



## **DECISION**

**Number 55/PUU-IX/2011**

**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. **The Association of Clove Cigarette Entrepreneurs**, located on K H. Turaikhan Street, Number 82, Kudus, Central Java, which in this case is represented by Hafash Gunawan, Chairman of the Governing Body of the Association of Clove Cigarette Entrepreneurs.

Hereinafter referred to as ----- **Applicant I;**

2. Name : **Zaenal Musthofa**  
Citizenship : Indonesia  
Place and date of birth : Kudus, 21 August, 1966  
Employment : Owner of the Hendra Jaya cigarette chain  
Address : Langgardalem RT/RW. 003/003  
Langgardalem Village, District of Kota  
Kudus, Kudus Regency, Central Java

Hereinafter referred to as ----- **Applicant II;**

3. Name : **Erna Setyo Ningrum**  
Citizenship : Indonesia  
Place, and date of birth : Kudus, 22 June 1977  
Employment : Owner of the Sendang

Translation provided by Lawyers Collective (New Delhi, India) and partners for the Global Health and Human Rights Database

Mulyo cigarette chain  
Address : Lau Village RT/RW.01/03,  
Dawe District, Kudus Regency, Central Java

Hereinafter referred to as ----- **Applicant III;**

By virtue of a Special Power of Attorney, dated August 16, 2010, power is granted to Chess Saptono Agus, SH, and Ahmad Suryono, SH, both Advocates / Legal Consultants who are members of the Saptono Agusdiana Law Offices with offices in the Cipta Sarana Complex, Block D, Number 34, Kemang XII Street, South Jakarta; either together or individually to act for and on behalf of the endorser;

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

- [1.3]** Having read the plea of the Plaintiffs;  
Having heard the testimonies of the Plaintiffs;  
Having examined the evidence of the Plaintiffs;

## **2. FACTS OF THE CASE**

**[2.1]** The Plaintiffs filed a petition with a letter of application dated August 5, 2011 which was received by the Registrar of the Constitutional Court (hereinafter referred to as the Court Registrar) on August 8, 2011, under the Deed of Acceptance of Petition File Number 293/PAN.MK/2011, and registered on August 15 2011 as petition number 55/PUU-IX/2011, which was amended and received by the Court Registrar on 23 September 2011, and outlines the following matters:

### **A. Legal Standing**

1. Pursuant to Article 51(1) of the Law of the Constitutional Court and its Explanation, those who may file a petition against the legality of the 1945 Constitution 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 Unitary Republic of Indonesia as regulated by law;
  - c. public or private legal entities; or

d. state institutions;

2. Since Constitutional Court Decision 006/PUU-III/2005 dated May 31 of 2005 and Constitutional Court Decision 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(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 prospective, impairment of which, according to logical reasoning, would 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 is granted, the constitutional impairment/ violation argued by the Plaintiffs, will not or no longer occur;
3. Applicant I is the Chairman of the Governing Body of the Association of Clove Cigarette Entrepreneurs, wherein the aim of the establishment of the Association is to accommodate the aspirations of clove cigarette entrepreneurs; championing the aspirations of its members as being accommodated in regulatory legislation issued by the Government; and fighting for the rights of members who have become financially weak, to the extent that it does not receive treatment which is discriminatory and unreasonable in fighting for its interests;
4. Applicant II is the owner of tobacco companies which employ hundreds of workers to produce clove products in the form of cigarettes, both clove cigarettes made by hand, and clove cigarettes made by machine; which in the past few years has struggled to survive with significantly reduced numbers of workers, both because of existing regulations and regulations which are planned to be put into effect;
5. Applicant III is the owner of tobacco companies which employ dozens of workers to produce tobacco products in the form of clove cigarettes, where to undertake production the companies mentioned depend on external factors such as price and the availability of clove as a raw material to manufacture these cigarettes.

- Specifically, a company owned by Applicant III will only produce these cigarettes if the situation is conducive and enables it to do so, to the extent that workers ultimately depend upon the external factors mentioned;
6. The Plaintiff's constitutional rights and/or authorities will be harmed by the promulgation of the need for both written and pictorial health warnings as stated in Article 114 of Law Number 36 of 2009 Concerning Health (hereinafter referred to as the Health Act), because the dangers of smoking upon human health is a claim that is both one-sided and debatable. Moreover, through imposing health warnings in the form of writing, the danger that cigarettes pose is not a certainty but rather a tendency, as represented by the words "can endanger health... and so on".
  7. The constitutional rights and/or entitlements of the Plaintiffs will be harmed as a result of the operation of the provisions enforcing written and pictorial health warnings, as mentioned in the phrase "... and may be accompanied by pictures or any other form", as set forth in section 114 of the Explanation Provision of the Health Act. If the provision mentioned is in operation then small cigarette companies' cost of production will increase which has the potential to increase the burden of production (and could actually be potentially lethal to the production process) as well as the continuity of employment of production workers working for these tobacco companies;
  8. The constitutional rights and/or entitlements of the Plaintiffs will also be harmed as a result of the operation of the provisions criminalizing the acts referred to in the 6 points outlined in the provisions of Article 199(1), where a voluntary act will be punished by criminal sanction. Thus, the legislators have knowingly criminalized these acts, which ultimately have a tendentious, discriminatory and ambiguous legal basis;
  9. The constitutional rights and entitlements of the Plaintiffs will be harmed as a result of the operation of the written and pictorial health warning provisions as stipulated in Article 114 of the Health Act, because the Plaintiff's rights are guaranteed by the Constitution as protected by Article 28F which states that, "*Every person shall have the right to communicate and to obtain information for the purposes of their personal development and social environment, and shall have the right to seek, obtain, possess, store, process and convey information through the employment of all available channels*", and also guaranteed by Article 28G(1) which states that "*Every person shall have the right to the*

*protection of him/herself, family, honour, dignity, and property, and shall have the right to feel safe and to have protection from the threat of fear of any violation of their human rights".* Rights are also guaranteed by Article 28I(2) which states that *"The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances";* and also protected by the operation of Article 27(2) which states that, *"each citizen shall have the right to work and to earn a humane livelihood";*

10. The Plaintiff's constitutional rights and/or authorities will be harmed through the operation of the provisions criminalizing the act of producing cigarettes as set out in the provisions of Article 199(1) of the Health Act, where the enactment of these provisions would ultimately create legal uncertainty and has the potential to criminalize cigarette manufacturers. The rights mentioned are protected by the 1945 Constitution as set forth in Article 28D (1) which reads, *"Everyone has the right to recognition, security, protection and legal certainty of fair and equal treatment before the law";*
11. Based on this, the Plaintiffs have legal standing to file a petition of the abovementioned legislation before the Court;

#### **B. Authority of the Court**

12. The authority (in this instance) of the Constitutional Court, based upon Article 24C(1) of the 1945 Constitution reaffirmed in Article 10(1)(a) of Law Number 24 of 2003 Concerning the Constitutional Court (State Gazette of the Republic of Indonesia of 2003, Number 98, Supplementary Document of the Republic of Indonesia 4236, hereinafter referred to as the 'Law of the Constitutional Court') and Article 12(1)(a) of Law Number 4 of 2004 Concerning Judicial Power (State Gazette of the Republic of Indonesia of 2004, Number 8, Supplementary Document Republic of Indonesia, Number 4358); is to test the Law of the Constitution of the Republic of Indonesia 1945 (hereinafter referred to as the 1945 Constitution);
13. Article 24C(1) of the Third Amendment of the 1945 Constitution, states, *"The Constitutional Court shall possess the authority to try a case at the first and final instance, and shall have the final power of decision in reviewing laws against the*

*Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding over disputes regarding the result of a general election". Furthermore, Article 10(1) of Law Number 24 of 2003 Concerning the Constitutional Court, 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) review a Law against the 1945 Constitution of the Republic of Indonesia";*

### **C. Reasons for the Petition**

#### **C.1. The material content of Article 114 and Article 199(1) breaches the obligation to provide clarity of purpose and formulation within the Health Act**

14. Section 114 of the Health Act, which imparts the obligation to provide health warnings, is not in accordance with the principles underpinning the formation of laws and regulations as stipulated in Article 5(a) of Law Number 12 of 2011 (Exhibit P-11) Concerning the the Formation of Legislation, which requires that an Act have clear objectives;
15. According to the Explanation Provision of Law Number 12 of 2011 Concerning the Formation of Legislation, the provision referring to clarity of purpose means "that every form of legislation must have a clear objective which is intended to be achieved";
16. The purpose of the Health Act is defined in Article 3, which reads "*The aim of health development is to increase an awareness, willingness, and capability of each person to live healthily, in order to realise a high standard of public health, which is ultimately an investment in the development of socially and economically productive human resources*". Furthermore, it is stated in the Explanation Provision of Article 3 that "*To realise a standard of public health is an effort to improve the overall situation of health which can be better than it previously was. A standard of health which is at its highest can be achieved at any time with the help of individual people and the public. Efforts to improve health have always endeavoured to promote a healthy community as a viable investment in the development of socially and economically productive lives*";
17. The objectives of the Health Act are generally associated with all things that support the development of health (Article 3 of the Health Act), but it has diverged from its clarity of purpose due to the sudden regulation of the marketing of cigarettes which involves its production and introduction into the Indonesian

community as set out in Article 114 of the Health Act in conjunction with its Explanation Provision;

## **C.2. Conflict with the Norms of Article 28F of the 1945 Constitution**

18. Article 28F of the 1945 Constitution states that, "*Every person shall have the right to communicate and to obtain information for the purposes of their personal development and social environment, and shall have the right to seek, obtain, possess, store, process and convey information through the employment of all available channels*";
19. The phrase 'health warning', as contained in Article 114 of the Health Act states that "*Any person who manufactures or imports cigarettes into Indonesian territory must include health warnings*", and is contrary to the rights set out in Article 28F of the 1945 Constitution which reads, "*Every person shall have the right to communicate and to obtain information for the purposes of their personal development and social environment, and shall have the right to seek, obtain, possess, store, process and convey information through the employment of all available channels*";
20. The Plaintiffs as tobacco companies have constitutional rights as stipulated in Article 28F of the 1945 Constitution as in the phrase "*... possess, store, process and convey information through the employment of all available channels*", in which the right mentioned is a constitutional right to information held by the Plaintiffs as producers of cigarettes;
21. The Constitutional Court in its decision 6/PUU-VII/2009 on 10 September 2009, stated that "*the tobacco industry has the same rights in marketing activities, including the right to use any available means of communication such as print media, outdoor media, internet, electronic media such as television and radio, as well as sponsorship and other promotional activities which as a whole is a communication vessel to the consumer so as to provide correct information about its products.*"
22. In the context of information relating to a product, there is a constitutional obligation to provide this information in a neutral fashion, both in terms of outlining a product's advantages and benefits; as well as its disadvantages;
23. This Constitutional obligation is further regulated by Article 7(b) of Law Number 8 of 1999 Concerning Consumer Protection (Exhibit P-10) which states that the obligation of the manufacturer or business is to provide true, clear and honest



information about the condition and guarantee of goods and/or services as well as to explain the use, repair and maintenance of goods;

24. Article 114 of the Health Act governing health warnings only operates to burden the obligation of the Plaintiffs to provide information which is not neutral, due to it only requiring the conveyance of information which is negative. The Plaintiffs do have the constitutional right to "*possess, store, process and convey information through the employment of all available channels,*" as stipulated in Article 28F of the 1945 Constitution. However, Article 114 of the Health Act should also provide a constitutional right for the Plaintiffs to display information that is positive. Hence, to this extent, the article is contradictory to Article 28F of the 1945 Constitution concerning the constitutional rights of the Plaintiffs as the manufacturer of cigarettes. By providing information which is both positive and negative, the producers of cigarettes are not precluding the constitutional rights of consumers to neutral and balanced information, to the extent that the consumers of cigarettes can still make a choice to buy or not buy cigarettes, and can also have the ability to make the choice not to smoke;

### **C.3. Conflict with the Norms of Articles 28G(1) and 27(2) of the 1945 Constitution**

25. The phrase 'health warning' as contained in Article 114 of the Health Act states that "*Any person who manufactures or imports cigarettes into Indonesian territory must include health warnings*" and is contrary to the rights set out in Article 28G(1) of the 1945 Constitution which reads, "*Every person shall have the right to the protection of him/herself, family, honour, dignity, and property, and shall have the right to feel safe and to have protection from the threat of fear of any violation of their human rights*";
26. Specifically, the Plaintiff's rights are guaranteed by Article 28G(1) of the 1945 Constitution within the phrase "*... has the right to feel safe and to have protection from the threat of fear of any violation of their human rights*". Here, the sense of security and protection is, for the Plaintiffs, in terms of their protection from the threat of fear in the manufacturing of cigarettes, and is a human right of the Plaintiffs;
27. The phrase 'health warning' as contained in Article 114 of the Health Act states that "*Any person who manufactures or imports cigarettes into Indonesian territory must include health warnings*" is also contrary to the Plaintiff's right as set forth in Article 27(2) of the 1945 Constitution which reads, "*Every citizen has*

*the right to work and live in a manner befitting that which is humane";*

28. The work of producing cigarettes is an attempt to generate revenue in order to achieve a decent standard of living for humanity and workers, to the extent that the phrase 'health warning' connotes a meaning as if the production of cigarettes, as a form of employment, does not correspond to a job providing a decent standard of living for humanity; where actually the production of cigarettes is an ordinary economic activity that is not dishonorable, and not degrading of human dignity;

#### **C.4. Conflict with the Norms of Article 28I (2) of the 1945 Constitution**

29. Article 28(2) of the 1945 Constitution states that "*Every person shall have the right to be free from discriminatory treatment on any grounds and shall have the right to protection from discriminatory treatment*".

30. Article 114 of the Health Act is the 'primary norm' which provides liability for cigarette manufacturers who do not include health warnings. Under Administrative Law jurisprudence, there is generally no use in including obligations or restrictions in any Act, when the regulation of that conduct cannot be enforced. Administrative law sanctions include:

- a. Government compulsion;
- b. Withdrawal of benefits (permits, payments, subsidies);
- c. Imposition of Administrative fines;
- d. Imposition of necessary fines by the Government;
- e. Criminal sanctions;

(Introduction to Administrative Law in Indonesia; Philipus M. Hadjon, March 2005, pages 245-265)

31. The provisions of Article 199(1) is the 'secondary norm' of Article 114 of the Health Law in the form of imposing criminal sanction for breach of the obligations within Article 114 which obliges cigarette manufacturers to include written and pictorial health warnings on their packaging. However, as this sanction is of an administrative nature, the sanctions sought should be of a milder nature. For example, a warning (or lack thereof) should be followed up with a revocation of manufacturing licenses. Indeed, criminal sanctions must be imposed as a last resort (*ultimum remedium*) and not as a first course of action (*remedium premium*) for violations of administrative health warnings. Hence, where lays administrative justice when administrative violations are not truly harming other

individuals nor harming the country, and there exists an abrupt threat of criminal prosecution?

32. The 'primary norm' (Article 114) and the 'secondary norm' [Article 199(1)] are also highly tendentious, discriminatory, ambiguous, and contradictory to Article 28I(2) of the 1945 Constitution. This is compared to the handling of the Health Act, which obviously does not regulate food or beverage products that are clearly harmful to health, including alcoholic beverages, foods that contain high cholesterol, etc. Thus the provisions of Article 114 and Article 199(1) of the Health Act regarding health warnings are highly tendentious, discriminatory, and ambiguous to the extent that they are detrimental to the constitutional rights of the Plaintiffs as guaranteed by Article 28(2) of the 1945 Constitution;

#### **C.5. Conflict of Norms with Article 28D(1) of the 1945 Constitution**

33. The enforcement of the provisions of Article 199(1) of the Health Act would also be contrary to the rights guaranteed by Article 28D(1) of the 1945 Constitution, which states that *"Everyone has the right to recognition, security, protection and legal certainty of fair and equal treatment before the law"*;
34. The Plaintiffs feel that they have the right to equality before the law. While the Health Act already regulates the marketing of tobacco products, on the other hand, it also criminalizes the Plaintiffs as manufacturers of cigarettes. This treatment is unbalanced when compared to the regulation of other products that have the same potential to harm the public, if not in a worse manner, than cigarettes;
35. Article 114 of the Health Act administratively regulates the process for the production of cigarettes in the form of the imposition of health warnings, where such regulation fails to clarify the purpose of health care itself. This regulation does not provide protection and legal certainty for manufacturers of cigarettes, because it seems to place cigarette products as the only products that endanger health, but the dangers of smoking to health remain to be further tested, and there also exist results on the benefits of tobacco use (evidence P-12; page 6-12).

#### **C.6. Harm and the Potential for Harm**

36. In accordance with the health warnings set forth in Article 114, cigarette manufacturers would need to increase production costs to incorporate pictorial health warnings on cigarette packs. On the other hand, for small cigarette

- manufacturers, each additional component for the cost of production will directly influence the scale of production which will also directly impact upon the ability to attain labour workers, to the extent that more workers will be laid off if the production of cigarettes is burdened by additional production costs;
37. In addition to the increase in production costs, the obligation to include health warnings in the form of images will also affect the ability of small cigarette manufacturers to compete in the market. Each pack of cigarettes not only serves the function of a container for the packaging of cigarettes, but also serves as an effective media promotion to introduce tobacco products. Based on this, the potential loss of market share of small cigarette manufacturers will be higher, which will also directly influence the ability of manufacturers to produce cigarettes;
38. If history is traced, it can be concluded that the emergence of Article 114 and Article 119 of the Health Act were part of an international anti-tobacco campaign known as the Framework Convention on Tobacco Control (FCTC), which is a framework for tobacco restriction under the healthcare regime of the World Health Organization (WHO). These international regulations intend to restrict the production, trade and consumption of tobacco on health grounds. Overall the main instruments employed by the FCTC are very diverse, ranging from the transfer of crops, high clearance, reduction of tar content, bans on advertising, and trademark protection. In essence, the FCTC intends to reduce the production of cigarettes, reducing the ability to industrially produce cigarettes and suppress the consumption of tobacco. The birth of this regulation forms the basis of the competition dynamic between 3 different parties: namely, firstly, between developed countries and developing countries, secondly, between large international companies and national companies (Exhibit P-13; pages 11 - 45) and thirdly, competition between tobacco companies and pharmaceutical companies in tackling the nicotine market (Exhibit P-12; page 7-15). To this extent, it can be assumed that the anti-tobacco and smoking campaign on health grounds could potentially be exploited by major international manufacturers and ultimately kill the businesses of smaller companies;
39. The efforts to incorporate the rules of the FCTC into national law, which is masterminded by the WHO and funded directly by international pharmaceutical companies in Indonesia, are very aggressive. Both of the major international actors mentioned above are most interested in making the principles of the

FCTC a national positive law in Indonesia, as part of their strategy to take over the nicotine market. Due to the barrage of international pressure and accompanied by a large amount of financial support to the cause, the Government passed the Health Act which puts nicotine as an addictive substance of tobacco, specifically regulates the production of cigarettes and imposes heavy criminal penalties for any infraction. In addition, the Government has proposed a Bill barring smoking and tobacco for the sake of health, and it is currently being addressed in Parliament. However, not only has the central Government been affected, the international regime has also directly infiltrated local Governments, to finance the imposition of local regulations suppressing the production and consumption of cigarettes. Various cities in Indonesia have issued regulations that restrict trade in tobacco and cigarettes by referring to the WHO FCTC regime. The overall agenda is a form of criminalization on cigarette manufacturers which endangers the existence of this business in this country (Exhibit P--13; halaman 141 – 185);

40. The efforts of the regime of the WHO FCTC have been systematic to deaden tobacco farming and shut down the national tobacco industry. The business of shutting down tobacco farms has been implemented through the promotion of different types of plants for smoking purposes. Furthermore, the industry has made efforts to push through the Health Act, and raise excise. As a result of Government action to raise the cigarette tax as a form of commitment to the FCTC, this action has systemically bankrupted small national tobacco companies (Exhibit P-13; pages 45-49). Other data states that as a result of the Government raising its tobacco tax policy, thousands of small and medium enterprises engaged in this industry have gone out of business. The Indonesian tobacco industry has declined from 4793 companies in 2008 to around 3255 companies in 2009 (Department of Finance, 2010). Amid the collapse of national companies, foreign cigarette companies have automatically taken over the share of the national tobacco market. Similarly, the existence of Article 114 and Article 199(1) of the Health Act will lead to the increasing cost of cigarette production, printing new packaging, and additional promotional costs, which are very burdensome upon small producers. This in turn will systematically shut down small cigarette manufacturers;
41. What has been done by the Indonesian government has the potential to cause

systematic effects upon employment. UN agencies specialising in the field of labour, including the International Labour Organization (ILO), have said that in Indonesia there are at least 10 million people who work in the tobacco production chain. Thus, the total mentioned is equivalent to 35% of the total number of workers currently in the employment sector in this country. The tobacco industry is also the largest contributor of tax, where cigarette company contributions in the form of excise reach 62.7 trillion dollars per year, exceeding the government's entire revenue earned from the exploitation of mines, and exceeds the value of all dividends paid by 140 state-owned enterprises in Indonesia. These contributions do not include other taxes and wages received by workers as well as the Corporate Social Responsibility (CSR) obligations of tobacco companies;

42. The magnitude of the benefits of the existence of the tobacco industry is one of the main factors which have caused the Government to be very careful in adopting the framework of the FCTC. In addition to the swift rejection of the industry and the tobacco farmers having separate political considerations, the FCTC has had consequences including the suppression of the tobacco industry and tobacco farming. Other reasons for precaution include the strong evidence of international interest in taking over the market of tobacco products in Indonesia. In recent years, international companies such as Philip Morris, British American Tobacco and Japan Tobacco International, have been actively making acquisitions of similar companies in developing countries and taken over the market quite suddenly. Indonesia's two largest national tobacco companies have been dominated by foreign firms (Exhibit P-13; pages 17-21). The current amount of tobacco imports due to free trade of ASEAN countries has not led to increased imports of tobacco. Indonesia has had a large trade deficit in the commodity of processed tobacco and tobacco products for the past 10 years. These conditions are potentially detrimental to small and medium companies in the national tobacco industry;
43. Current anti-tobacco and smoking campaigns obscure the truth, and are believed to have a political and economic agenda, already creating obstacles for farmers and national cigarette manufacturers in regard to production, in maintaining their existence in production and creating difficulties in selling tobacco and processed tobacco products. Such anti-smoking campaigns and policies have directly hurt small-scale cigarette manufacturers and other

- businesses directly related to the small-scale production of clove cigarettes (Exhibit P-14);
44. Anti-smoking and tobacco policies such as the excise tax price increase have directly hit small-scale cigarette industries nationwide. Hundreds of home-based cigarette manufacturers in the District of Losari, the Cirebon Regency, are now bankrupt due to regulations issued by the Minister for Finance Regulation No. 203/PMK.011/2008 of Tobacco Products Excise Tariff of 2008 with effect from the date of February 1, 2009. The Head of Industry and Trade Cirebon, H. Haki, has stated that the Government, through the Ministry of Finance, has made a decision that it is not in the interests of the people, with the effect that home-based cigarette manufacturers are now out of business (Pikiran Rakyat, March 19, 2011). The bankruptcy of small-scale tobacco companies have also been triggered by other policies such as the absence of tobacco subsidies, the rising price of cloves, various anti-smoking campaigns and the fatwa that forbids smoking. These have triggered the demise of the national cigarette industry;
45. The obligation to include written and pictorial health warnings on cigarette packaging or other forms of tobacco would increase the cost of production of small scale clove cigarette companies. The inclusion of written and pictorial health warnings would force tobacco companies to replace all existing packaging and printing, print new packaging, redesign packaging, as well as promote re-packaging which would require an additional fee. Furthermore, given the current cost of production is more expensive; manufacturers are finding it increasingly difficult to maintain their businesses. To this extent, the inclusion of health warnings directly harms small-scale cigarette companies. In relation to the cost of printing health warnings in the form of images, small-scale clove cigarette manufacturers have an additional fee of about 4% of total production costs, not including the cost of investment and promotion costs;

**D. The Plaintiffs argue:**

1. That their petition should be granted in its entirety;
2. The Court to declare that the provisions mentioned in relation to Article 114 and Article 199(1) of Law Number 36 of 2009 Concerning Health (State Gazette of the Republic of Indonesia of 2009, Number 144, Supplementary State Gazette of the Republic of Indonesia, Number 5063) is contrary to Article 27(2), Article 28D(1), Article 28G(1), Article 28F, and Article 28I(2) of the Constitution of the

Republic of Indonesia 1945;

3. The Court to declare that Article 114 and Article 199(1) of Law Number 36 of 2009 Concerning Health (State Gazette of the Republic of Indonesia of 2009, Number 144, Supplementary State Gazette of the Republic of Indonesia, Number 5063) does not have binding legal force;

4. The Court to order the proper promulgation of this decision in the Official Gazette of the Republic of Indonesia according to the statutory provisions already in force;

5. When the Panel of Judges on the Constitutional Court of the Republic of Indonesia hears another decision, implore the decision which is the fairest - *ex aequo et bono*.

**[2.2]** To prove their arguments, the Plaintiffs have submitted evidence of letters/ articles marked as exhibits P-1 through to P-14 as follows:

1. Exhibit P-1 : Photocopy of the Deed of Amendment of the Association of Clove Cigarette Entrepreneurs (FPRK);
2. Exhibit P-2 : Photocopy of the identity card of Hafash Gunawan;
3. Exhibit P-3 : Photocopy of board composition of FPRK of the period 2009 – 2014;
4. Exhibit P-4 : Photocopy of the identity card of Zaenal Musthofa;
5. Exhibit P-5 : Photocopy of the number of employer's goods subject to excise (NPPBKC) of H. Zaenal Musthofa;
6. Exhibit P-6 : Photocopy of the identity card of Ema Setyo Ningrum
7. Exhibit P-7 : Photocopy of the number of employer's goods subject to excise (NPPBKC) of Erna Setyo Ningrum;
8. Exhibit P-8 : Photocopy of Law Number 36 of 2009 Concerning Health;
9. Exhibit P-9 : Photocopy of the 1945 Constitution;
10. Exhibit P-10 : Photocopy of Law Number 8 of 1999 Concerning Consumer Protection;
11. Exhibit P-11 : Photocopy of Law Number 10 of 2004 Concerning The Formation of Legislation;
12. Exhibit P-12 : Book: Nicotine War by Wanda Hamilton;
13. Exhibit P-13 : Book: Criminalization Leads to Monopoly, Salamuddin Daeng, et al;
14. Exhibit P-14 : Book: The Study of the Economy and Culture of Clove in 4 Cities, Roem Topatimasang, et al;



**[2.3]** To mention briefly, everything which occurs in the trial is sufficiently designated in the Court Hearing, which is fundamental to this decision;

### **3. LEGAL CONSIDERATIONS**

**[3.1]** The intent and purpose of the petition of the Plaintiffs is to examine Article 114 and Article 199(1) of Law Number 36 of 2009 Concerning Health (State Gazette of the Republic of Indonesia of 2009, Number 144, Supplementary State Gazette of the Republic of Indonesia, Number 5063, hereinafter referred to as Law 36/2009) of the Constitution of the Republic of Indonesia of 1945 (hereinafter referred to as the 1945 Constitution);

**[3.2]** Before considering the subject of this application, the Constitutional Court (hereinafter referred to as the Court) shall first consider:

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

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

**[3.3]** Pursuant to Article 24C(1) of the 1945 Constitution and Article 10(1)(a) of Law Number 24 of 2003 Concerning the Constitutional Court, as amended by Law Number 8 of 2011 Concerning the Amendment of Law No. 24 of 2003 Concerning the Constitutional Court (State Gazette of the Republic of Indonesia of 2011 No. 70, Additional State Gazette of the Republic of Indonesia No. 5226), hereinafter referred to as the 'Law Court' in conjunction with Article 29(1)(a) of Law Number 48 of 2009 Concerning Judicial Power (State Gazette of the Republic of Indonesia of 2009 No. 157, Supplementary State Gazette of the Republic of Indonesia, Number 5076), the Court has the authority to hear at the first and final instance so as to, among other things, test the law against the 1945 Constitution;

**[3.4]** The petition of the Plaintiffs is to test the constitutionality of Article 114 and Article 199(1) of Law 36/2009 against the 1945 Constitution, as the Court has authority to examine, hear and decide upon the petition;

#### **Legal Standing of the Applicants**

**[3.5]** 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 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 Unitary Republic of Indonesia as regulated by law;
- c. public or private legal entities; or
- d. state institutions;

Thus, the Plaintiff, in testing the law against the 1945 Constitution, must first clarify and exhibit:

- a. Their position as an Applicant as referred to in Article 51 paragraph (1) of the Law of the Constitutional Court;
- b. The impairment of the rights and/or authorities granted by the 1945 Constitution as a result of the enactment of the law petitioned for review;

**[3.6]** Since Constitutional Court Decision 006/PUU-III/2005 dated May 31 of 2005 and Decision of the Constitutional Court 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(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 the Law petitioned for review;
- c. The violation of constitutional rights must be specific (special) and actual or at least prospective, impairment of which, according to logical reasoning, would 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;

**[3.7]** The Plaintiffs in this petition argue their respective cases as follows:

1. Applicant I is the Chairman of the Association of Clove Cigarette Entrepreneurs and is fighting for the aspirations and rights of members who have weak financial capital and have received discriminatory treatment through the operation of the Articles in the Act;
2. Applicants II and III are the owners of clove companies which employ hundreds of workers to produce cloves in cigarette form, both handmade clove cigarettes and factory produced clove cigarettes, which are struggling to survive as a result of the operation of the clauses within the Act;

Based on Exhibit P-1 which was the Deed of Amendment of the Association of Clove Cigarette Entrepreneurs (FPRK), Exhibit P-2, Exhibit P-4, and Exhibit P-6 in the form of ID in the name of Hafash Gunawan, Zaenal Musthofa and Setyo Ningrum, the Plaintiffs have standing as individual Indonesian citizens and groups of people who have similar interests to apply for judicial review of Law 36/2009;

The Plaintiffs consider their rights and/or authorities as guaranteed in Article 27(2), Article 28D(1), Article 28F, and 28G of the 1945 Constitution to have been harmed as a result of the operation of Article 114 and Article 199(1) of Law 36/2009 which states:

- Article 114: *“Any person who manufactures or imports cigarettes into Indonesian territory must include health warnings”;*
- Article 199(1): *“Any person who knowingly manufactures or imports cigarettes into the territory of the Republic of Indonesia without including any form of health warning as referred to in Article 114 shall be punished with a term of imprisonment of up to 5 (five) years and a maximum fine of Rp 500.000.000, 00 (five hundred million rupiah)”;*

In the opinion of the Plaintiffs, Article 114 of Law 36/2009 which requires the inclusion of health warnings, both pictorial and written, will adversely affect expenditure through the need for greater production by the Plaintiffs, as well as the operation of Article 199(1) of Law 36/2009 which criminalizes the actions of manufacturers of cigarettes and has the potential to cause legal uncertainty;

Regarding the Plaintiff's arguments concerning their rights and/or authorities, the Court believes that Applicant I, in addition to having the right to advance the petition, based on Exhibit P-1 and Exhibit P-3, they also have the right to represent the Association in and out of court to: (i) fight for the aspirations of the tobacco

companies that bring a sense of justice, (ii) fight for the aspirations of the members so accommodated in any regulations issued by the Government, (iii) fight for the rights of members whose finances have been weakened so they do not suffer discriminatory and unfair treatment in fighting for their interests. Applicant I and II have a right to seek judicial review of the Act in question, because the effect of Article 114 and Article 199(1) of Law 36/2009 imposes criminal sanctions upon the Applicants, as tobacco companies, if they do not include health warnings. This has led to Applicants II and III paying more production costs than that which previously had to be paid, thus potentially adding to the burden of production as well as threatening production itself and the continued employment of workers in tobacco companies. Based on this assessment as well as legal considerations, the Court believes the Plaintiffs have legal standing to seek judicial review of the Acts in question;

**[3.8]** Since the Court has the authority to hear the petition, and the Plaintiffs have established legal standing, the Court will further consider the application;

### **Core of the Petition**

**[3.9]** The Plaintiffs are essentially arguing that the health warnings as stipulated in Article 114 and Article 199(1) of Law 36/2009 are contrary to Article 27(2), Article 28D(1), Article 28G(1), Article 28F, and Article 28I(2) of the 1945 Constitution based on the following reasons:

- a. The sentence outlining the obligation to include health warnings in Article 114 of the Act operates to simply burden the Plaintiffs as tobacco companies to provide information that is not neutral and detrimental, whereas the Plaintiffs have the constitutional right to possess, store, process and convey information by employing all available channels, as guaranteed in Article 28F of the 1945 Constitution;
- b. The health warning obligation in Article 114 of the Act in question has the consequence that the Plaintiffs produce cigarettes without protection from threat, as as guaranteed in Article 28G(1) of the 1945 Constitution;
- c. The health warning obligation in Article 114 of the Act in question connotes that cigarette manufacturing jobs are jobs that do not correspond as providing a decent living for humanity, with that right being guaranteed in Article 27(2) of the 1945 Constitution;
- d. The health warning obligation in Article 114 of the Act in question does not provide

- protection and legal certainty for manufacturers of cigarettes in implying that tobacco products are the only products that endanger health, with the truth of the dangers of smoking yet to be tested further;
- e. According to the Plaintiffs, the criminal penalties outlined in Article 199(1) of the Act should be replaced in favour of administrative sanctions. This is because criminal sanctions are to be imposed as a last resort (*ultimum remedium*) and not as a first course of action (*remedium premium*) for violations of including health warnings as provided for in Article 114 of Law 36/2009;
  - f. The norms enshrined within Article 114 and Article 199(1) of the Act in question are tendentious, discriminatory, ambiguous, and contradictory to Article 281(2) of the 1945 Constitution. This is because the Act in question fails to regulate food or beverage products which clearly also have the potential to endanger health, such as alcoholic beverages and foods that contain high cholesterol;
  - g. Article 199(1) of the Act in question is contrary to the Plaintiff's rights as guaranteed in Article 28D(1) of the 1945 Constitution, due to the Act in question marketing tobacco products, while also criminalizing certain conduct of the Plaintiffs as manufacturers of cigarettes. This treatment is unbalanced when compared to the treatment of other products which have the potential to be worse than cigarettes upon health;

### **Opinion of the Court**

**[3.10]** Prior to considering the purpose thereof, the Court should cite Article 54 of the Law of the Constitutional Court which states, "*The Constitutional Court may request information and/or minutes of meetings, relating to the application being examined, from the People's Consultative Assembly, House of Representatives, Regional Representative Council, and/or the President*" in conducting an examination of the Act. In other words, the Court may request or not request information and/or minutes of meetings relating to the application being examined, from the People's Consultative Assembly, House of Representatives, Regional Representative Council, and/or President, depending on its urgency and relevance. Because the legal issues in the petition are clear, the Court sees no urgency and relevance to request information and/or minutes of meetings from the People's Consultative Assembly, House of Representatives, Regional Representative Council, and/or the President, so the Court may immediately decide the petition;

**[3.11]** After the Court's careful examination of the petition, and the letters and article exhibits filed by the Petitioners, the court's view is as follows:

**[3.12]** The Plaintiffs filed a petition for judicial review of the constitutionality of Article 114 and Article 199(1) of Law 36/2009 as against Article 27(2), Article 28D(1), Article 28G(1), Article 28F and Article 28I(2) the 1945 Constitution. Article 114 and Article 199(1) of Law 36/2009 have already been petitioned and decided by the Court in Decision 34/PUU-VIII/2010, dated November 1, 2011;

**[3.13]** Article 60 of the Law of the Constitutional Court states that "*Regarding material content, clauses, and/or sections of an Act which have already been reviewed, they cannot be re-reviewed again*". However, the Constitutional Court in practice opens the possibility of re-review of a section, subsection, phrase, and/or part of an Act which has already been tested, as stipulated in Article 42(2) of Constitutional Court Regulation Number 06 of 2005 Concerning Guidelines for Examining Legislation which states that, "*Notwithstanding the provisions of paragraph (1) above, the petition for judicial review of a Law against the content of paragraphs, chapters, and/or the same part of a case which has already been decided by a Court, can be petitioned and return to the terms of its constitutionality which form a different basis for the petition*";

**[3.14]** Court decision 34/PUU-VIII/2010, dated 1 November 2011, concerned judicial review of Article 114, the Explanation Provision of Article 114 and Article 199(1) of Law 36/2009. In this decision the Court stated that the word "may" in the Explanation Provision of Article 114 and the phrase "form of images" in Article 199(1) were contrary to the 1945 Constitution. The arguments put forward in relation to Article 114, the Explanation Provision of Article 114 (except the word "may") and Article 199(1) (except the phrase "form of image") were rejected in the judgment based on the the following considerations:

"Although the intent of the petition is to nullify the provisions of Article 114 of Law 36/2009 and its Explanation Provision as well as Article 199(1) of Law 36/2009 in order to eliminate the liability of manufacturers and importers of cigarettes to include health warnings in the form of clear text and images, it is considered contrary to the Constitution of 1945. However, according to the Court, an alternative explanation arising from Article 114 of Law 36/2009 should be given with a definite meaning that is not contrary to the principle of fair legal certainty as guaranteed in Article 28D(1) of the 1945 Constitution. According to the Court, Article 114 of Law 36/2009 and its Explanation provision should be understood as imparting an obligation for manufacturers and importers of cigarettes to include a

warning in the form of clear text and images. It thus deals with security and protection of the rights of every person to obtain information as stipulated in Article 28F of the 1945 Constitution, which states, "*Every person shall have the right to communicate and to obtain information for the purposes of their personal development and social environment, and shall have the right to seek, obtain, possess, store, process and convey information through the employment of all available channels*";

Mandatory written and pictorial health warning signs, in addition to other forms of warning, will further ensure the fulfillment of the constitutional rights of citizens of Indonesia, especially the rights of consumers and/or potential consumers of cigarettes to obtain information regarding the dangers of smoking, as consumers and/or prospective consumers, consisting of the part of the community which has the ability to read and write, and also consisting of those who cannot or do not have the ability to read and write. Even for those who suffer physical disabilities, such as blindness, health warning information is also required, and can be accounted for in the phrase "other forms", for example by using braille, as stated in the Explanation Provision of Article 114 of Law 36/2009";

Thus, in this decision it was the Court's opinion that Article 114, the Explanation Provision of Article 114 (except the word "may") and Article 199(1) of Law 36/2009 (except the phrase "form of image") were constitutional;

**[3.15]** Although the Plaintiffs in this petition filed a judicial review application which was slightly different, namely based on Article 28G(1) and Article 28F of the 1945 Constitution; ultimately the substance of Article 114 and Article 199(1) of Law 36/2009 has already been assessed and considered the Court in Decision 34/PUU-VIII/2010, dated November 1, 2011. Hence, the Court's judgment in Decision 34/PUU-VIII/2011 *mutatis mutandis* applies for consideration in the decision in this case. Based on these considerations, the Court is of the opinion that the petition of the Plaintiffs is *ne bis in idem*;

#### **4. CONCLUSION**

Based on the assessment of facts and law as described above, the Court has concluded that:

- [4.1]** The Court has authority to adjudicate the petition;
- [4.2]** The Plaintiffs have legal standing to file the petition;
- [4.3]** The Petition of the Petitioners is *ne bis in idem*;

Amendment to Law Number 24 of 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia of 2011, Number 70, Supplementary State Gazette of the Republic of Indonesia, Number 5226) and Law Number 48 of 2009 Concerning Judicial Power (State Gazette of the Republic of Indonesia of 2009 Number 157, Supplementary State Gazette, number 5076).

## **5. DECISION**

### **The Court decides,**

The Plaintiff's case cannot be accepted;

Thus it was decided in a Consultative Meeting which was attended by 9 Constitutional Court Justices, namely Moh. Mahfud MD, as Chairman and concurrent Members, Achmad Sodiki, Anwar Usman, Ahmad Fadlil Sumadi, Maria Farida Indrati, Hamdan Zoelva, Harjono, M. Akil Mochtar, and Muhammad Alim, respectfully as Justices, on Wednesday 4<sup>th</sup> January 2012, and was pronounced in the Plenary Session of the Constitutional Court, open for public on Tuesday, 17<sup>th</sup> January 2012 by 9 Constitutional Court Justices, namely Moh. Mahfud MD, as Chairman and concurrent Justices, Achmad Sodiki, Anwar Usman, Ahmad Fadlil Sumadi, Maria Farida Indrati, Hamdan Zoelva, Harjono, M. Akil Mochtar, and Muhammad Alim, respectfully as Justices, assisted by Sunardi as Substitute Registrar, attended by the Plaintiffs and their attorneys, the House of Representatives or its representative, and the Government or its representative.

**CHIEF JUSTICE,**

**Moh. Mahfud MD**



**JUSTICES**

**Achmad Sodiki**

**Anwar Usman**

**Ahmad Fadlil Sumadi**

**Maria Farida Indrati**

**Hamdan Zoelva**

**Harjono**

**M. Akil Mochtar**

**Muhammad Alim**

**REGISTRAR**

**Sunardi**