, August 18, 2005**, and was pronounced in the Plenary Hearing of the Constitutional Court open for the public on this day, **Wednesday August 31, 2005** by us **Prof. Dr. Jimly Asshiddiqie, S.H.** as the Chairperson and concurrent Member, **Prof. Dr.**

H.M. Laica Marzuki, S.H., Prof. H.A.S. Natabaya, S.H., LL.M, H. Achmad Roestandi, SH, Dr. Harjono, S.H., M.C.L, Prof. H. Abdul Mukthie Fadjar, S.H., M.S., I Dewa Gede Palguna, S.H., M.H., Maruarar Siahaan, S.H., and **Soedarsono, S.H.**, respectively as Members, assisted by **Ida Ria Tambunan, S.H.** as the Substitute Registrar and in the presence of the Petitioners/Attorneys of the Petitioners, the Government, DPR, DPD, and the Related Parties.

CHIEF JUSTICE

signed

Prof. Dr. Jimly Asshiddiqie, S.H.

JUSTICES,

signed	**signed**
Prof.Dr.H.M.Laica Marzuki, S.H.	**Prof.H.A.S.Natabaya,S,H.,LL.M.**
signed	**signed**
H.Achmad Roestandi, SH	**Prof.H.A.Mukthie Fadjar,S.H.,M.S.**
signed	**signed**
Dr. Harjono, S.H., M.C.L.	**I Dewa Gede Palguna, S.H., M.H.**
signed	**signed**
Maruarar Siahaan, S.H.	**Soedarsono, S.H.**

SUBSTITUTE REGISTRAR,

signed

Ida Ria Tambunan, S.H.