



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

FOR THE SAKE OF JUSTICE UNDER GOD ALMIGHTY

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Upon examining, hearing and deciding upon constitutional cases at the first and final instance, passes a decision in the case of a petition of Law Number 36 of 2009 Concerning Health against the Constitution of the Republic of Indonesia 1945, filed by:

- [1.2]**
1. Name : **Misram, S.Km;**
Occupation : Civil servant, nurse, Head of Kuala Samboja Health Centre;
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 Health Centre;
Address : Desa Sekuro Jaya, Long Ikis District,
Paser, East Kalimantan Province;
 3. Name : **Zulkifli, Amd. Kep;**
Occupation : Civil servant, Chief Administrator of Lolo Community Health Centre;
Address : Keluang Village, Kuaro District, Paser Regency, East Kalimantan Province;
 4. Name : **Giyana, S. Km;**
Occupation : Civil servant, Head of Krayan Community Health Centre;
Address : Krayan Makmur Village, Neighbourhood Ward 03/ Block 1

Long Ikis, Paser Regency, East Kalimantan Province;
5. Name : **Muchlas Sudarsono, Amd. Kep;**
Occupation : Civil servant, Head of Padang Pangrapat Community Health
Centre;

Address : Jalan Sawit, Keluang Lolo Village, Neighbourhood Ward 09/03,
Kuaro District, Paser Regency, East Kalimantan Province;

6. Name : **Loging Anom Subagio;**

Occupation : Civil servant, Head of Argomulya Community Health Centre;

Address : Jalan KS. Tubun, Argomulyo Village, Sepaku District,
North Penajam Paser Regency, East Kalimantan
Province;

7. Name : **Edi Waskito;**

Occupation : Civil servant, Head of Bulu Minung Community
Health Centre;

Address : Minung Sub-District, Neighbourhood Ward 2,
Penajam District, North Penajam Paser Regency,
East Kalimantan Province;

8. Name : **Abdul Munif;**

Occupation : Civil servant, Head of Muara Jawa Ulu Community
Health Centre;

Address : Jalan Delima, Neighbourhood Ward 3, Muara Jawa Ulu
Sub-District, Muara Jawa District, Kutai Kartanegara
Regency, East Kalimantan Province;

9. Name : **Afriyanto;**

Occupation : Civil servant, Head of Pembantu Teluk Dalam
Community Health Centre;

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

By Virtue of a Special Power of Attorney, dated 20 December, 2009, 1 February, 2010 and 8 February, 2010, power is granted to (1). Muhammad Aidiansyah, S.H., and (2). Erwin, S.H., M.H, both of whom are Advocates and Legal Counsel for **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 Plaintiffs**

- [1.3]** Having read the petition of the Plaintiffs;
Having heard the testimonies of the Plaintiffs;
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 experts and witnesses of the Plaintiffs;
Having heard the testimonies of the witnesses of the Government;
Having heard the testimonies of the Related Parties, namely the Indonesian Pharmacists Association, National Nurses Association of Indonesia and the Indonesian Medical Association;
Having read the affidavit of the Related Party, Dr. Mangku Sitepoe;
Having examined the documentary evidence presented by the Plaintiffs;

2. FACTS OF THE CASE

[2.1] The Plaintiffs, in their petition dated 10 February, 2010, were registered by the Registrar's Office of the Constitutional Court (hereinafter referred to as the Court Registrar) on February 16, 2010 under the Deed of Acceptance of Petition File No. 26/PAN.MK/2010, and registered with petition Number 12/PUU-VIII/2010 on March 1, 2010, which was amended and received by the Court Registry on 29 March 2010, and outlines the following matters:

Authority of the Court

1. The Plaintiffs request that the Constitutional Court (hereinafter referred to as the Court) perform an examination of Article 108(1) and its Explanation in conjunction with Article 190(1) of Law No. 36 of 2009 Concerning Health;
2. As set forth in Article 24C(1) of the 1945 Constitution in conjunction with Article 10(1)(a) of Law No. 24 of 2003 Concerning the Constitutional Court (Constitutional Court Law), one of the Constitutional Court's authorities is to conduct judicial review of laws against the 1945 Constitution. Article 24C(1) of the 1945 Constitution, among other things, states that, "The Constitutional Court has the authority to hear cases at the first and final instance, where it's

decision shall be final, to (a) review a law against the 1945 Constitution". Further, Article 10(1)(a) of the Constitutional Court Law, among other things, states that, "The Constitutional Court has the authority to hear cases at the first and final instance, where its decision shall be final, to:

a. Test existing laws against the 1945 Constitution of the Republic of Indonesia;

3. Furthermore, pursuant to the provisions of Article 7 of Law No. 10 of 2004 Concerning the Formation of Legislation, it stipulated that there is a hierarchy where the 1945 Constitution is of a higher legal position than legislation. Hence, any provision of a Law must not conflict with the 1945 Constitution. Thus, if there are provisions in a Law which conflict with the 1945 Constitution, such a provision may be petitioned for review under the mechanism of the Law of Examination;
4. Based on the matters referred to above, the Constitutional Court is authorized to adjudicate and decide upon the petition of this Law.

Legal Standing of the Plaintiffs

5. Pursuant to Article 51(1) of the Law of the Constitutional Court and its Explanation, those who may file a petition against the Constitution of 1945 are those who consider their rights and/or authorities granted by the 1945 Constitution to be impaired by the enactment of a law, namely:
 - a. Individual Indonesian citizens (including groups of people who have similar interests);
 - b. customary law communities which are still alive and living in accordance with the development and principles of the Unitary Republic of Indonesia as regulated by law;
 - c. public or private legal entities; or
 - d. state institutions;
6. Based on the above provisions, there are two conditions which must be met by the Plaintiffs in seeking judicial review of the Law of the Constitution of the Republic of Indonesia 1945. The first requirement is that the petitioners be qualified to act as Plaintiffs, and the second requirement is that the Plaintiff's

- constitutional rights as contained in the 1945 Constitution be harmed / violated by the enactment of a law;
7. The Plaintiffs are health workers whose civil status is assigned by the District Government / Department of Health on Health Centres as Heads of Health Centres and/ or nursing staff in remote areas, where there is no medical personnel (doctors) and pharmacy personnel (pharmacists / assistant pharmacists) in the Kertanegara Kutai Regency, Paser Regency and North Penajam Paser Regency in East Kalimantan Province, so that all health services provided to citizens were borne by the Plaintiffs alone. Thus, the Plaintiffs are individuals / a group of Indonesian citizens as per Article 51(1) of the Constitutional Court Law and have the qualifications to act as Plaintiffs;
 8. According to the Constitution of 1945, the Plaintiffs have the following constitutional rights:
 - Article 27(1)

"All citizens have equal standing before the law and government, and shall uphold the law and government, with no exception".
 - Article 28C(2)

"Every person has the right to advance themselves in the fight for their rights collectively to build a society, nation and country".
 - Article 28D(1)

"Every person is entitled to recognition, security, protection and legal certainty of fair and equal treatment before the law".
 - Article 28D(3)

"Every citizen is entitled to equal opportunities in government".
 - Article 28H(1)

"Every person has the right to live in physical and spiritual prosperity, in their residence, and obtain a good and healthy environment as well as receive medical care".
 - Article 28J(1)

"Every person shall respect the human rights of others in the orderly life of society, nation and state".
 9. Article 108(1) of Law No. 36 of 2009 Concerning Health states that:

"Pharmaceutical practices comprising of production including quality control of pharmaceutical preparation, security, supply, storage and distribution of drugs, prescription drug services, drug information services and the development of drugs, medicines and traditional medicines, must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation ".

Furthermore, in the Explanation of Article 108(1), it is stated that:

"What is meant by "health worker" in this provision is a pharmaceutical worker who is accorded with the proper expertise and authority. In the absence of a pharmaceutical worker, certain health workers may perform limited pharmaceutical practice which is to be carried out in accordance with legislation, for example (among others), as physicians and/or dentists, midwives and nurses".

10. The practice of pharmacy referred to in Article 108 (1) of Law No. 36 Year 2009 Concerning Health which covers manufacturing including quality control of pharmaceutical preparation, security, procurement, storage, distribution of drugs, prescription drug services, drug information services as well as drug development, medicines and traditional medicines; must be implemented by health workers who have the expertise and authority per Government Regulation No. 51 of 2009 Concerning Pharmaceutical Employment, and Article 33(1) of the Pharmaceutical Professionals Law which consists of:

- a. Pharmacists; and
- b. Technical Pharmaceutical Personnel

11. Article 198 of Law No. 36 of 2009 Concerning Health 2009 on Health states that:

"Any person who does not have the expertise and authority to conduct pharmaceutical practice as referred to in Article 108 shall be punished with a fine of up to Rp.100.000.000, 00 (one hundred million rupiah)".

12. Furthermore, Article 190(1) of Law No. 36 of 2009 Concerning Health states that:

"The director of a health care facility and / or health worker who practices or works at a health care facility, and who intentionally does not provide first aid

to a patient in an emergency situation as referred to in Article 32 or Article 85(2), shall be punished with a term of imprisonment for 2 (two) years or a maximum fine of Rp.200.000.000, 00 (two hundred million rupiah) "

13. Per the enactment of Section 108(1) and the Explanation provision of Law No. 36 of 2009 Concerning Health, if a pharmaceutical worker is not available, then the Plaintiffs may perform limited pharmaceutical practice (per the Regulation of the Minister for Health No. 148 of 2010 Concerning Licensing and Implementation of Nursing Practices, which emphasizes that nurses may only provide drugs which can only be sold over the counter (non-prescription), and drugs which have no further limitations on being sold.
14. However, the restriction on this authority is contradictory to the obligations of the Plaintiffs in providing first aid to patients in an emergency as defined by:
Article 32 of Law No. 36 of 2009 which states:

Subsection (1) In an emergency, health care facilities, both public and private, must provide life-saving health services to patients to prevent disability;

Subsection (2) In an emergency, health care facilities, both public and private, are prohibited to refuse patients and / or request an advance payment;

Furthermore Article 85(2) of Law No. 36 of 2009 states: health care facilities, in providing health services in disasters as referred to in (1) are prohibited from rejecting a patient and/or requesting an advance payment;

Furthermore, in an emergency, harmful drugs are also usually required, including those listed in Schedule G, for example, antibiotics. And if the Plaintiffs do not do their service they will be punished with a prison term or fine as referred to in the Act;

Article 190(1) of Law No. 36 of 2009 Concerning Health states that, "The director of a health care facility and/or health worker who practices or works at a health care facility, who intentionally does not provide first aid to a patient in an emergency as referred to in Article 32 or Article 85(2), shall be punished with a term of imprisonment of 2 (two) years or a maximum fine of Rp.200.000.000, 00 (two hundred million rupiah)".

15. Conversely, if the Plaintiffs do undertake pharmaceutical practice as referred to in the Explanation of Article 108, and exceed the specified limits, their actions are punishable by a fine as per Article 198 of Law No. 36 of 2009 Concerning Health which states:

Any person who does not have the expertise and authority to perform pharmaceutical practice as defined in section 108 shall be punished with a maximum fine of Rp.100.000.000,00, - (one hundred million rupiah).

16. The application of Article 108(1) and its Explanation provision, in conjunction with Article 190(1) of Law No. 36 of 2009 Concerning Health are detrimental to the constitutional rights of the Plaintiffs as health workers in providing equality before the law, in obtaining security, protection and fair legal certainty as referred to in Article 27(1), and Article 28D paragraph (1) of the 1945 Constitution. It is thus requested that there be an order that the application of Article 108(1) and the Explanation provision, in conjunction with Article 190(1) of Law No. 36 of 2009 Concerning Health not have the force of law;

17. Based on the analysis above, it is demonstrated that the Plaintiffs have legal standing to bring a petition for judicial review of Article 108(1) and its Explanation provision, in conjunction with Article 190(1) of Law No. 36 of 2009 Concerning Health, against the 1945 Constitution;

Reasons for the Petition of Law No. 36 of 2009 Concerning Health

18. On March 4, 2009, Applicant I (Misran) was arrested by the Police of the Republic of Indonesia and East Kalimantan and put under house arrest until March 23, 2009 on charges of alleged violation of Article 82(1)(d), in conjunction with Article 63(1) of Law No. 23 of 1992 Concerning Health;

19. Article 82(1) (d) of Law No. 23 of 1992 Concerning Health states:

“Any person who, without expertise and authority intentionally conducts pharmaceutical practice as defined by Article 63(1) shall be punished with a term of imprisonment for 5 (five) years and/or a maximum fine of Rp.100.000.000, 00., (One hundred million rupiah)”;

Furthermore, Article 63(1) of Law No. 23 of 1992 Concerning Health states:

“Pharmaceutical work in the procurement, production, distribution, and service preparations of pharmacy must be performed by health workers who have the expertise and authority to do so”

20. On October 13, 2009, the District Attorney in the District Court of Tenggaraong requested that the Applicant (Misran) have a 10 month prison sentence and a fine of 5 (five) million rupiah;
21. On 19 November 2009, the Judge of the District Court of Tenggaraong ruled on the decision of the Applicant, stating that he should be imprisoned for 3 months, reduced for the time he had already spent in custody, coupled with a fine of Rp.2.000.000,00.- (dua juta rupiah);
22. On October 13, 2009 the Government of Indonesia repealed Law No. 23 of 1992 Concerning Health (State Gazette of the Republic of Indonesia of 1992 No. 100, Additional State Gazette of the Republic of Indonesia No. 3495) and it was replaced by Law No. 36 of 2009 Concerning Health;
23. The implementation of Law No. 36 of 2009 Concerning Health, Government Regulation No. 51 Concerning Pharmaceutical Services and the Regulation of the Minister for Health No. HK.02.02/MENKES/148/I/2010 Concerning Licensing and the Implementation of Nursing Practices, according to the Plaintiffs, are essentially the same as Law No. 23 of 1992 Concerning Health, especially regarding pharmacy not being aligned with nursing professionals who serve in remote rural areas which don't have professional doctors/ pharmacists or staff, and are susceptible to blame and being charged by both police and prosecutors for conducting pharmaceutical services.
24. Article 108(1) of Law No. 36 of 2009 Concerning Health states that:

"Pharmaceutical practices comprising of production including quality control of pharmaceutical preparation, security, supply, storage and distribution of drugs, prescription drug services, drug information services and the development of drugs, medicines and traditional medicines, must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation "

Furthermore, in the Explanation provision of Article 108(1) it states that:

"What is meant by "health worker" in this provision is a pharmaceutical

worker who is accorded with the proper expertise and authority. In the absence of a pharmaceutical worker, certain health workers may perform limited pharmaceutical practice which is to be carried out in accordance with legislation, for example (among others), as physicians and/or dentists, midwives and nurses”.

25. Furthermore, in Article 198 of Law No. 36 Year 2009 Concerning Health it was stated that:

"Any person who does not have the expertise and authority to conduct the practice of pharmacy as referred to in Article 108 shall be punished with a fine of up Rp.100.000.000, 00., - (One hundred million rupiah)".

26. Furthermore, in Article 190 (1) of Law No. 36 of 2009 Concerning Health it states that:

"The director of a health care facility and / or health worker who practices or works at a health care facility, and who intentionally does not provide first aid to a patient in an emergency situation as referred to in Article 32 or Article 85(2), shall be punished with a term of imprisonment for 2 (two) years or a maximum fine of Rp.200.000.000, 00 (two hundred million rupiah) ".

27. The facts indicate that at the Induk Health Centre, almost entirely at Health Centres throughout the East Kalimantan Province, and even throughout the region of the Republic of Indonesia, are led by health nurses on duty because the government has not yet been able to utilize/ place medical personnel (doctors) and pharmacists (pharmaceutical technicians) in the areas mentioned;

28. Based on the results of research from the University Of Indonesia School Of Public Health and the Ministry of Health (2005) conducted in urban and rural health centers, 92% of nurses perform medical diagnosis and 93% of nurses provide prescriptions. The results of this study indicate the large role of nurses in the community, which are not currently recognized;

29. The implementation of Article 108 (1) along with its Explanation provision, in conjunction with Article 190(1) of Law No. 36 of 2009 Concerning Health, are not only detrimental to the constitutional rights of the Plaintiffs, but also have the potential to violate the constitutional rights of all nursing personnel on

- duty throughout the Republic of Indonesia, who are in remote areas/ without a doctor/ without a pharmacist or pharmaceutical personnel;
30. Article 108(1) and its Explanation provision, in conjunction with Article 190 of Law No. 36 Concerning Health, form the authority for the Plaintiffs and all nursing staff in the territory of the Republic of Indonesia to perform pharmaceutical work. However, this authority is limited to drugs which can only be sold over the counter (non-prescription), and drugs which have no further limitations on being sold. However, in an emergency situation where the referral process cannot be implemented, whether due to the geographical conditions of the region, cost, power, distance, and the availability of means of transport; in order to ensure that the public's right to gain access to health services is fast, precise, and of quality, the Plaintiffs/nursing staff are required to provide the drugs included in Schedule G (Gevaarlijk / dangerous), such as antibiotics, analgesics, etc;
31. In this situation, the Plaintiffs or nursing staff experienced dilemmas and legal uncertainty. On the one hand, there are limitations on the authority provided by law, and at the same time there are limited human health resources or the unavailability of health workers who have the relevant level of expertise and authority (medical and pharmacy personnel) in remote areas. But on the other hand, nursing personnel are required to conduct health services (medical services and pharmaceutical services) for all levels of society, particularly in emergencies, because their failure to do so would be punishable by a term of imprisonment or a fine.
31. Thus, Article 108 (1) and its Explanation provision in conjunction with Article 190(1) of Law No. 36 of 2009 Concerning Health contradict the 1945 Constitution, or in other words, the application of Article 108(1) and its Explanation in conjunction with Article 190(1) of Law No. 36 of 2009 Concerning Health violate the constitutional rights of the Plaintiffs per Article 27(1), Article 28D(1), Article 28H(1), and Article 28J(1) of the 1945 Constitution;

The Petition:

Based on what has been described above as well as the attached evidence, the Plaintiffs have appealed to the Panel of Judges of the Constitutional Court to:

1. Accept and grant the petition of the Plaintiffs in its entirety;
2. To declare that Article 108(1) as well as the Explanation provision of Law No. 36 of 2009 Concerning Health are contradictory to Article 27(1), and Article 28D(1) of the Constitution of the Republic of Indonesia 1945;
3. To declare that Article 190(1) of Law No. 36 of 2009 Concerning Health is contradictory to Article 28H(1), and Article 28J(1) of the Constitution of the Republic of Indonesia 1945;
4. To declare that Article 108 (1) as well as its Explanation provision, in conjunction with Article 190(1) of Law No. 36 of 2009 Concerning Health have no binding legal force with any legal effect;
5. Order the proper promulgation of this decision in the Official Gazette of the Republic of Indonesia as properly represented.

Or, if the Constitutional Court is of another opinion, to reach a verdict which is as fair as possible.

[2.2] To prove their arguments, the Plaintiffs filed letters of evidence from Exhibit P-1 through to Exhibit P-9 as follows:

1. Exhibit P-1 : A photocopy of Law No. 36 of 2009 Concerning Health;
2. Exhibit P-2 : A photocopy of Constitution Court Regulation No. 06/PMK/2005 as the Guideline for examining Case Law of the Constitutional Court of the Republic of Indonesia;
3. Exhibit P-3 : A photocopy of the Constitution of the Republic of Indonesia 1945, Law No. 24 of 2003 Concerning the Constitutional Court;
4. Exhibit P-4.1 : A copy of a newspaper article: "Institutional Hope for the Arif Law";
5. Exhibit P-4.2 : A copy of a newspaper article: "Nurses Threaten Kukar Ancam Strike";

6. Exhibit P-4.3 : A copy of a newspaper article: "Proposed Regulation of Health";
7. Exhibit P-4.4 : A copy of a newspaper article: "Providing Schedule G Drugs, Sentenced to 3 Months";
8. Exhibit P-4.5 : A copy of a newspaper article: "Midwives and Nurses Fear Citizens Disappointed";
9. Exhibit P-4.6 : A copy of a newspaper article: "Doctors Powers Reduced";
10. Exhibit P-5 : Copy of Government Regulation No. 51 of 2009 Concerning Pharmaceutical Employment;
11. Bukti P-6 : A photocopy of Law No. 23 of 1992 Concerning Health;
12. Bukti P-7 : Photocopy of Decision Number 364/Pid.B/2009/PN.Tgr
13. Bukti P-8 : Copy of Regulation of the Minister for Health of the Republic of Indonesia Number HK.02.02/MENKES/148/2010 Concerning Licensing and the Implementation of Nursing Practice
14. Bukti P-9 : *Compact Disk* "Dedicated Nurses Looking for Justice";

[2.3] Upon reform to the trial of the petition dated 5 April 2010, the Plaintiffs have stated that such reforms are consistent with the arguments of the petition;

[2.4] At the hearing on May 6, 2010 the court heard statements by the government, witnesses of the Plaintiffs, the Related Party, Pharmacists Association of Indonesia, National Nurses Association of Indonesia, and the Indonesian Medical Association, which are outlined as follows:

Statements of the Government

- Article 108(1) of Law No. 36 of 2009 Concerning Health is intended for careful and thorough consideration regarding the dangers that can arise from the use of drugs which are not consumed for their designated use. This is because it is appropriate that if a drug is available to a community, it must be prescribed by people who have the competence, expertise and authority to do so.
- Pharmaceutical workers are personnel who are authorized to perform the work of pharmacy, as stipulated in Government Regulation No. 51 of 2009 Concerning Pharmacy. Article 1(1) of Government Regulation No. 51 of 2009 states, "Pharmacy work' covers manufacturing, including quality control of pharmaceutical preparations, security, procurement, storage, and distribution, or distribution of drugs, medication management, medication services for a doctor's prescription, drug information services, as well as drug development, medicinal materials and traditional medicine;
- Article 1(1) of Government Regulation No. 51 of 2009, reaffirmed in Article 2(2), states that "pharmaceutical work as referred to in (1) must be performed by qualified and authorised health personnel. A health worker who is qualified and authorized to do that is a health worker which consists of pharmacists and pharmaceutical technicians;
- Article 108(1) as well as its Explanation provision within Law No. 36 of 2009 essentially regulates pharmaceutical practice and is therefore not related to the status of the Plaintiffs as civil servants who served as both Heads of Health Centers and affiliate Centres. According to the Government, the activities, functions, and duties of the Plaintiffs are already independently determined by legislation. The authority of a nurse is already regulated in the Regulation of the Minister for Health No. 148/Menkes/I/2010 Concerning Licensing and the Implementation of Nursing Practice;
- If the petition is granted it will lead to:
 - A legal vacuum and chaos in the regulation of pharmaceutical practice;
 - It will lead to the circulation, acquisition, and distribution of drugs made by parties who are irresponsible;
 - The protection of and control over society regarding the use of drugs will not be assured;

- It is granted that if the management of health care facilities and/ or health workers, who do not provide and prioritise assistance to ensure the welfare of human life in emergency situations, such as those mentioned, they shall be given legal sanctions. Because such would be contrary to the rights of any person to obtain health services as secured and guaranteed by the Constitution;
- The petition for judicial review of Article 190(1) of Law No. 36 of 2009 Concerning Health is inappropriate and irrelevant. Even if the petition is granted, according to the Government, it can harm the rights of the community in obtaining security, protection and health services in times of emergency or disaster;

Related Parties: the Doctors Association of Indonesia, Pharmacists Association of Indonesia, and National Nurses Association of Indonesia

1. Doctors Association of Indonesia

- Article 108(1) of Law No. 36 of 2009 is already compliant/ not contrary to the 1945 Constitution;
- The definition of pharmaceutical practice, which is very broad, is listed in Article 108(1) of Law No. 36 of 2009, and should be followed with an adequate explanation or in the Explanation provision;
- Largely, most cures and drug developments in the world have been discovered by doctors, pharmacists, dentists, and veterinarians. In the process of finding a cure there is a process of storage, development and research of traditional medicine and medicinal materials. So doctors, dentists and veterinarians also have authority over medicines at all times, beginning from storage, delivery, research, and development of the drug, whether or not there is a pharmaceutical worker present;
- In the practice of medicine, physicians, and also dentists are authorized to store and deliver patient medication for correct distribution. However, in the Explanation of Article 108 and Government Regulation No. 51 of 2009, this is not listed, and only pharmaceutical personnel are listed. The philosophy of pharmaceutical workers is changing/ mixing pharmaceutical preparations and

prescription services;

- The Explanation of Article 108(1) of Law No. 36 of 2009 and Government Regulation No. 51 of 2009 do not explain the type of drugs which are referred to. In Indonesia, drugs are divided into drugs which do not need a prescription (those which are 'freely' available), a limited category of other freely available drugs, hard drugs (Schedule G), psychotropic drugs and narcotic drugs. Health workers such as nurses and midwives have the authority to store drugs which do not need a prescription, and the 'limited' category of other freely available drugs;
- The type of drugs along with authorised health workers should be listed in the Explanation of Article 108(1) of Law No. 36 of 2009 and Government Regulation No. 51 of 2009, but they are not. As a result of not listing the types of drugs mentioned, the community at large, as well as doctors, dentists, veterinarians, nurses and midwives can be threatened with criminal penalties;
- The Doctors Association of Indonesia wishes there to be reform of the Explanation of Article 108(1) of Law No. 36 of 2009 and Government Regulation No. 51 of 2009, so that community health care is not compromised and the health workers who serve the community can be protected by law;

2. Pharmacists Association of Indonesia

- Regarding the petition for judicial review of Article 108(1) of Law No. 36 of 2009 Concerning Health, the Pharmacists Association of Indonesia suggests that the Article be kept and not changed or added to;
- Repealing Article 108(1) of Law No. 36 of 2009 will result in very broad application. Namely, the pharmaceutical practice, including drug development, distribution services, and issuance of the drug could be done by any person and they would not need to refer to the standards of science, profession, ethics or morals. At the same time it would not guarantee that patients have the right to obtain basic rights with the best possible health service;
- Article 108(1) of Law No. 36 of 2009 constitutes a guarantee for the wider community of the ongoing validity of pharmaceutical services based on science and the health profession;

3. National Nurses Association of Indonesia

- Empirical and juridical facts regarding the Health Law are harming nurses. Basic facts indicate that the majority of the main health centres and in almost all health centres, especially in remote areas, are led by nurses and health workers serving there. These nursing staff are on the frontline because the government has not been able to utilize and place medical personnel, namely competent doctors and pharmacists, in those areas;
- Other evidence shows the results of research in 2005 by the Faculty of Public Health at the University of Indonesia and the Ministry of Health (Republic of Indonesia), where, in urban and rural health centres, 92% of nurses perform medical diagnosis and 93% of nurse provide prescriptions;
- The application of Article 108(1) as well as its Explanation in Law No. 36 of 2009 violate the constitutional rights of the Plaintiffs and also have the potential to harm the constitutional rights of all nursing personnel on duty in remote areas throughout Indonesia with no doctor, pharmacist, or pharmaceutical staff;
- The Explanation of Article 108(1) of Law No. 36 of 2009 forms a justification for the Plaintiffs and all nursing personnel throughout Indonesia to do pharmaceutical work. However, the limited authority of merely providing drugs which do not require a prescription, providing a limited category of drugs only to be distributed in emergency situations, and merely processing referrals sometimes cannot be adhered to due to constrained factors. These include the geographical conditions of the region, cost, authorization, distance, and the availability of means of transport while allowing patients to gain access to a fast, reliable and quality public health service. In these circumstances, the Plaintiff nursing personnel are required to provide the drugs included those in Schedule G;

Witnesses of the Plaintiffs

1. Trisno Widodo

- The witness worked as a member of the DPRD Kutai Kartanegara Regency;
- The witness was confused because, according to the Chief District Medical

Officer of Kutai Kartanegara Regency, what was done by the nurses was in accordance with the guidelines and rules issued by the Ministry of Health. However, according to law enforcement officers, the High Attorney, and the court, what had been done by the nurses was contrary to the law, and namely in violation of the Health Law;

- Geographically, East Kalimantan and especially the Kutai Kartanegara Regency, has 18 sub-districts, 248 villages, a total population of approximately 600,000 people; while there are 75 people who are doctors in that region. If the Article prohibits nurses from helping the community in terms of health care while the total number of doctors is very small, service to the community will not be as expected;

2. H. Edy Sukanto, S.Kp

- The witness worked as Chairman of the Advisory Council of the Association of Nurses in East Kalimantan;
- The witness agreed that nurses should not perform work in addition to their mandated job. But in East Kalimantan, to implement public services is to protect the community, but the government should also pay attention to nurses working on the basis of regulations that are indeed still valid;

3. H. Abdul Jalal

- At the main clinic there is only 1 doctor who has a structural role as head of the health centre, so he cannot serve on a full time basis to aid the problem of the delivery of medicine and pharmaceuticals;
- The Article cannot be well applied practically, especially in East Kalimantan where there are no assistant pharmacists and pharmacists at the main health centre and affiliate health centres;

4. Hj. Emy Dasimah

- The witness is the Chief District Medical Officer of the Kutai Kartanegara Regency;
- The witness was very surprised at the Plaintiff being arrested by the police for providing medicinal services, because to date there has been cooperation between the main health centre and the other health centres,

and Police members who seek treatment. The health centres which are in operation have not closed the possibility of being served by nurses, including the Plaintiffs themselves;

- If the Article applies, then how many more cases will occur of nurses, like the Applicant, who will be convicted of providing drug services while the conditions in the Kutai Kartanegara Regency mean disproportionate numbers between total population and available doctors who can provide health services;
- With the presence of nurses in the law in the Kutai Kartanegara Regency, health care in the Kutai Kartanegara Regency, including in urban and remote areas, are paralyzed because all nurses will not want to serve patients;

5. Andi Baharuddin

- From 2008 to 2010, all nurses in the Kutai Kartanegara Regency were afraid to provide health services to the community;
- The witness wishes that nurses can return to serving the community because, at the moment, when sick people call it is a nurse who comes. It is nurses and never doctors who are called upon to provide services for these patients at home, because to this day patients only visit a doctor;

[2.5] The Government, through the Court on May 20, 2010, filed a written statement as follows:

I. Core of the Plaintiff's Petition

- a. According to the Plaintiffs, the provisions of Article 108(1) and its Explanation, as well as Article 190(1) of Law No. 36 of 2009 Concerning Health, have already violated their constitutional rights. This is because the provisions gave rise to legal uncertainty against the Plaintiffs who held the positions of Civil Servants (PNS) who worked as a nurse, Head of a Health Center and were Health Center workers (in an area of one of the regencies in the province of East Kalimantan), where, in these remote areas there was no professional doctor or pharmacist, to the extent that all health services to citizens were charged to the Plaintiffs,

according to the Decree of the Regent and the Memorandum of the Head of the District Office;

- b. According to the Plaintiffs, with due regard to the above, the provisions have prevented the Plaintiffs from providing optimal health services to the community, particularly in the practice of pharmacy (medicine delivery);
- c. Also according to the Plaintiffs, the provisions of Article 108(1) as well as its Explanation are contradictory to the provisions of Article 190(1) of Law No. 36 of 2009 Concerning Health, because the Plaintiffs' work as health workers, Heads of Health Centre and were Health Centre workers residing in remote areas that do not have doctors and pharmacists, are vulnerable to blame by law enforcement officials (especially police and prosecutors);
- d. In short according to the Plaintiffs the provisions have provided distinction, unequal treatment, put in place a position which is unbalanced and is not fair to the Plaintiffs in providing primary health services to people in remote areas far from hospitals, with no doctors or pharmacists. Therefore, according to the Plaintiffs, the provisions are considered contrary to the provisions of Article 27(1), Article 28C(2), Article 28D(1) and (3), Article 28H(1), and Article 28J(1) of the Constitution of the Republic of Indonesia 1945.

a. Legal Standing of the Plaintiffs

In accordance with the provisions of Article 51(1) of Law No. 24 of 2003 Concerning the Constitutional Court, it states that the applicant is a party who considers their constitutional rights and/or authorities to be impaired by the enactment of a law, namely:

- (a) Individual citizens;
- (b) Unified indigenous communities living in accordance with the development of society and the principle of the unitary state of Indonesia as regulated by law;
- (c) Public and private legal entities; or

(d) state institutions

The above provisions asserted in their Explanation that what is meant by "constitutional rights" are rights provided for in the Constitution of the Republic of Indonesia 1945.

Thus for a person or a party to be accepted as a Plaintiff who has legal standing in a petition for judicial review of laws against the Constitution of 1945, they must first clarify and exhibit:

- a. Their qualification to be an Applicant as referred to in Article 51(1) of the Law of the Constitutional Court;
- b. The rights and/or authorities granted by the 1945 Constitution have been violated by the enactment of the law petitioned for review;
- c. The violation of the constitutional rights and/or authorities as a result of enactment of the law petitioned for review.

Since the Constitutional Court Decision No. 006/PUU-III/2005 dated May 31 of 2005 and Decision of the Constitutional Court Number 11/PUU-V/2007 dated 20 September 2007, as well as subsequent decisions, there is an opinion that the constitutional rights and/or authorities referred to in Article 51 paragraph (1) of the Law of the Constitutional Court must meet five conditions, namely:

- a. That there is a right and/or constitutional authority granted by the 1945 Constitution;
- b. That that right and/or constitutional authority stated by the Applicant is considered to be impaired by the enactment of Law petitioned for review;
- c. The violation of constitutional rights must be specific (special) and actual or at least potential, which, according to logical reasoning, will surely occur;
- d. There is a causal relationship between the loss and the enactment of the Law petitioned for review;
- e. There is a possibility that, if the petition be granted, the constitutional impairment/ violation argued by the petitioners, will not or no longer occur;

Based on what is mentioned above, according to the Government, it should

be doubted whether the Plaintiffs have the right as a party who considers their constitutional rights and/or authorities to be affected by the provisions of Article 108(1) along with its Explanation, and Article 190(1) of Law No. 36 of 2009 Concerning Health. And, in addition, whether or not the constitutional violation of the Plaintiffs in question is specific (special) and actual, or at least potential in nature, which, according to logical reasoning will surely occur, and whether there is a causal relationship between loss and the enactment of a law being petitioned for review.

According to the Government, the petition of the Plaintiffs is unclear and unfocused, especially in describing/ explaining and constructing the violation of their constitutional rights and/or authorities and the operation of the legislation, because of the following:

1. If the Plaintiffs claim to be civil servants (PNS), while also also being the Heads of Community Health Centres, then according to the Government, it is inappropriate and irrelevant if the Plaintiffs state that the provisions being petitioned for review are detrimental to their rights and/or authorities, because the Plaintiffs as civil servants have rights and obligations which are regulated and prescribed in the legislation itself.
2. If the Plaintiffs (in this case the Applicant named Misran) state that a violation of their constitutional rights and/or authorities has emerged because of the existence of actions relating to inquiries, investigations, prosecution, and court decisions by law enforcement, according to the Government, it is thus an action of law enforcement, which can not be equated with the actions deemed detrimental to the rights and/or constitutional authorities of the Plaintiff as guaranteed by the Constitution. In addition the process of legal action against the Applicant (Misran) mentioned relating to the implementation of Law No. 23 of 1992 Concerning Health, it is not based on Law No. 36 of 2009 Concerning Health.

Based on the above description, according to the Government the petition of the

Plaintiffs is not clear, firm or relevant; especially in constructing its legal standing. Therefore, according to the Government the legal standing of the Plaintiffs do not meet the qualifications as prescribed in Article 51(1) of Law No. 24 of 2003 Concerning the Constitutional Court and by the decisions of the Constitutional Court referenced earlier (Decision Number 006/PUU-III/2005 and 11/PUU-V/2007). However, if His Majesty the Chairman/Council of Judges of the Constitutional Court is of another opinion, the Government fully surrenders to His Excellency the Chairman/Members of the Panel of Judges of the Constitutional Judge to consider and assess whether the Plaintiff has legal standing or not.

II. Material Examination of Law No. 36 of 2009 Concerning Health

In relation to the petition for judicial review of Article 108(1) along with its Explanation, and Article 190(1) of Law No. 36 of 2009 Concerning Health, it states:

Article 108 (1) states that, *"Pharmaceutical practices comprising of production including quality control of pharmaceutical preparation, security, supply, storage and distribution of drugs, prescription drug services, drug information services and the development of drugs, medicines and traditional medicines, must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation "*.

The Explanation of Article 108(1) states that, *"What is meant by "health worker" in this provision is a pharmaceutical worker who is accorded with the proper expertise and authority. In the absence of a pharmaceutical worker, certain health workers may perform limited pharmacy practice which are to be carried out in accordance with legislation, for example (among others), as physicians and/or dentists, midwives and nurses"*.

Article 190(1) states that, *"The director of a health care facility and / or health worker who practices or works at a health care facility, and who intentionally does not provide first aid to a patient in an emergency as referred to in Article 32 or Article 85(2), shall be punished with a term of imprisonment for 2 (two) years or a maximum fine of Rp.200.000.000, 00 (two hundred million rupiah) "*.

The foregoing is considered to be contrary to the provisions of Article 27(1), Article 28C(2), Article 28D(1) and (3); Article 28H(1), and Article 28J(1) of the Constitution of the Republic of Indonesia 1945, which states:

Article 27(1) states that, “All citizens shall have equal status before the law and the government and shall hold without exemption the law and the government in esteem.”

Article 28C(2) states that, “Each person has the right to self-improvement by way of a collective struggle for his rights with a view to developing society, the nation, and the country.”

Article 28D(1) states that, “Each person has the right to recognition, security, protection and certainty before the law, which shall be just and treat everybody as equal before the law”.

Article 28D(3) states that, “Each citizen has the right to equal opportunity in government.”.

Article 28H(1) states that: “Each person has a right to a life of well-being in body and mind, to a place of residence, to enjoy a good and healthy environment, and to receive medical care”.

Article 28J(1), “Each person has an obligation to respect the fundamental human rights of others while partaking in the life of the community, the nation, and the state”.

Regarding what is alleged by the Plaintiffs above, the Government shall explain its position as follows:

1. Regarding the provisions of Article 108(1) as well as its Explanation provision in Law No. 36 of 2009 Concerning Health, the Government explains as follows:

In order to obtain a comprehensive overview and explanation, it is necessary to review philosophically and sociologically, why regulation is required regarding pharmaceutical work as set forth in the legislation, which can be described as follows:

- a. To carry out health services require various actions, one of which is the

field of Pharmacy which involves the provision, storage, distribution, and use of medicine and medical devices, as well as the control, supervision and development of efforts in the field of medicine, including narcotics, psychotropic drugs, medical devices and other pharmaceutical supplies.

- b. In order to realize an optimal degree of public health, medicine has a strategic role in the prevention of illness, increased endurance, the treatment of disease and the recovery of health. There is also medicine which is used to diagnose a disease that can affect bodily function. Medicine used must be safe, effective, and of good quality, and should be provided by persons who have the qualifications and authority to do so, so as to produce optimal therapeutic effect.
- c. Medicines per se must be treated as special commodities which play an important and necessary role in efforts to improve the status of community health. Therefore, the provision of medicine must be regulated more strictly, regarding the distribution of prescriptions by doctors, to prevent abuse and drug use which is incorrect, irrational and harmful to the patient due to improper administration. Furthermore, certain drugs must also be regulated whereby they can only be provided with a doctor's prescription.
- d. When medicine is given by people who do not have the expertise and authority to do so it can endanger the health of those who use it, and may cause drug resistance, permanent disability or even death.
- e. In obtaining medicine, a drug can be classified in 2 (two) ways:
 1. Drugs which can be obtained freely. Namely, the drugs included in this group are a limited group of drugs, drugs which don't need a prescription, as well as bound pharmacy drugs which can be obtained on the basis of consideration of the managing pharmacist at a pharmacy.
 2. Medicine which can only be obtained by prescription. Included in this group are the class of narcotic drugs, psychotropic substances, and hard drugs. However there is still the possibility that a doctor may write a drug prescription grouped in (1) above.

From the above description, according to the Government, the provisions of

Article 108(1) as well as its Explanation in Law No. 36 of 2009 Concerning Health, are intended to carefully and thoroughly consider the dangers that can arise from the use of drugs not for their intended use. Because of that, it is appropriate that if the drug is intended to be used by the community it must be given by people who have the competence, expertise, and authority to provide it.

Furthermore, the Government can convey that pharmaceutical personnel are personnel authorized to perform the work of pharmacy, as stipulated in Government Regulation No. 51 of 2009 Concerning Pharmaceutical Work (refer to Article 1(1) which states that "Pharmacy work' covers manufacturing, including quality control of pharmaceutical preparations, security, procurement, storage, and distribution, or distribution of drugs, medication management, medication services for a doctor's prescription, drug information services, as well as drug development, medicinal materials and traditional medicine). Furthermore, the provisions above are emphasized in Article 2(2) which states that pharmacy work as referred to in paragraph (1) must be performed by health professionals who have the expertise and authority to do so. What is meant by 'health workers' who have the expertise and authority to do so, are the pharmacy staff which consists of pharmacists and pharmaceutical technicians.

Based on the above description, according to the Government, the provisions of Article 108 as well as its Explanation provision within Law No. 36 of 2009 Concerning Health, basically regulate pharmaceutical practice, and are therefore not related to the status of the Plaintiffs as civil servants, who served as Heads of Community Health Centres and Assistant Heads of Community Health Centres. This is because, according to the Government, the duties, functions and obligations of the Plaintiffs have been determined independently by the laws which govern them. For example, the duties and functions of Civil Servants in general are regulated by Law No. 43 of 1999 Concerning Human Resources as well as the legislation beneath it.

The regulation of the existence, duties and functions of Health Centres are set out in decision No. 128/Menkes/SK/II/2004 Concerning the Policy Centre for Public Health. Regulation regarding the authority of nurses (including the

Plaintiffs in this petition) is set out in the Regulation of the Minister for Health No. 148/Menkes/I/2010 Concerning Licensing and Nursing Practice.

Thus, according to the Government, the Plaintiffs' petition of the provisions of Article 108(1) as well as its Explanation is misplaced and irrelevant. Also, according to the Government, if the allegations by the Plaintiffs are true and their request is granted by the Constitutional Court, such a decision may cause any of the following:

1. There will be a legal vacuum and chaos regarding the regulation of pharmaceutical practice,
2. It may lead to the circulation, acquisition, and distribution of drugs by irresponsible parties.
3. The protection and supervision of the community over the use of drugs will not be assured.

From the above description, according to the Government, the provisions of Article 108(1) as well as its Explanation in Law No. 36 of 2009 Concerning Health are intended to provide protection to the public as guaranteed and mandated by the Constitution, primarily regarding the circulation, acquisition, distribution and delivery of drugs made by persons/ parties who have the authority to do so.

2. Regarding the provision of Article 190(1) of Law No. 36 of 2009 Concerning Health, the Government explains as follows:

The substance of the criminal provisions as provided in Article 190(1) of Law No. 36 of 2009 Concerning Health, basically addressed the leadership of health care facilities and / or health workers who deliberately refused to admit patients and/or requested an advance payment in providing health services in emergency situations or disasters.

The obligation of the Head of health care facilities and/or health workers is to organise health efforts, which consists of, amongst other things, treatment services including the provision of aid in an emergency or disaster to save patients and prevent disability.

In an emergency or disaster, health care facilities which do not prioritize the rescue of people first, or ask for an advance payment, not only demonstrates that the actions of the leadership of the health care facilities and/or health workers are contrary to the principles of health service delivery which promotes humanitarian values, but it also contradicts the existence of a health care facility whose main task it is to provide primary health services to the community.

Thus, according to the Government, it is already granted that if the leaders of health care facilities and/or health workers, who do not provide assistance and give priority to the safety of people in a state of emergency will be given legal sanction, because it is contrary to the rights of any person to obtain health services as mandated and guaranteed by the Constitution.

From the above description, according to the Government, petition for judicial review of the provision of Article 190(1) of Law No. 36 of 2009 Concerning Health is inappropriate and irrelevant, and that even if the Plaintiffs' request is granted by the Constitutional Court, according to the Government, doing so will actually harm the right of people to obtain security, protection and health services during emergencies or natural disasters.

III. CONCLUSION

Based on the above explanation, the Government appealed to the Noble Chairman/ Council of Judges of the Constitutional Court of the Republic of Indonesia to examine, decide and adjudicate the petition for judicial review of Law No. 36 of 2009 Concerning Health against the Constitution of the Republic of Indonesia 1945, and asks that the Court provide the following decision:

1. The Plaintiffs had no legal standing;
2. To reject the petition of the Plaintiffs in whole or at least declare that the petition of the Plaintiffs cannot be accepted;
3. To receive the statement of the Government in whole;
4. To declare that the provisions of Article 108(1) as well as its Explanation and Article 190(1) of Law No. 36 of 2009 Concerning Health is not

inconsistent with the provisions of Article 27(1), Article 28C(2), Article 28D(1) and (3), Article 28H(1), and Article 28J(1) of the Constitution of the Republic of Indonesia 1945.

However if His Majesty the Chairman/Council of Judges of the Constitutional Court of the Republic of Indonesia is of another opinion, it is requested that a decision be passed which is wise and as fair as possible (*ex aequo et bono*).

[2.6] The DPR through the Court Secretariat on May 25, 2010, filed a written statement which is substantially as follows:

A. ARTICLE PROVISIONS OF LAW NO. 36 OF 2009 CONCERNING HEALTH AGAINST THE CONSTITUTION OF THE REPUBLIC OF INDONESIA 1945.

The Plaintiffs in their petition proposed a review of Article 108(1) as well as its Explanation in conjunction with Article 190(1) and (2) of Law No. 36 of 2009 Concerning Health, against the 1945 Constitution.

The Articles of law are as follows:

Article 108(1) reads:

"Pharmaceutical practices comprising of production including quality control of pharmaceutical preparation, security, supply, storage and distribution of drugs, prescription drug services, drug information services and the development of drugs, medicines and traditional medicines, must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation".

The Explanation of Article 108(1) reads:

"What is meant by "health worker" in this provision is a pharmaceutical worker who is accorded with the proper expertise and authority. In the absence of a pharmaceutical worker, certain health workers may perform limited pharmaceutical practice which is to be carried out in accordance with legislation, for example (among others), as physicians and/or dentists, midwives and nurses".

Article 190 reads:

(1) "The director of a health care facility and / or health worker who practices or works at a health care facility, and who intentionally does not provide first aid to a patient in an emergency as referred to in Article 32 or Article 85(2), shall be punished with a term of imprisonment for 2 (two) years or a maximum fine of Rp.200.000.000, 00 (two hundred million rupiah) ".

(2) In the event that the acts referred to in paragraph (1) result in disability or death, the Head of a health care facility and/or health personnel will be sentenced to a term of imprisonment of 10 (ten) years and a maximum fine of Rp.1.000.000.000 (one billion rupiah).

The Petitioners believe the provisions of articles mentioned are contradictory to Article 27(1), Article 28C(2), Article 28D(1), Article 28D(3), and Article 28H(1) of the 1945 Constitution.

B. THE CONSTITUTIONAL RIGHTS AND/ OR AUTHORITIES CONSIDERED BY THE PLAINTIFFS TO HAVE BEEN VIOLATED BY THE OPERATION OF LAW NO. 36 OF 2009 CONCERNING HEALTH

In the petition it is stated by the Plaintiffs, that with the enactment of Article 108(1) as well as its Explanation, in conjunction with Article 190(1) and (2) of Law No. 36 of 2009 Concerning Health, their constitutional rights have been impaired for the following reasons:

1. Through the operation of Article 108(1) and its Explanation in conjunction with Article 190(1) of Law No. 36 of 2009 Concerning Health, the Plaintiffs' constitutional rights as civil servants / citizens who work as health workers serving the nursing profession in isolated areas as the Head of health centres and health centre assistants where the power of doctors and pharmacists do not exist, has been impaired namely by a lack of legal certainty for the Plaintiffs in carrying out their duties providing health services to residents/patients.

2. According to the Plaintiffs, as health workers who originate as nurses in a remote and distant area, and which is far from a hospital, cannot provide optimal health services to residents/patients, especially pharmaceutical services (in providing medicine) as specified in Article 108(1) as well as its Explanation. The Article mentioned is also considered by the Plaintiffs to contradict Article 190(1)

of Law No. 36 of 2009 Concerning Health. This violates the constitutional rights of the Plaintiff as guaranteed and protected by the 1945 Constitution.

3. The legislation as referred to in Article 108(1) and the Explanation of Law No. 36 of 2009 Concerning Health until now has not yet been published by the Government. All the while, healthcare services, especially pharmaceutical practices, are still being conducted by the Plaintiffs. As a result of geographical conditions, there are an absence of doctors and pharmacy staff who work / are on duty there. This has violated the constitutional rights of the Plaintiffs as set forth in Article 28H(1) of the 1945 Constitution, namely the right to provide health services to the community. On the other hand they are very vulnerable to blame by law enforcement officials, especially the police and judiciary. These matters have been detrimental to the Plaintiffs' constitutional rights as civil servants.

4. According to the Plaintiffs as health workers, nurses have the right to equality in law and government, to obtain fair legal certainty, equal treatment in law and equal opportunity in government. Therefore, legal provisions which intentionally allow differentiation, unequal treatment, and an unbalanced and unfair position to community health services in rural areas which are far from hospitals, without doctors or pharmacists about pharmacy services; this matter violates the principles of human rights as protected by the 1945 Constitution.

5. According to the Plaintiffs, the provisions of Article 108(1) and its Explanation in conjunction with Article 190(1) of Law No. 36 of 2009 Concerning Health will have ineffective and inappropriate force in remote areas in the East Kalimantan Province unless the Department of Health of the Republic of Indonesia places doctors and pharmacists in health centres. From reviews, almost 95% of the entire leadership of health centres consists of nurses instead of doctors and pharmacists.

Thus according to the Plaintiffs, the provisions of Article 108(1) and its Explanation in conjunction with Article 190(1) and (2) of Law No. 36 of 2009 Concerning Health are contradictory to Article 27(1), Article 28C(2), Article 28D(1), Article 28D(3), and Article 28H(1) of the Constitution of the Republic of Indonesia 1945.

The disputed provisions of the Constitution of the Republic of Indonesia Year 1945 are as follows:

Article 27(1) states that, “All citizens shall have equal status before the law and the government and shall hold without exemption the law and the government in esteem.”

Article 28C(2) states that, “Each person has the right to self-improvement by way of a collective struggle for his rights with a view to developing society, the nation, and the country.”

Article 28D(1) states that, “Each person has the right to recognition, security, protection and certainty before the law, which shall be just, and shall treat everybody as equal before the law”.

Article 28D(3) states that, “Each citizen has the right to equal opportunity in government.”.

Article 28H(1) states that: “Each person has a right to a life of well-being in body and mind, to a place of residence, to enjoy a good and healthy environment, and to receive medical care”.

C. DECLARATION OF THE HOUSE OF REPRESENTATIVES

With respect to the arguments of the Plaintiffs as described in this petition, on this occasion the Parliament delivers its views regarding legal standing, and can be explained as follows:

1. Legal Standing of the Plaintiffs.

Pursuant to Article 51(1) of the Law of the Constitutional Court and its Explanation, those who may file a petition against the Constitution of 1945 are those who consider the rights and/or authorities granted by the 1945 Constitution to be impaired by the enactment of a law, namely:

- a. Individual Indonesian citizens (including groups of people who have similar interests);
- b. customary law communities which are still alive and living in accordance with the development and principles of the Republic of

- Indonesia as regulated by law;
- c. public or private legal entities; or
- d. state institutions;

The provision is reinforced in the Explanation provision that what is meant by 'constitutional rights' are the rights set forth in the Constitution of the Republic of Indonesia Year 1945. The Explanation of Article 51(1) states that only the rights explicitly set in the 1945 Constitution may be regarded as 'constitutional rights'.

Therefore, according to the Constitutional Court Law, in order for a person or a party to be accepted as an Applicant who has legal standing in a petition for judicial review of a law against the Constitution of the Republic of Indonesia 1945, it must be proved:

- a. They have the rights and/or authorities referred to in Article 51(1) and the Explanation of the Law of the Constitutional Court" which are considered have been impaired by the enactment of a law petitioned for review;
- b. That there has been a violation of the Constitutional rights and/or authorities as a result of the enactment of the law petitioned for review.

Regarding constitutional violation, the Constitutional Court has provided meaning and also limits on the types of constitutional violation which can arise due to the enactment of a law, and based on Article 51(1) of the Constitutional Court five requirements must be met (see the Decision on Case No. 006 / PUU-III/2005 and Decision on Case No. 011/PUU-V/2007), as follows:

- a. The Plaintiffs have constitutional rights as granted by the 1945 Constitution.
- b. The constitutional rights of the Plaintiffs as deemed by the Plaintiffs have been aggrieved by an Act.
- c. The violation of the constitutional rights of the Plaintiffs in question is specific, or unique and actual, or at least has the potential in nature to occur, according to logical reasoning.
- d. There is a causal relationship between the loss suffered and the

enactment of the law petitioned for review.

e. There is the possibility that through the granting of the petition, the violation of constitutional rights which was postulated will not or no longer occur.

If these five conditions are not met by the Plaintiffs in seeking judicial review of the law against the 1945 Constitution, the Plaintiffs have no legal standing as Applicants.

Based on the provisions of Article 51(1) and the Explanation of the Law of the Constitutional Court, and the requirements, according to the Decision of the Constitutional Court decision 006/PUU-III/2005 and Decision 011/PUU-V/2007, Parliament is of the opinion that as legal subject, the Plaintiffs have the qualifications as stipulated in Article 51(1) of the Law of the Constitutional Court. However, there has been no constitutional violation to the Plaintiffs, and none which may potentially occur with the enactment of Section 108(1) as well as its Explanation, and Article 190 (1) and (2) of Law No. 36 of 2009 Concerning Health, based on the following explanation:

1. The Plaintiffs in this petition did not explain and justify a concrete, specific and actual, or at least potential in nature, possibility of constitutional violation, which, according to logical reasoning, would surely be suffered by the Plaintiffs as civil servants in their position as a Nurse, Head of Community Health Centre and head of the TU Health Centre as a result of the enactment of Article 108(1) as well as it's Explanation, in conjunction with Article 190(1) and (2) of Law No. 36 of 2009 Concerning Health.
2. Against the proposition of the Plaintiffs which states that they can not work optimally in providing health services to the community because of lack of doctors and pharmacists in the region, the House believes it is not an issue of the constitutionality of Article 108(1) as well as its Explanation, in conjunction with Article 190(1) and (2) of Law No. 36 of 2009 Concerning Health. Therefore, if the Plaintiffs state that their constitutional rights and/or authorities have already been violated because of the inquiries, investigations, prosecution and court decisions by law enforcement which

have ensued as a result of the Plaintiffs conducting pharmacy practice, the House is of the view that such matters are an issue for the application of norms in the Articles mentioned.

Based on these explanations, the House is of the view that the provisions of Article 108(1) and its Explanation, in conjunction with Article 190(1) and (2) of Law No. 36 of 2009 Concerning Health do not hinder and harm the Plaintiffs' constitutional rights as guaranteed by Article 27(1), Article 28C(2), Article 28D(1), Article 28D(3), Article 28H(1) of the 1945 Constitution. Therefore there is no constitutional violation or potential constitutional violation caused to the Plaintiffs. Thus, the Plaintiffs in this petition have no legal standing as required by Article 51(1) of the Law of the Constitutional Court and the earlier decision of the Constitutional Court in case number 011/PUU-V/2007 and 006/PUU-III/2005.

Thus the Parliament has appealed to the honourable Chairman/Judge of the Constitutional Court that the petition of the Plaintiffs can not be accepted.

However, should the Chairman / Constitutional Court judges be of another opinion, the following shall be delivered by the Parliament regarding the judicial review of Law No. 36 of 2009 Concerning Health against the 1945 Constitution.

2. Examination of Law No. 36 of 2009 Concerning Health.

The Plaintiffs in this petition argued that their constitutional rights have been violated or at least have the potential in nature to result in violation by the enactment of Section 108(1) and its Explanation in conjunction with Article 190(1) and (2) of Law No. 36 of 2009 Concerning Health. According to the Plaintiffs these provisions violate the constitutional rights of the Plaintiffs to obtain legal protection and avoid discriminatory treatment, hence it is considered contrary to Article 27(1), Article 28C(2), Article 28D(1) , Article 28D(3), and Article 28H(1) of the 1945 Constitution.

Regarding the matters put forward by the Plaintiffs, the House of Representatives testifies as follows:

1. Article 28H of the 1945 Constitution is the constitutional basis for health. This provision not only strengthens the basis of health as being a part of human rights, but it creates a new paradigm that health is an obligation upon all parties (individuals, communities and the nation) to create a condition whereby every individual or citizen is in good health, so that they may be productive both economically and socially.
2. Since major reforms were undergone, constitutional development has evinced a huge shift. Central and local government relations shifted from centralization to decentralization marked by Law No. 32 of 2004 Concerning Regional Government. This Law contains a provision stating that the field of health is left entirely to each region, whereby each region is given the authority to manage and organize all aspects of health.
3. The lack of doctors and pharmacists, and the distance of hospitals in remote areas such as East Kalimantan are technical issues regarding the recruitment of health personnel. In the areas concerned, they have already been given full authority to manage and organize all aspects of health, and the matters mentioned are irrelevant if associated with the constitutionality of Article 108(1) and its Explanation, in conjunction with Article 190(1) and (2) of Law No. 36 of 2009 Concerning Health. These provisions actually provide legal certainty for the Plaintiffs to perform pharmaceutical practice, if in those areas there are no pharmaceutical workers.
4. In the case that the Plaintiffs' assumption that Article 108(1) and its Explanation of the Law Concerning Health are unconstitutional and their petition is granted by the Constitutional Court, then it would hinder the Plaintiffs in providing basic health care and lose the judicial basis for the Plaintiffs to conduct pharmaceutical practice, given the Explanation of Article 108(1) the Law Concerning Health, which reads "..... In the absence of a pharmaceutical worker, certain health workers may perform limited pharmaceutical practice which is to be carried out in accordance with legislation, for example (among others), as physicians and/or dentists, midwives and nurses".
5. Parliament is of the opinion that the provisions of Article 108(1) as well as

its Explanation of Law No. 36 of 2009 Concerning Health, provide a legal basis as well as legal certainty for the applicant to carry out pharmaceutical practice.

6. The substance of the material in the criminal provisions of Article 190(1) of the Law Concerning Health is, in principle, addressed to the management of health care facilities and/or health workers who deliberately refuse to admit patients and/or the delivery of health services in an emergency or disaster.
7. In an emergency or disaster, health care facilities which do not give priority to rescuing people, means that the action of the Heads of health care facilities and/or its health workers are contrary to the principles of health service delivery that promote human values. In addition, it is also contradictory to the existence of a health care facility whose task is to provide basic health services to the community.
8. Therefore, the Parliament is of the opinion that it very much fulfils the sense of justice and has a clear legal logic and basis that if the Heads of health care facilities and/or health workers do not provide assistance and give priority to the safety of people in a state of emergency, they will be given legal sanction, because it is thus contrary to the rights of any person to obtain health services as mandated and guaranteed in Article 28H(1) of the 1945 Constitution.
9. Based on the issues that have been raised, the provisions of Article 108(1) and its Explanation in conjunction with Article 190(1) and (2) of Law No. 36 of 2009 Concerning Health, are in no way contrary to the provisions of Article 27(1), Article 28C(2), Article 28D(1), Article 28D(3), and Article 28H(1) of the Constitution of the Republic of Indonesia 1945.

Based on the arguments mentioned above, Parliament requests the Chairman/Council of Judges of the Constitutional Court to rule a verdict as follows:

1. To state that the Plaintiffs have no legal standing, so that this petition may be declared void;

2. To reject this petition in its entirety or at least declare this petition as void;
3. To declare that Article 108(1) and its Explanation in conjunction with Article 190(1) and (2) of Law No. 36 of 2009 Concerning Health are not contrary to Article 27(1), Article 28C(2), Article 28D(1), Article 28D(3), Article 28H(1) and (2) of the Constitution of the Republic of Indonesia 1945.
4. To declare that Article 108(1) and its Explanation in conjunction with Article 190(1) and (2) of Law No. 36 of 2009 Concerning Health still have binding legal force.

If the Chairman/ Constitutional Court judges are of another opinion, the Parliament requests that the fairest decision be made.

[2.7] At the hearing on June 16, 2010, the Plaintiffs' expert testimony was heard as well as the testimony of the Government's witnesses; and can principally be explained as follows:

1. Plaintiffs' Expert Prof. Dr. Azrul Azwar, M.PH (Lecturer, Faculty of Medicine, University of Indonesia)

- Article 108(1) of Law No. 36 of 2009 Concerning Health indicates that the competence of regulations regarding drugs are not clear and must not be maintained;
- Article 108(1) mentions traditional medicine and Article 99(2) mentions traditional treatment. Both articles are in conflict with one another;
- During the time of Aristotle, and the time of Socrates, pharmaceutical authority clung to doctors and medical personnel;
- Nurses must also be given authority based on the needs of local communities;

GOVERNMENT WITNESSES

1. Dr. H. Agus Gusmara A, M.Kes (Head of the Regency Office Serang)

- Given the limitations upon health personnel, especially doctors and pharmaceutical workers, as well as to institute growth in the Serang

Regency, a decree has been made for health care cases where, one day, if they do not have a doctor's authority or a doctor isn't available, then the designated health care officer, in this case nurses and midwives, can provide health care or technical medical services at a health facility or health centre and its affiliate health centres;

- With the existence of Article 108 of Law No. 36 of 2009 Concerning Health, officials in remote areas feel more assured in performing their duties because it is possible to provide technical medical services at health facilities. While at the Regency level, health services have a clear legal framework with the existence of such laws;

2. Dr. Asep Misbah Alfalah, Apt., M.M (Head of the Health Department, Kota Serang)

- In Kota Serang in 2008 there were 10 health centres and 13 affiliate health centres already being filled by 2 pharmaceutical workers. There is better drug management, and more efficiency, and it is hoped that the community can obtain clearer information, because medicines are not merely commodities to be sold or used;

[2.8] The Related Party, Dr. Mangku Sitepoe, filed an affidavit with the Court on October 22, 2010, which stated the following:

- The formation of Article 108 of Law No. 36 of 2009 Concerning Health has had great intervention by businesses. Medicine has been identified as mere merchandise. Pharmaceutical practice is monopolized by pharmaceutical workers while pharmacy only forms one part of health care. Business interests dominate the practice of pharmacy to the extent that it gives rise to contravention. The price of medicine is one determining factor in the drug business in Indonesia;
- Although Law No. 36 of 2009 Concerning Health has already been ratified as a revision of Law No. 32 of 1992, but in Indonesia it is still considered that the Dutch law Staatsblad 1937 No. 541, which became Law No. 419 of 1949 Concerning Prescription Drugs, still prevails and also regulates the practice of

pharmacy where it is not monopolized by pharmaceutical workers;

- The procurement of medicines in Schedule G, both in the hospital and in health care units, up to health care centres, should be able to write prescriptions for pharmacist approval. The presence of Schedule G drugs in health centres is already the responsibility of doctors in the Regency with the approval of a pharmacist if the Head of the clinic is a nurse. But the handing over of drugs to patients must be by those who have medical authority such as doctors, dentists, paramedics and midwives;
- The provision of Schedule G drugs to patients at health centres are permitted by paramedics or midwives. Paramedics and midwives are educated and have been trained to become professionals with such medical authority; they simply do not have the authority to write prescriptions. Pharmacists are not permitted to hand over Schedule G drugs directly to patients, who must have a prescription, but the pharmacist can mix medicines, store medicines, make medicines and so on in accordance with Law No. 419 of 1949 Concerning Prescription Drugs;
- Article 108 of Law No. 36 of 2009 Concerning Health set the legal basis for the manufacture, control, security, storage, and distribution of medicines, prescription medicine services for doctors, drug information services as well as the development of medicinal drugs and traditional medicine. But it still did not touch upon the issue of the use of drugs;
- Per Article 108 of Law No. 36 of 2009 Concerning Health, pharmaceutical practice is monopolized by health workers in the field of pharmacy, namely pharmacists and pharmaceutical technicians, at the expense of other health personnel in the field of medicine;
- Article 108(1) of Law No. 36 of 2009 Concerning Health is a provision of pharmaceutical practice which is synonymous with Government Regulation No. 51 of 2009 Concerning Pharmaceutical Employment, which restricts other health personnel. This has given rise to various controversies in its application;
- The constitutional rights of nurses had been revoked by Article 108 of Law No. 36 of 2009 Concerning Health. Article 108 of Law No. 36 of 2009

Concerning Health was contradictory to Article 28H of the 1945 Constitution;

[2.9] For the purposes of shortening the commentary in this decision, everything which has occurred in the hearing has been sufficiently designated in the official report which remains an integral part of this decision;

3. LEGAL CONSIDERATIONS

[3.1] The purpose and objective of the petition of the Plaintiffs is to review the constitutionality of:

- Article 108(1) which states, "Pharmaceutical practices comprising of production including quality control of pharmaceutical preparation, security, supply, storage and distribution of drugs, prescription drug services, drug information services and the development of drugs, medicines and traditional medicines, must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation ".
- The Explanation of Article 108(1) which states, "What is meant by "health worker" in this provision is a pharmaceutical worker who is accorded with the proper expertise and authority. In the absence of a pharmaceutical worker, certain health workers may perform limited pharmaceutical practices which are to be carried out in accordance with legislation, for example (among others), as physicians and/or dentists, midwives and nurses".
- Article 190(1) states, "The head of a health care facility and / or health worker who practices or works at a health care facility, and who intentionally does not provide first aid to a patient in an emergency as referred to in Article 32 or Article 85(2), shall be punished with a term of imprisonment for 2 (two) years or a maximum fine of Rp.200.000.000, 00 (two hundred million rupiah) ".
- Law No. 36 of 2009 Concerning Health (State Gazette of the Republic of Indonesia of 2009 No. 144, Supplement to State Gazette of the Republic of Indonesia No. 5063, hereinafter referred to as Law 36/2009) against the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution):

Article 27(1) which states, "All citizens have equal standing before the law and government, and shall uphold the law and government, with no exception".

Article 28C(2) which states, "Every person has the right to advance themselves in the fight for their rights collectively to build a society, nation and country".

Article 28D(1) which states, 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(3) which states, "Every citizen is shall have the right of equal opportunities in government".

Article 28H(1) which states, "Every person shall have the right to live in physical and spiritual prosperity, to have a home, and obtain a good and healthy environment, and shall have the right to receive medical care".

Article 28J(1) which states, "Every person shall respect the human rights of others in the orderly life of society, nation and state".

- The Plaintiffs argued that the Law petitioned for review on the one hand created a dilemma and legal uncertainty for the Plaintiffs as nursing staff (under the limited authority granted by law), while on the other hand, the Plaintiffs are required to perform health services;

[3.2] Prior to considering the principal issue of the petition, the Constitutional Court, hereinafter referred to as the Court, shall first consider the following matters:

1. The authority of the Court to examine, try and decide upon this petition;
2. The legal standing of the Plaintiffs;

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

The Authority of the Court

[3.3] Based on the provision of Article 24C(1) of the 1945 Constitution which reads, "The Constitutional Court has the authority to hear at the first and final

instance, the decision of which shall be final, to conduct 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(1) of Law No. 24 of 2003 Concerning the Constitutional Court (State Gazette of the Republic of Indonesia of 2003 No. 98, Supplement to State Gazette of the Republic of Indonesia No. 4316, hereinafter referred to as the Constitutional Court Law) which reads, “The Constitutional Court has the authority to hear at the first and final instance, the decision of which shall be final, to: (a) Conduct judicial review of laws against the 1945 Constitution of the State of the Republic of Indonesia”, in conjunction with Article 29(1)(a) of Law No. 48 of 2009 Concerning Judicial Authority (State Gazette of the Republic of Indonesia of 2009 No. 157, Supplement to State Gazette of the Republic of Indonesia No. 5076) which reads, “The Constitutional Court has the authority to hear at the first and final instance, the decision of which shall be final, to (a) Conduct judicial review of laws against the 1945 Constitution of the State of the Republic of Indonesia”;

[3.4] The petition is intended to review the constitutional norms of Article 108(1), the Explanation of Article 108(1), and Article 190(1) of Law No. 36 of 2009 against Article 27(1), Article 28C(2), Article 28D(1) and (3), Article 28H(1) and Article 28J(1) of the 1945 Constitution. Hence, the Court is of the opinion that it has the authority to examine, hear, and decide upon this petition;

Legal Standing of the Plaintiffs

[3.5] Based on Article 51(1) of the Law of the Constitutional Court, as well as its Explanation, a Plaintiff in judicial review of a Law against the Constitution shall be one who considers their constitutional rights and/or authorities granted by the 1945 Constitution to be impaired by the effect of the Law petitioned for review, namely:

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

- Customary law communities which are still alive and living in accordance with the development and principles of the Unitary Republic of Indonesia as regulated by law;
- Public or private legal entities; or
- State institutions;

[3.6] Regarding the impairment of constitutional rights and/or authorities as referred to in Article 51(1) of the Law of the Constitutional Court, since Decision No. 006/PUU-III/2005 dated May 31, 2005 and Decision No. 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:

- a. The existence of constitutional rights and/or authorities for the Plaintiffs granted by the 1945 Constitution;
- b. The Plaintiffs consider that such constitutional rights and/or authorities have been impaired by the effect of the Law petitioned for review;
- c. The impairment of such constitutional rights and/or authorities must be specific and actual or at least potential in nature which, pursuant to logical reasoning, will likely occur;
- d. There is a causal relationship between the impairment of such constitutional rights and/or authorities and the coming into effect of the Law petitioned for review;
- e. There is the possibility that with the granting of the petition, the impairment of such constitutional rights and/or authorities as argued by the Plaintiffs will not or will no longer occur

[3.7] Based on the reasoning as provided in paragraphs [3.5] and [3.6] above, the Court shall subsequently consider the legal standing of the Plaintiffs in the petition as follows:

[3.8] The Plaintiffs argued as individuals/a group of Indonesian citizens, and believe that they have constitutional rights granted by Article 27(1), Article 28C(2),

Article 28D(1) and (3), Article 28H(1) and Article 28J(1) of the 1945 Constitution as quoted in paragraph [3.1] which are impaired by the effect of Article 108(1), the Explanation of Article 108(1), and Article 190(1) of Law No. 36 of 2009;

[3.9] The impairment of such constitutional rights of the Plaintiffs are specific and actual or potential in nature by the effect of the provisions of Article 108(1), the Explanation of Article 108(1), and Article 190(1) of Law No. 36 of 2009. Hence, such impairment also has a causal relationship with Law No. 36 of 2009 which is petitioned for review, and it can be assured that such impairment will not occur if the petition of the Plaintiffs be granted;

[3.10] Therefore, the Court is of the opinion that the Plaintiffs prima facie have legal standing to file the petition. However, since there is a close relationship between the impairment of the constitutional rights of the Plaintiffs and the core of the petition, the existence or nonexistence of the impairment of the constitutional rights of the Plaintiffs as a result of the effect of the provisions will be considered along with the core of the petition;

Core of the Petition

[3.11] The legal issue in the petition of the Plaintiffs is the constitutionality of Article 108(1), the Explanation of Article 108(1) and Article 190(1) of Law No. 36 of 2009 against Article 27(1), Article 28C(2), Article 28D(1) and (3), Article 28H(1) and Article 28J(1) of the 1945 Constitution based on the following reasoning:

- The Applicant (Misran) has been apprehended, detained and sentenced to 3 months imprisonment (taking into account the period in which the he was detained) with a fine in the amount of Rp 2,000,000 (two million rupiah) under the accusation of violating Article 82(1)(d) and Article 63(1) of Law No. 23 of 1992 Concerning Health;
- The practical fact is that most of the main community health centres and nearly all affiliate community health centres in the East Kalimantan Province and in fact, throughout Indonesia, are headed by health worker nurses working in remote areas since the government has not been able to assign medical personnel

(doctors) and pharmaceutical personnel (pharmacists/ technical pharmaceutical personnel) in such areas;

- The Plaintiffs 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 resources and the unavailability of health workers having the expertise and authority in remote areas. However, on the other hand, nursing staff are required to perform health services (medical and pharmaceutical services) for all spectres of the community, particularly in emergency situations. In fact, if they do not perform such services, they are subject to the penalty of imprisonment or a fine;

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

Expert Azrul Azwar

- Nurses must also be granted authority on the basis of the needs of the local community;

Witnesses

1. Trisno Widodo

- Geographically, East Kalimantan, particularly in the Kutai Kartanagara Regency, there are 18 Districts, 248 Villages, with a population of approximately 600,000, while the number of doctors is 75. If the abovementioned Articles prohibit nurses from helping the community via their health services, while the number of doctors are extremely limited, community service will not be at the expected level;

2. H. Edy Sukamto

- The witness agrees that nurses should not perform any work other than their own duties. However, in East Kalimantan, community service is performed to protect the community. Therefore, the government should also pay attention to nurses who are working on the basis of regulations which are still applicable;

3. H. Abdul Jalal

- The Articles cannot be ideally implemented practically, particularly in East Kalimantan, because the assistant pharmacists and pharmacists are not available in the main health centres and the affiliate health centres;

4. Hj. Emy Dasimah

- Based on the fact that there are nurses in the Kutai Kartanegara Regency being prosecuted, health services in the Kutai Kartanegara Regency including urban and remote areas have been inactive because all nurses are not willing to provide services for patients;

5. Andi Baharuddin

- The witness hopes that nurses can provide services for the community again because currently, whenever someone is ill, paramedics or nurses are the health workers who make house calls. No doctors have ever been called to provide services, because to date, the patient is the one who visits the doctor;

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

Article 108(1) of Law No. 36 of 2009 is intended to cautiously and carefully consider the dangers which may arise in using drugs in a manner incompatible with their intended purpose. Therefore, it is appropriate that the drugs to be used by the community be administered by persons who have the competence, expertise and authority to do so;

Article 1(1) of Government Regulation No. 51 of 2009 as further affirmed in Article 2(2) which states that pharmaceutical work as intended in paragraph (1) must be performed by health workers having the expertise and authority to do so. Health workers which having the expertise and authority to do so shall be pharmaceutical workers which consist of pharmacists and technical pharmaceutical workers;

If the petition of the Plaintiffs is granted, the consequences will be as follows:

- There will be a legal vacuum 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 regarding the use of drugs cannot be guaranteed;

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

1. H. Agus Gusmara A

- Due to the limited number of health workers, particularly physicians and pharmaceutical workers, as well as regarding the growth of 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 technical medical services at health facilities or community health centres and their affiliates, namely auxiliary community health centres, village health centres and *poliner*;

2. Asep Misbah Alfalah

- In the city of Serang in 2008 there were 10 community health centres and 13 auxiliary community health centres being serviced by 2 pharmaceutical workers. Drug management was better, more efficient, and it is expected that the community should receive clearer information, since drugs are not just commodities to be merely sold or used;

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

- The provisions of Article 108(1) of Law No. 36 of 2009 along with its Explanation provision provided the juridical basis and legal certainty for the Plaintiffs to perform pharmaceutical practices;

- The provisions of Article 108(1) and its Explanation provision in conjunction with Article 190(1) and (2) of Law No. 36 of 2009 are not in any way contradictory to the provisions of Article 27(1), Article 28C(2), Article 28D(1) and (3) as well as Article 28H(1) of the 1945 Constitution

[3.16] The Court has heard the testimonies of the Related Parties, namely the Indonesian Medical Association, the Indonesian Pharmacists Association and the National Nurses Association of Indonesia, and the affidavit of Dr. Mangku Sitepoe, all of which principally state as follows:

1. Indonesian Medical Association

- Article 108(1) of Law No. 36 of 2009 is in accordance with and not contradictory to the 1945 Constitution;
- Both the Explanation of Article 108(1) of Law No. 36 of 2009 and Government Regulation No. 51 of 2009 do not clarify the type of drugs referred to in the provisions mentioned. In Indonesia, drugs are categorized into over-the-counter drugs, pharmacists' prescription drugs, doctors' prescription drugs (Schedule G), psychotropic drugs and narcotic drugs. Health workers such as nurses and midwives are authorized to store over-the-counter drugs and pharmacists' prescription drugs;
- The Indonesian Medical Association hoped that there would be an amendment to the Explanation of Article 108(1) of Law No. 36 of 2009 and to Government Regulation No. 51 of 2009 so that the provision of health services for the community would not be hampered and health workers performing such services could be protected by the law;

2. Indonesian Pharmacists Association

- The Indonesian Pharmacists Association proposed that the Articles mentioned should not be amended or supplemented;
- Article 108(1) of Law No. 36 of 2009 constitutes a guarantee for the community at large that pharmaceutical services will be performed based on science and the health profession;

3. National Nurses Association of Indonesia

- The empirical and juridical facts regarding the Health Law have adversely affected nurses. The facts show that, practically, most of the main community health centres and nearly all community health centres, particularly those in remote areas, are headed by a nurse;

4. Dr. Mangku Sitepoe

- Article 108 of Law No. 36 of 2009 indicates that pharmaceutical practices are to be monopolized by health workers in the field of pharmacy, namely pharmacists and technical pharmaceutical personnel, as it disregards other health workers in the field of medicine;
- The provision regarding pharmaceutical practice in Article 108(1) of Law No. 36 of 2009 is identical to that of Government Regulation No. 51 of 2009 Concerning Pharmaceutical Employment which restricts other health workers. This has created controversy regarding its application in terms of implementation;
- The constitutional rights of nurses have been revoked by Article 108 of Law No. 36 of 2009. Article 108 of Law No. 36 of 2009 is therefore contradictory to Article 28H of the 1945 Constitution;

Opinion of the Court

Core of the Petition

[3.17] The core of the Plaintiff's petition is the judicial review of the constitutionality of the articles in Law No. 36 of 2009 and its Explanation provision, namely:

- Article 108(1), which reads, "Pharmaceutical practice comprising of production including quality control of pharmaceutical preparation, security, supply, storage and distribution of drugs, prescription drug services, drug information services and the development of drugs, medicines and traditional medicines, must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation".
- Elucidation of Article 108 paragraph (1) reads, "What is meant by "health worker" in this provision is a pharmaceutical worker who is accorded with

the proper expertise and authority. In the absence of a pharmaceutical worker, certain health workers may perform limited pharmaceutical practice which is to be carried out in accordance with legislation, for example (among others), as physicians and/or dentists, midwives and nurses"; and

- Article 190(1) which reads, "The director of a health care facility and / or health worker who practices or works at a health care facility, and who intentionally does not provide first aid to a patient in an emergency as referred to in Article 32 or Article 85(2), shall be punished with a term of imprisonment for 2 (two) years or a maximum fine of Rp.200.000.000, 00 (two hundred million rupiah)";

The Articles and Explanation of the Law petitioned for review are contradictory to Article 27(1), Article 28D(1), Article 28H(1), and Article 28J(1) of the 1945 constitution;

- Article 27(1) reads, "All citizens have equal standing before the law and government, and shall uphold the law and government, with no exception".
- Article 28D(1) reads, "Every person is entitled to recognition, security, protection and legal certainty of fair and equal treatment before the law".
- Article 28H(1) reads, "Every person has the right to live in physical and spiritual prosperity, in their residence, and obtain a good and healthy environment as well as receive medical care".
- Article 28J(1) reads, "Every person shall respect the human rights of others in the orderly life of society, nation and state

[3.18] Article 108(1) of Law No. 36 of 2009 principally regulates health practices in the field of pharmacy, which may only be performed by pharmaceutical workers. The Explanation of Article 108(1) of Law No. 36 of 2009 principally provides for the exceptions to the provision set forth in Article 108(1) of Law No. 36 of 2009; namely, in the event that pharmaceutical workers are unavailable, 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(1) of Law No. 36 of 2009 principally provides for the criminal sanctions against the head of a health service

facility and its health workers who intentionally do not administer first aid to a patient in an emergency situation;

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

[3.19] Based on the reasoning in the above explanation, the issue which must be considered by the Court is whether or not the provisions in the above-mentioned two Articles and one Explanation are contradictory to the principles of: equality before the law and government [vide Article 27(1) of the 1945 Constitution], certainty before a just law [vide Article 28D(1) of the 1945 Constitution], the right to live in prosperity and the right to obtain health services [vide Article 28H(1) of the 1945 Constitution] and the duty to respect the human rights of others [vide Article 28J(1)]?

[3.20] Prior to considering the principal issues of the case, the Court must first state the following:

[3.20.1] Health is one of the basic needs of every man, and it is therefore included in the Constitution as a fundamental right of every person which must be protected, guaranteed and fulfilled. To meet these needs, it is required by health workers, including nursing staff and pharmaceutical workers, who are educated in the field of health, to participate in advancing the nation's life and country. In addition to the above, health workers have fundamental obligations and rights, both relating to their professions and to their positions as human beings. With respect to fundamental rights, the state has the obligation to respect, protect and fulfil them [vide Article 28I(4) and Article 34(3) of the 1945 Constitution];

[3.20.2] Pharmaceutical practices, in the context of maintaining and achieving health, in addition to helping reach the objective of health maintenance, also contain risks which are counterproductive for health, such as physical disabilities - whether temporary or permanent- 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 voiding any risks, however small they are, in performing the pharmaceutical practices as described above. Hence, pharmaceutical practices must be performed by well-educated people having high competence and professionalism in line with the advancements in science and technology in their field. Such people 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 this, the state has the obligation to properly 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 the benefits of the law in relation to the practical (real) situation in society;

[3.21] 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 Plaintiffs, the witnesses of the Plaintiffs and the Government as well as having carefully examined the documentary evidence presented by the Plaintiffs, makes the following judgment:

[3.22] The Court is of the opinion that from the perspective of established norms, the main provision of Article 108(1) of Law No 36 of 2009, which states that the production and management of drugs and traditional drugs must be

performed by pharmaceutical workers having the relevant 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(1) of Law No. 36 of 2009 which reads, "Pharmaceutical practices comprising of production including quality control of pharmaceutical preparation, security, supply, storage and distribution of drugs, prescription drug services, drug information services and the development of drugs, medicines and traditional medicines, must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation ", is constitutional and not contradictory, in particular, to Article 27(1) and Article 28D(1) of the 1945 Constitution. However, the specific sentence "**... must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation**" in the Article connected to the Explanation of this Article which reads, "What is meant by "health worker" in this provision is a pharmaceutical worker who is accorded with the proper expertise and authority. In the absence of a pharmaceutical worker, certain health workers may perform limited pharmaceutical practice which is to be carried out in accordance with legislation, for example (among others), as physicians and/or dentists, midwives and nurses", has created a constitutional problem, and therefore the Court will make a separate consideration;

[3.23] Concerning Article 190(1) of Law No. 36 of 2009, the Court is of the opinion that from the perspective of established norms, this Article which imposes a criminal sanction of imprisonment or fine on the head of health service facility and/or health workers practicing or working at a health service facility who intentionally refrain from providing 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 sustain life as stated in Article 28A of the 1945 Constitution, and the right to obtain health services as guaranteed by Article 28H(1) of the 1945 Constitution. Therefore the state has an obligation to respect, protect and fulfill such rights as stipulated in Article 28I(4) of the 1945 Constitution. The head and/or workers of a health service facility who intentionally refrain from providing aid to a patient in an emergency situation have thereby intentionally disregarded the obligation of the state, and the government in particular, to provide health services for citizens. Therefore, the Court is of the opinion that the provision of Article 190(1) of Law No. 36 of 2009 is constitutional and not contradictory in particular to Article 28H(1) and Article 28J(1) of the 1945 Constitution;

[3.24] The Plaintiffs argued that Article 108(1) of Law No. 36 of 2009 along with its Explanation provision, in conjunction with Article 190(1) of Law No. 36 of 2009 have created a dilemma. This is because on one hand, the provision of Article 108(1) along with its Explanation provision 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(1) of Law No. 36 of 2009 states that if they intentionally refrain from giving aid to a patient in an emergency situation, they are subject to criminal sanction by way of imprisonment or fine. According to the Plaintiffs, this has resulted in legal uncertainty which is contradictory to Article 28D(1) of the 1945 Constitution. With regard to such argument, the Court is of the opinion that from the perspective of established norms, Article 108(1) of Law No. 36 of 2009 which requires the production and management of drugs and traditional drugs to be performed by pharmaceutical workers does not have any issue of constitutionality, 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 Explanation provision 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 No. 36 of 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 Plaintiffs. All of the above facts make the sentence “... **must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation**” in Article 108(1) along with its Explanation provision, when associated with Article 190(1) of Law No. 36 of 2009, inappropriate to be applied the same way in all places throughout Indonesia;

[3.25] With regard to the sentence “... **must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation**” in Article 108(1) and its Explanation provision, the Court is of the opinion that the formulation of such norms do 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 legal certainty, it is only found in the Explanation of the article which states that “health workers” in the Article shall be pharmaceutical workers. Such an Explanation would not be required if the provision of the said norm had been formulated in the Article. Based on such consideration, the Court is of the opinion that the sentence “... **must be**

implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation” creates legal uncertainty. Therefore it is contradictory to Article 28D(1) of the 1945 Constitution if it is not construed in a certain interpretation that provides certainty so that the norm contained within the sentence can be applied in all areas in Indonesia under any conditions;

[3.26] With regard to the Explanation provision of Article 108(1) of Law No. 36 of 2009, which contains an exclusion provision, the Court is of the opinion that the placement of the exclusion provision in the Explanation section is incorrect because such a provision is still categorized as an established norm instead of merely an Explanation. Furthermore, the established norm contained in the Explanation may have an implication through the imposition of criminal sanction against the violating party, even though the provision of such a 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 the norm, the exclusion provision, as argued by the Plaintiffs, has led 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 Plaintiffs. 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 an exclusion provision which is highly restrictive 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 Plaintiffs;

[3.27] Based upon all of the reasoning in the above considerations, the Court is of the opinion that the arguments in part of the petition of the Plaintiffs have no legal basis, and have legal basis for a separate part. Namely, in so far as it concerns the sentence “... ***must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation***” in Article 108(1) of Law No. 36 of 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, including (among others) doctors and/or dentists, midwives, and nurses who perform their duties in an emergency situation which threatens the life of a patient and immediate medical treatment is required in order to save the patient. The Explanation provision of Article 108(1) of Law No. 36 of 2009 which provides extremely limited authority, creates a dilemma and results in the absence of a just legal certainty. Therefore it is contradictory to Article 28D(1) of the 1945 Constitution;

4. CONCLUSION

Based on the foregoing considerations of fact and law, the Court has come to the following conclusions:

[4.1] The Court has authority to examine, hear and decide upon this petition;

[4.2] The Plaintiffs have legal standing to file the petition;

[4.3] The core of the petition is legally proven in part;

Based on the 1945 Constitution of the Republic of Indonesia and Law No. 24 of 2003 Concerning the Constitutional Court (State Gazette of the Republic of Indonesia of 2003 No. 98, Supplement to State Gazette of the Republic of Indonesia No. 4316) as well as Law No. 48 of 2009 Concerning Judicial Authority (State Gazette of the Republic of Indonesia of 2009 No. 157, Supplement to State Gazette No. 5076).

5. DECISIONS

Decides,

To declare:

- To grant the petition of the Plaintiffs in part;
- Article 108(1) of Law No. 36 of 2009 Concerning Health (State Gazette of the Republic of Indonesia of 2009 No. 144, Supplement to State Gazette of the Republic of Indonesia No. 5063) in so far as it concerns the sentence, “... ***must be implemented by health personnel who have the appropriate***

expertise and authority as prescribed by legislation", is contradictory to the 1945 Constitution in so far as not all health workers are pharmaceutical workers but in the event that no pharmaceutical worker is available, certain health workers may perform limited pharmaceutical practices, including (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 immediate medical treatment is required in order to save the patient;

- Article 108(1) of Law No. 36 of 2009 Concerning Health (State Gazette of the Republic of Indonesia of 2009 No. 144, Supplement to State Gazette of the Republic of Indonesia No. 5063) in so far as it concerns the sentence, "***... must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation***", does not have binding legal effect in so far as not all health workers are pharmaceutical workers but in the event that no pharmaceutical worker is available, certain health workers may perform limited pharmaceutical practices, including (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 immediate medical treatment is required in order to save the patient;
- The Explanation provision of Article 108(1) of Law No. 36 of 2009 Concerning Health (State Gazette of the Republic of Indonesia of 2009 No. 144, Supplement to State Gazette of the Republic of Indonesia No. 5063) is contradictory to the 1945 Constitution of the Republic of Indonesia;
- The Explanation of Article 108(1) of Law No. 36 of 2009 Concerning Health (State Gazette of the Republic of Indonesia of 2009 No. 144, Supplement to State Gazette of the Republic of Indonesia No. 5063) does not have binding legal effect;
- To reject the other and the remaining parts of the petition of the Plaintiffs;
- To order the proper promulgation of this Decision in the Official Gazette of the Republic of Indonesia;

This decision was made in the Consultative Meeting of Justices attended by nine Constitutional Court Justices, namely, Moh. Mahfud MD as the Chairperson and concurrent Member, Achmad Sodiki, Ahmad Fadlil Sumadi, 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, 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 Plaintiffs/their Attorneys, the Government or its representative, the People's Legislative Assembly or its representative and the Related Parties.

CHIEF JUSTICE

Moh. Mahfud MD.

JUSTICES

Achmad Sodiki
Harjono

Ahmad Fadlil Sumadi
Muhammad Alim

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Anwar Usman
Maria Farida Indrati

Hamdan Zoelva
M. Akil Mochtar,

SUBSTITUTE REGISTRAR

Ida Ria Tambunan