

RULING

NUMBER 34/PUU-VIII/2010

FOR THE SAKE OF JUSTICE UNDER GOD ALMIGHTY  
CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] adjudicate constitutional cases at the first and last,  
passed a decision in the case of Law Number 36 Year  
2009 on the Health of the Constitution of the Republic  
Indonesia Year 1945, filed by:

[1.2] 1. Name: Vishnu Nurtanto Brata, S.E.;

Occupation: Chairman of the Indonesian Tobacco Farmers Association (APTI), DPD  
Central Java;

Address: 46 Jalan Sari Mix Feather, Waterford, Central Java;

2. Name: Amin Subarkah;

Occupation: Chairman of the Indonesian Tobacco Farmers Association (APTI), DPD  
East Java;

Address: Jalan Patemon Number 59, Sidomukti, Kraksaan,  
Probolinggo, East Java;

3. Name: Abdul Aziz H. Hafidz SPD;

Occupation: Secretary of the Tobacco Growers Association (APTI), DPD Java  
East;

Address: Jalan Semiru Number 85, Village Summersari,  
Jember, East Java;

4. Name: Drs. Muslim Thalabudin KH.;

Occupation: Chairman of the Indonesian Tobacco Farmers Association (APTI),  
Sumenep;

Address: Central Pakondang Hamlet, Village Pakandang, RT / RW  
009/002, Rubaru, Sumenep, Madura, East Java;

5. Name: Moh. Tafri H;

Occupation: Chairman of the Indonesian Tobacco Farmers Association (APTI),  
Pamekasan;

Address: Hamlet Kotteh, Village Galis, RT / RW 002/010, Galis,  
2

Pamekasan, Madura, East Java;

6. Name: H. Parmuji;

Occupation: Farmers Tobacco;

Address: Hamlet Hamlet, Village Wonosari, RT / RW 001/003, Feather,  
Waterford 56 253;

7. Name: Arise;

Occupation: Farmers Tobacco;

Address: Jojogan, Village Mondoretno, RT / RW 001/001, Feather,  
Waterford 56 253;

8. Name: H. Supriyadi;

Occupation: Farmers Tobacco;

Address: Hamlet Will, Village Campurejo, RT / RW 005/002,  
Tretap, Waterford 56 259;

9. Name: Salim;

Occupation: Farmers Tobacco / Head of the Village;

Address: Village Banaran, RT08/RW02, Tembarak, Waterford;

10. Name: Suparno;

Occupation: Worker PT. Gudang Garam, Tbk., Waterford;

Address: Village Mondoretno, RT / RW 009/002, Feather,

Waterford 56 253;

11. Name: Suryadi;

Occupation: Member of the SPSI / Carrier Tobacco Workers;

Address: Kenteng, Village Danupayan, RT / RW 004/002,

Feathers, Waterford 56 253;

12. Name: Hodri;

Occupation: Director, PR (Cigarette Company) Diva Top Independent;

Address: Hamlet Batoh Ba West, Middle Village Kertagena,

RT / RW 001/001, Kadur, Pamekasan, Madura, Java

East;

13. Name: Ahmad Maftuh;

Occupation: Director, PR (Cigarette Company) Coffee Mathuk;

Address: Village Kertomulyo RT / RW 1.6, district

3

Margoyoso, Pati regency, Central Java Province;

14. Name: Mashadi Waluyo;

Occupation: Director, PR (Cigarette Company) Sekar Melati TF;

Address: Village Trangkil RT / RW 1.2, district Trangkil,

Pati regency, Central Java Province;

15. Name: Sosiowati;

Occupation: Director, PR (Cigarette Company) Daughter of Mountain;

Address: Village Ketanen RT / RW 1.3, district Trangkil,

Pati regency, Central Java Province;

16. Name: Hanif;

Occupation: Farmer;

Address: Village SeraTengah, RT / RW 008/004, District Bluto,

Sumenep, Madura, East Java.

Based on the Special Power of Attorney dated May 14, 2010 and May 23, 2010

authorizing A. H. Vice Kamal, SH, M.H., Guntoro, SH, and Iqbal

Tawakal Pasaribu, SH all of which are on the Office of Legal Advocate

AWK & PARTNERS legal based on the 28th floor Tower Road Works

H. R. Rasuna Said Block X-5 Kav. 1-2, Jakarta 12950, either individually or

together, acting as legal counsel indorser;

Hereinafter referred to as ----- - the Petitioners;

[1.3] Reading the petition of the Petitioners;

Having heard the statements of the Petitioners;

Read the written statement of the Government;

Read a written statement of the House of Representatives;

Read the petition of the National Commission on the Protection of Related Party

Children, Society Jakarta Residents Forum, and dr. drh. Mangku Sitepoe;

Heard and read the experts of the Petitioners;

Checking the written evidence submitted by the Petitioners;

Reading the written conclusions of the Petitioners.

4

## 2. CASE SITTING

[2.1] Considering whereas the Petitioner filed a petition

dated May 18, 2010 accepted and registered in the Court

The Constitution (hereinafter referred to as the Court) on Tuesday

dated May 18, 2010 under the Deed of Acceptance of Application File Number

117/PAN.MK/2010 and registered on Monday, May 31, 2010 by

Case Number 34/PUU-VIII/2010 registration, which has been repaired and accepted in

Court Registrar's Office on July 5, 2010, which outlines the matters

as follows:

### A. POSITION OF LAW (LEGAL STANDING)

1. That the petition for judicial review laws against the 1945 Constitution,

for a person or a party acceptable legal status (legal

standing) as the applicant was before the Court, then based on

Article 51 paragraph (1) of the Constitutional Court, determining that "Petitioner is a

party

the rights and / or authorities, have been harmed by

enactment of the law ", namely:

a. individual Indonesian citizens (including groups of people who have an equal interest);

b. customary law community unit along still alive and in accordance with the development of society and the principle of the Unitary Republic of Indonesia regulated in law;

c. public or private legal entities; or

d. state institutions.

2. That since the Court Decision Number 006/PUU-III/2005 to date,

has been the establishment of the Court that it can be said to exist

constitutional rights and / or authorities referred to

in Article 51 paragraph (1) of the Constitutional Court must meet the requirements as the following:

5

a. the rights and / or constitutional authority of the granted by the 1945 Constitution;

b. rights and / or constitutional authority, be deemed to have impaired by the enactment of the Act being applied testing;

c. rights and / or authorization must be specific (special) and actual or at least potential are based on logical reasonable will certainly take place;

d. The existence of causality (causal verband) between loss referred to the enactment of the Act being applied testing;

e. The possibility that the petition is granted then the constitutional impairment will not or no longer occur.

3. That the legal position of the Petitioners in the case a quo, qualify as an individual Indonesian citizens (including group of people who have similar interests) who have been harmed rights and / or authorities with the enforcement provisions ".... a phrase along the tobacco, tobacco products containing ,...." in the provisions of Article 113 paragraph (2), Article 114 as well as explanations and Article 199 paragraph (1) the Health Act.

4. Whereas Petitioner I was Chairman of the Association of Indonesian Tobacco Farmers (APTI), DPD Central Java who have been and are struggling together to empower the tobacco farmers, so that all farmers tobacco in Central Java is more prosperous and earn a living more feasible. Likewise, Petitioner II and III is the Chairman and secretary of the Indonesian Tobacco Farmers Association (APTI), DPD Java Eastern consistent fight for the rights of tobacco farmers by life of a better future.

5. That the Petitioner and Petitioner IV V are respectively the Chairman Indonesian Tobacco Farmers Association (APTI), Sumenep and

6 Pamekasan, Petitioner XVI is a tobacco farmer from Sumenep. The majority of Madura Tobacco Farmers who have hereditary produces the best quality tobacco that has been recognized by the world, can even rival the tobacco from America, it can be read on cigarette packs DJI SAM SOE which reads "This Cigarette Use High share it with Tobacco Tobacco Madura Sweet Smells And The Fragrant American Tobacco ... .. ". On dry season, the Madurese community can only be farmed tobacco, so the only plant that can grow in dry soil and minimal water. With a work ethic Madurese farmers is high, with a bathed sweat in the hot sun, farmers work hard tembaku produce the best in the country, because the tobacco plant not easy, very difficult takes persistence and patience are height of preparing the seed, the land until the harvest, compared with other crops. In the period of ten years ago and earlier, Madura tobacco farmers very wealthy and prosperous because it has been produce good quality tobacco and tobacco at the time tobacco purchased at high prices. But in a decade this, farmers that produce tobacco tembaku Madurese high quality The tobacco prices have fallen sharply, there is no assurance reasonable price. Although not as beautiful as before ten years last crop of tobacco is the only hope to achieve living adequate for the Madurese. With the enactment of the provisions ".... a phrase along the tobacco, tobacco products containing ,...." in the provisions of Article 113 paragraph (2), Article 114 as well as explanations and Article 199 paragraph (1) the Health Act, is clearly among the Madurese the majority of tobacco farmers will be threatened eyes

livelihood that is the only source of life,  
 proven year after year Madura tobacco production continued to decline.  
 While the government for years to get income  
 57 trillion from the cigarette tax was never concerned about their fate.

7

6. Likewise, Petitioner VI, VII Petitioner, Petitioner VIII and IX Applicant  
 is a tobacco farmer from Waterford who were hereditary  
 has produced the best quality tobacco and is very famous.  
 Tobacco plants are the only plants that are very  
 profitable for farmers in Waterford, so that the community  
 Waterford mostly living from farming tobacco  
 enjoy a prosperous and decent life, send their children  
 them to higher levels of education thanks to tobacco farming. Is  
 very ironic with all the provisions of the phrase ".... belakunya tobacco,  
 ,...." products containing tobacco in the provisions of Article 113 paragraph  
 (2), Article 114 and Article 199 and the explanation is paragraph (1) of the Health Act  
 these, clearly the majority of society Waterford farmers  
 tobacco will be threatened perikehidupannya. Grand design of the application  
 provision aims to eliminate tobacco from the earth  
 pertiwi.

7. Furthermore, Applicant X and XI is the applicant or employee unions  
 to support his family and pay for their children's education  
 are strongly associated with tobacco and products containing  
 tobacco, with all the provisions of the phrase ".... belakunya tobacco,  
 ,...." products containing tobacco in the provisions of Article 113 paragraph  
 (2), Article 114 and Article 199 The explanation and the Health Act,  
 it will threaten their perikehidupannya, including all  
 people who work associated with tobacco production will  
 job loss, at least, will decrease the level of  
 their welfare because their income decreases dramatically.

8. Then Petitioner XII, XIII petition, the Petitioner XIV, XV and Applicant  
 are the owners of tobacco companies that are small industries  
 a source of life, including employment can absorb,  
 so with all the provisions of the phrase ".... belakunya tobacco,  
 ,...." products containing tobacco in the provisions of Article 113 paragraph  
 (2), especially in this case affected by the provisions of Article 114

8

and description and Article 199 paragraph (1) of the Health Act, then  
 would threaten businesses and jobs, at least will decrease  
 level of their welfare because their income decreases  
 drastically due to these provisions.

9. That the Petitioners have harmed the rights and / or authority  
 constitutional provisions phrase ".... with tobacco, a product  
 containing tobacco ,...." in the provisions of Article 113 paragraph (2),  
 The explanation and Article 114 and Article 199 paragraph (1) of Health,  
 as guaranteed by Article 27 paragraph (2) of the 1945 Constitution which reads: Each

citizen has the right to decent work and livelihoods for humanity, and also protected by the provisions of Article 28A of the 1945 Constitution which states: Everyone has the right to live and sustain life and living. Then the provisions of Article 28D Paragraph (2) of the 1945 Constitution mandates, "Every person has the right to work and receive remuneration and fair treatment and decent in working relationship. "This provision implies that every person including tobacco farmers, tobacco industry and its workforce as well The applicant has the right to work by gaining rewards as well as fair and decent treatment for life.

10. Petitioners also argue that with the enactment of the provisions provisions of the phrase "... tobacco, tobacco products containing ,...." in the provisions of Article 113 paragraph (2), Article 114 as well as explanations and Article 199 paragraph (1) of Health, has been detrimental to the rights and / or its constitutional authority, because that provision does not provide legal certainty of fair and equal treatment before the law law, therefore, considered and believed to be contrary to provisions of Article 28D paragraph (1) of the 1945 Constitution, stating, "Everyone entitled to recognition, security, protection, and legal certainty fair and equal treatment before the law ".

11. Whereas the Petitioners as well as with the enactment of the opinion formulation of norms has been detrimental to the rights and / or authority  
9

constitutional, because it is discriminatory to contradict with the provisions of Article 28I paragraph (2) of the 1945 Constitution states, Everyone right to be free from discriminatory treatment on any grounds and entitled to protection against treatment that is was discriminatory.

12. Whereas, based on the above description, it is clear the Petitioners have legal status (legal standing) to file petition for judicial review of Law in this case.

#### B. CONSTITUTIONAL COURT AUTHORITY

13. That the issue of authority of the Court is based on the provisions Article 24C Paragraph (1) of the 1945 Constitution, among others, stated that the Court authority to hear at the first and last decision is final to test the Law of Law Basic Law. Later reaffirmed in Article 10 paragraph (1) letter a of Law Number 24 Year 2003 concerning the The Constitution (hereinafter referred to as the Constitutional Court Law), then under the provisions of law that has been described above, the Court has authority examine, hear and decide upon the testing of Section 113 paragraph (2), Article 114 and Article 199 paragraph explanation and (1) of Health is.

#### C. OF APPLICATION

14. That the test article in Health Act is intended to

protection, guarantees of justice and legal certainty for the Petitioners. Where as we all know that tobacco farming and manufacture of cigarettes especially clove cigarettes have occurred in Indonesia hundreds of years ago. This suggests that the tobacco and clove cigarettes have become part of the life of the people of Indonesia and has a culture from generation to generation, so that in its settings should really consider all aspects and holistic, not partial and no piece in pieces;

10

15. That the petition for judicial review of this Act that contains the formula norms governing tobacco and products containing tobacco as regulated by the provisions of Article 113 paragraph (2) of the Health Act which states, "addictive substance as referred to in paragraph (1) include tobacco, products that contain tobacco, dense liquid, and gas that is addictive to its use may cause losses for themselves and / or surrounding community. " Then The next set of health provision in Article 114 of Law which states, "Any person who manufactures cigarettes or enter kewilayah Indonesia must include health warnings ". The Explanation of Health Law Article 114 states, "The meant by "health warning" in this provision is writing a clear and easily legible and can be accompanied by drawings or other forms ". as well as the provisions of Article 199 paragraph (1) of the health states, "Any person who knowingly manufactures or insert cigarettes into the territory of the Republic Indonesia and do not include health warnings in the form drawings referred to in Article 114 shall be punished imprisonment 5 (five) years and a fine of not more Rp.500.000.000, 00 (five hundred million rupiah) ";

16. That the formulation of norms provisions phrase "... tobacco, products that containing tobacco ,...." in the provisions of Article 113 paragraph (2), Article 114 as well as explanation and Article 199 paragraph (1) the Health Act, is clearly contrary to the provisions of the 1945 Constitution, as provided for and guaranteed Article

27 paragraph (2) of the 1945 Constitution which states, "Every citizen has the right top job and a decent livelihood for humanity ", and also protected by the provisions of Article 28A of the 1945 Constitution which states: Every person has the right to live and sustain life and his life. Then the provisions of Article 28D paragraph (2) of the 1945 Constitution mandates, "Everyone has the right to work and get remuneration and fair treatment and decent working relationship ". This provision implies that every person, including farmers

11

tobacco, tobacco industry and its workforce as well as the Petitioners have the right to work and earn reward fair and decent treatment for life. The Petitioners as

tobacco farmers who are the only livelihood life is threatened with such provisions, not only tobacco farmers who threatened his job but the whole activity associated with tobacco production will be threatened peri-life.

17. Petitioners also argue that with the enactment of the provisions Article 113 paragraph (2), Article 114 and Article 199 and the explanation is paragraph (1)

Health Act has been detrimental to the rights and / or authority constitutional, because that provision does not provide legal certainty fair and equal legal treatment before the law, by because it is seen and believed to be contrary to the provisions of Article 28D paragraph (1) of the 1945 Constitution, which states, "Everyone is entitled to recognition, security, protection, and fair legal certainty and equal treatment before the law ". Terms phrase ".... tobacco, products containing tobacco ,...." clearly did not provide legal certainty of fair and equal treatment before the law law because only the type of tobacco which expressly stated that contain addictive substances in the provision. Likewise provisions of Article 114 nor the Health Act gave the legal treatment the same as the provisions that set forth in Section Seventeenth Security addictive substances, the fundamental question why the sudden appear provisions of Article 114 which regulates the cigarette. Moreover, in Law-making process is a controversy, for which provisions were smuggled suddenly, even that provision does not in the manuscript submitted to the secretariat of state post Parliament in plenary session decided that the Health Act. Controversy ayatayat of tobacco is, clearly proves that the norm not based on an in-depth academic text, so it does not provide a fair legal certainty.

12

18. Whereas the Petitioners as well as with the enactment of the opinion formulation of norms has been detrimental to the rights and / or authority constitutional, because it is discriminatory to contradict with the provisions of Article 28I paragraph (2) which states, "Every person right to be free from discriminatory treatment on any grounds and entitled to protection against treatment that is discriminatory ". Terms phrase ".... tobacco, products that contain tobacco ,...." clearly discriminatory because it only kind of tobacco which expressly stated that contain addictive substances in the applicable them. Similarly, the provisions of Article 114 is also the Health Act because it is discriminatory provisions set forth in Section Seventeenth Security addictive substances, the fundamental question why the sudden appear provisions of Article 114 which regulates the cigarette. Why other products containing addictive substances harmful health are not required to include health warnings? Should there is a comprehensive solution regarding the regulation of addictive substances in



order

regulation of addictive substances is not solely regulate tobacco only.

19. Drugs and addictive substances are active ingredients that when consumed by living organisms can cause biological work as well as cause dependence or addiction is difficult to stop and have an effect like use them continuously that if it can be stopped give effect to tired extraordinary or unusual pain. As a key to life, the brain is set up to ensure that people repeat fun activities. Encouragement excess of sensation fun, teach the brain to repeat activities that craving that often leads to out of control and the concomitant addicted by the time the picture of the brain manifested in physical form penilaian form, study it, memories and feelings from the heart.

20. The tiger various addictive substances, can be classified into three groups, among others, First of legal addictive substances, namely: a. Caffeine, 13

for example: coffee, tea, sodas, and drinks for sports, and coffee have approximately two times more caffeine among others, well if excess it will cause difficulty sleeping, increased pulse heart, headaches, anxiety and nausea; b. Nicotine, for example: smoking, cigars, pieces of nicotine, caffeine and nicotine is a stimulant, which increases dopamine and adrenaline. Excess adrenaline increase heart rate and blood pressure, and leads to high blood sugar; c. Alcohol, for example: Wine (wine), beer (beer), Liquor alcohol is a depressant type that includes the influence nervous system which leads to relaxation, drowsiness, coma, and death; d. Inhalants, such as: aerosol, solvents (materials for cleaning), gas nitrate, these products ranging from paint thinner, hair spray into the tank of propane, Inhalation of high similar to alcohol, even one-time use inhalation can kill or cause heart failure. Second, the some specific addictive substances available or combined with prescription drugs: a. Amphetamine, for example, speed, crystal meth, is a classified as a stimulant that increases alertness and concentration, goal for treatment, but many persons who misused in excessive doses for addicts; b. Sedativehypnotic, or drugs mortgages, for example benzodiazepines xanax, Valium, barbiturates, seconol, phenobarbital. Benzodiazepines are also classified as depressants because it can decrease the activity of the brain. This is a prescription medication for insomnia, anxiety, and symptoms of attack bipolar and depression. Even a fraction of sleeping pills, used for numbing medication, can cause coma, respiratory symptoms or of death. c. Opioids, eg heroin, morphine, oxycodone, codeine and other drugs, this drug ingredient for pain relief, and dangerous when misused, as it will cause

addiction and the damage to our brains and bodies. Third, following the classified as an illegal addictive substances: a. Cannabis, for example: Marijuana, marijuana. His influence can make the wearer to relax and if use of more then it will induce a feeling of spiritual happiness and

14  
physical, and hallucinations, can make use of long-term addiction and nerve damage; b. Cocain, for example: cocaine, crack-cocain, make the wearer feel happy physical, spiritual, increase performance of the body, before heading to the turmoil of depression and paranoia, the use of can be smoked, inhaled, injected and burned. This substance can cause damage to the brain, body and addiction; c. Hallucinogens, for example, LSD, ecstasy, these substances can change the feeling, the change time, colors, sounds and thoughts of their own, and users will still be cause damage to the brain, nervous system, emotions and behaviors not controlled; d. Phencyclidine (PCP), for example: angel dust, ketamine, This substance causes numbness, and use only for animals, users of these substances can change one's nature becomes hard, grumpy, suicide and contraction of muscles and fractured bones;

21. Article 113 paragraph (2) of the Health Act which had horrendous, because been eliminated from the bill that has been discussed and passed by the House, but his explanation was not abolished, making it easy discovery of a provisions authorized to be lost. Finally, the provision appears back in the bill and then passed into law.

The issue raised was that the objection to them who did not approve the inclusion of Article 113 paragraph (2) is why the addictive substances referred to in Article 113 paragraph (1) only tobacco alone, if there are no other plants that contain substances other than tobacco addictive? Yet according to research some other plants as well contain addictive substances, such as coffee, tea, wine and other so on, but not loaded in the sense that plants contain addictive substances. Previously, the Health Act the old (Act No. 23 of 1992) have set up and then issued Government Regulation No. 19 of 2003 which regulates cigarette raw materials derived from tobacco. Health Act which long and the regulations implementing the provisions set more wise and fulfilling aspects of sociological, juridical, and philosophical, so publication of the Act and implementing regulations do not cause

15  
turmoil in society, while the publication of the Act which recently caused controversy, not only the loss of Article 113 paragraph (2) after being discussed and passed, but also after the introduction now, because it contains elements of the group diskriminasi people who have jobs that tobacco farmers are down generations have been farmed since the Dutch era that never disturbed

such as the current reform era.

22. Determination of tobacco as an addictive plant containing more addressed to the fulfillment and strength of group negotiations anti-smoking public policy analysis and compared with tobacco as a legal political determination of addictive substances. This is evident in penormaannya arrangement that is not systematic and appears impressed all of a sudden. Legal norms contained in:

1. Article 113 paragraph (1) contains the aims and objectives of the addictive substance namely "Securing the use of materials containing addictive substances directed so as not to disturb and endanger the health Individuals, families, communities and the environment. "

2. Article 113 paragraph (2) then states "addictive substances as referred to in paragraph (1) include tobacco, products that contain tobacco, solids, liquids and gases that are addictive use can cause harm to themselves and / or surrounding community. "

3. Article 113 paragraph (3) "Production, distribution, and use of materials contain addictive substances must meet the standards and / or the specified requirements. "

4. Section 116 contains provisions "further provisions regarding the securing material containing addictive substances defined by Government Regulation. "

The order of the article has demonstrated the presence of Article 113 paragraph (2) looks irrelevant and not in accordance with the arrangement of norms contained in 16

Article 113 paragraph (1) and paragraph (3) and Article 116. Status of Section 116 a further adjustment of the legal norms contained in

Article 113 paragraph (1) the delegate settings further into Regulation of the Government, then used the phrase "Security of materials containing addictive substances ", which means that as a follow-up of the norm law contained in Article 113 paragraph (1) established by Regulation The Government. On the basis of legal reasoning, the existence of norms law of Article 113 paragraph (2) clearly forced.

23. A fundamental question in the case a quo is of various kinds items that contain addictive substances as defined in above, why only tobacco called explicitly in provisions of Article 113 paragraph (2) the Health Act, is not coffee, tea, wine, etc. also contain addictive substances? What are the premise that only one type of tobacco mentioned clearly? According to the Petitioners saving provision is not very clear so it does not provide a decent livelihood guarantees and no warranties certainty of just laws for tobacco farmers, and the norm highly discriminatory for tobacco farmers who already have negative stigma, different treatment of grape growers, coffee, tea and

so forth. Why would that be just cigarette explicitly in Article 144 and Article 199 paragraph (1), obviously also does not provide guarantee a decent living, and does not provide legal certainty fair, and tend to be discriminatory as well get the stigma already negative compared with keompok people involved in the production coffee, tea, wine and so forth. Why there are no rules require coffee or tea products have included a warning health as well. Related to the notion of discrimination as has been regulated in Law Number 39 Year 1999 on Human Rights Humans, limitation of discrimination in essence is not membedakan enforcement against people based on the grounds religious, ethnic, racial, ethnic, group, class, social status, status economic, gender, language and political beliefs (see Article 1 point 17

(3) of Law Number 39 Year 1999 on Human Rights and Article 2 of the International Covenant on Civil and Political Rights); by therefore should not be discriminating treatment between farmers tobacco and all involved are related to production tobacco growers of coffee, tea or wine, or involved with production of coffee, tea, wine and so forth. Did not the Court argued that the substances contained in cigarettes can harm health but the content of these substances are not equivalent to content of other addictive substances such as morphine, opium, marijuana, and the like (See the Constitutional Court Decision No. 6/PUU-VII/2009, p. 278), as well as coffee, tea and wine can also be detrimental to health.

24. That the grand design of tobacco regulation in Article 113 paragraph (2) be the only one that contains highly addictive substance loaded with economic motive for the benefit of foreign capitalists. While tobacco products Cigarettes are the only genuine products in Indonesia can not be exported to the United States and the tobacco farmers in Indonesia continues to declining production. While tobacco and cigarettes from the United States increasingly rampant free entry into Indonesia. Government so far has received revenue from cigarette excise approximately 57 billion into state coffers, but what the Government was never indifferent prostitute against the tobacco industry in the country, even a government of ignoring sweat and tears of tobacco farmers, different treatments during this compared with other plant growers, such as rice farmers obtain agricultural extension, seed free of charge, the assistance others, including the government set prices above the lowest limit grain, as well as the Government in order to protect farmers clove set the price above the lowest limit of cloves.

25. That tobacco is not always a negative connotation as a cause cancer, it turns out the plant can also produce anti-cancer protein useful for cancer patients, say researchers from the Centre

Biotechnology Research Indonesia Institute of Sciences (LIPI), DR

18

Arief Budi Witarto MEng. In his research proposal Arief was trying to produce proteins important "Growth Colony Stimulating Factor" (GCSF)

using tobacco plants (*Nicotiana spp.*, L.) from the local

The most suitable varieties "genjah kenongo" of 18 local varieties

examined. Tobacco plants is not taken for tobacco leaf

manufactures cigarettes but used as a protein-producing reactor

GCSF, a hormone that stimulates the production of blood.

26. That the manufacture of cigarettes not only from tobacco alone, there are also

cloves in it. In the United States cigarettes that contain

Clove Clove is prohibited because it is considered as an aromatic ingredient

could trigger the interest of children to smoke. Clove when

be used as material for cigarette then he also has an adverse effect on

health, such as lung infections, allergic reactions, respiratory illness.

When used as materials for clove cigarettes, it also

should get the same treatment as with tobacco. Tobacco

before used as ingredients of cigarettes, it does not endanger the health of the same

as with cloves, and even has its benefits. This condition is

shows that Article 113 paragraph (2) of the phrases tobacco

tend to be negative berstigma highly inappropriate. Because tobacco is also

have benefits and no negative effect to health before processing

a cigarette.

27. Whereas Article 114 in conjunction with the elucidation of Article 114 in conjunction with

Article 199 (1) of the Act

Health has no arguments and logic of a strong legal

why should regulate the necessity to include the "warning

health ". And about the "health warning" does not only apply

for cigarettes, but it should also apply to foods and beverages

containing other addictive substances that can / can threaten health.

For example soft drinks, sports drinks / energy, coffee,

tea, beer, wine and other alcoholic beverages and other products

contain addictive substances. Even the food and drinks that are considered

adiktifpun not contain substances must be labeled "health warning",

19

for example, health warnings on products that are harmful to sugar

the diseased sugar, products containing meat fat for

people with heart disease / high blood pressure. Why should only cigarettes

to include health warnings?

28. Criminal provision applies when the cigarette does not list "warning

health "also does not have a reason / logic and legal arguments

strong. This is because the threat of health food products / beverages other

which also can / can not get the health threat of criminal

weighing what is stipulated in Article 199 paragraph (1) Health Act.

The provision of alcoholic beverages is only included in the Decision President Number 3 Year 1997 on the Supervision and Control Alcoholic beverages. In the setting of alcoholic beverages is not set does not include criminal provisions when "warning health "with the threat of a maximum of 5 (five) years and a fine of many Rp500.000.000, 00 (five hundred million rupiahs). It shows there has been discrimination against tobacco products. Though drinks alcohol is clearly contrary to religious values and more dangerous than cigarettes. Thus Article 114 in conjunction Article 199 paragraph (1) Health Law against Article 28I Paragraph (2) of 1945 which states, every person is entitled to be free from treatment discriminatory on any grounds and are entitled to protection against discriminatory treatment that.

29. That as well as the provisions of Article 199 paragraph (1) of health, according to saving the Petitioners Criminal threat imprisonment of 5 (five) years is clearly Excessive (redundant), because of the problems kriminalisasi administrative per se, let alone cigarettes are legal products in Indonesia.

Besides, the phrase "... .. the form of images referred to in Article 114 ... .. "is very different from the provisions of Article 114 in conjunction Explanation of Health Law Article 114. Provisions of Article 114 in conjunction Explanation of Health Law Article 114 stipulates that "warning health is the writing that is clear and easily legible and can be accompanied 20

pictures or other forms ", while in the provisions of Article 199 paragraph (1) only the form of images. So the formulation of Article 199 paragraph (1) not perfect, because it is not clear and unequivocal accordance with the principle of lex certa a principle of criminal law, so it does not provide legal certainty the fair. Thus Article 199 paragraph (1) is contrary with Article 28D paragraph (1) of the 1945 Constitution which states, "Every person entitled to recognition, security, protection, and legal certainty fair and equal treatment before the law ".

30. That we are aware of consequences arising from the impact of tobacco presented as the World Health Organization (WHO), however not fair that only regulate the impact of sheer tembaku. By Petitioners therefore agree with the Court. That appropriate with the provisions of Article 24 paragraph (1) and paragraph (2) of the 1945 Constitution, the Court

authorities not only to hold the judiciary, but also to enforce the law, justice, and expediency. In relation to the issue of tobacco advertising, justice would be upheld based on the law always made keeping in mind considerations from various perspectives, ie from the perspective sociological, juridical, scientific, and cultural. Cigarette advertising legal issues, it is not fair (unfair) if consideration is made with only

focuses on the cigarette itself and the negative impact of smoking alone by ignoring considerations of perspective lives of tobacco farmers, farmers clove, tobacco industry, advertising industry, film industry, printing industry, and transportation services Other cultural life in which the related businesses, labor work depend on the tobacco industry and industriindustri related. In addition, it is unfair if considerations focused on the perspective of sustainability tobacco farmers, farmers clove, tobacco industry, advertising industry, film industry, printing industry, and transportation services with the sheer ignoring the negative impact caused by smoking (see Decision Constitutional Court Number 6/PUU-VII/2009, p. 275). If the norm

21 Article 113 paragraph (3) and Article 114 is associated with the Health Act Court's legal reasoning, then obviously the norm does not provide a fair legal certainty because only focus the impact of tobacco or cigarettes without regard to principles perspective of justice and expediency for tobacco growers, farmers clove cigarette industry and so on.

31. That tobacco plants which become raw material with cigarette with cloves though in the beginning was the foreign plants planted in Indonesia was forced to capital formation for strength mercantilism and the Netherlands industry, in its development Tobacco has been rooted in the culture of Indonesia, as evidenced by the habit of smoking, rolling skills and expertise in cultivating tobacco plants that already exist before the arrival of big industry. It shows the nation Indonesia is a nation of creative adaptation to foreign cultures which should be respected and developed. Attitudes that will not prohibit the cultivation of tobacco or cigarette factory but suppresses cigarette advertising is tantamount to hipokritisme attitude and the nature of what type of advertising

had always been persuaded (WAS Rendra Government expert testimony). In addition, tobacco farming and cigarette smoking has become a cultural and has attracted other nations to come to Indonesia. Moreover, accordance with the description of the Related Parties (DPRD Waterford), farming tobacco is a livelihood for some communities in Indonesia, so it should not be hindered (vide Court Decision Number 6/PUU-VII/2009 Constitution, p. 276); Based pertimbangan Court is not only an economic problem alone, but berdemensi also cultural and historical aspects.

32. As an industry, tobacco industry whether small, medium, as well as large-scale economic activities become part of people's which has a long chain from upstream to downstream with

involving millions of tobacco farmers, farmers clove, paper industry,

22

broadcasters, advertising industry, advertising the film industry, wholesalers and retail, business printing, transportation services, and so forth;

That the number of workers who depend on industry

tobacco and related industries were not small. In 2008, more or less

Absorbed 400,000 workers directly on the tobacco industry, 2.4 million farmers

tobacco, 1.5 million clove farmers; 4.8 million wholesale and retail merchants;

and one million workers in related support industries such as

printing and transportation. In addition to the labor sector, the tobacco industry

and related industries to contribute large foreign exchange. Acceptance

State tax and excise from the tobacco industry during 2008

reaches approximately 57 trillion rupiah, while advertising expenditure

issued by the tobacco industry during 2008 reached 1.4 trillion rupiah

(See the Constitutional Court Decision No. 6/PUU-VII/2009, p. 276).

Based on consideration of the Court was clearly just how

tobacco and its derivatives have been the source of life for

various layers masyarakat, even have contributed to the foreign exchange

a pretty big country. But on the other hand the state has given

unfair treatment and does not provide legal certainty, with

legal provisions contained in the Health Act.

33. That based on the Constitutional Court Decision No. 54/PUU-VI /

2008 dated 14 April 2009 in the case Testing Law

Act No. 39 of 2007 on Excise against the 1945 Constitution,

Court argued that the tobacco excise funds is wrong

a designation used for building the social environment should

construed to fund activities at the level of peasant producers

tobacco farmers need coaching and guidance, transfer

technology, and technology escort at the farm level in order to

produce raw materials is expected. Moreover, the policy

Government in the field of health and the environment will affect

imposition of excise on tobacco and resulted in significantly

to reduced production and consumption of tobacco, so that farmers

tobacco should be prepared to perform the conversion of plant

23

kebudidaya other tobacco farming in the future. But

true the government did not care about the fate of tobacco farmers,

state revenues from cigarette tax by 57 trillion berdaya no positive

for the fate of tobacco farmers. Even tobacco farmers has always been

in a very weak position, especially related to the uncertainty

price of tobacco;

34. That the cultivation of tobacco in Indonesia is not including the

prohibited and the farmer has the right to determine what type of plants selected

accordance with Law Number 12 Year 1992 concerning Cultivation



Crops. In other words, tobacco is a legal product, but why restricted during tobacco sales have not banned in Indonesia mengh Angus should be no regulation of tobacco products as sources of income that is still legal.

#### D. APPLICATION

That based on the legal reasons outlined in the above, the Petitioners requested that the Constitutional Court can granted the following matters:

1. To grant the application which requested the applicant to in full;
2. Provision stating the phrase ".... all tobacco products containing tobacco ,...." in the provisions of Article 113 paragraph (2), Article The explanation and 114 and Article 199 paragraph (1) of Law No. 36 Year 2009 regarding Health (State Gazette of the Republic of Indonesia Year 2009 Number 144, Additional State Gazette of the Republic of Indonesia No. 5063) contrary to Article 27 paragraph (2), Article 28A, Section 28D Paragraph (1) and paragraph (2) and Article 28I paragraph (2) of the Constitution Republic of Indonesia Year 1945;
3. Provision stating the phrase ".... all tobacco products containing tobacco ,...." in the provisions of Article 113 paragraph (2), Article The explanation and 114 and Article 199 paragraph (1) of Law No. 24 36 Year 2009 regarding Health (State Gazette of the Republic of Indonesia Year 2009 Number 144, Additional State Gazette of the Republic of Indonesia No. 5063) otherwise do not have binding legal force;
4. Order the proper promulgation of this decision in the Official Indonesia as it should.

[2.2] Considering whereas to prove their arguments, the Petitioners has submitted evidence or written a letter marked as exhibits P-1 through with evidence of P-20 which was passed in the trial on Tuesday, December 20 July 2010, Evidence Additional evidence of P-21 that is received by the Court on Thursday, August 19, 2010 and evidence of P-22 received by the Registrar's Office Court on Monday, February 14, 2011, as follows:

1. Exhibit P-1: Photocopy of Law Number 36 Year 2009 on Health (State Gazette of the Republic of Indonesia Year 2009 Number 144, Additional State Gazette Indonesia Number 50635063);
2. Exhibit P-2: Photocopy of ID card in the name of Vishnu Nurtanto Brata, SE, Sari Mix is located at 46 Feather Road, Waterford, Java Central;
3. Exhibit P-3: Photocopy of ID card in the name of Amin Subarkah, address at Jalan Patemon Number 59, Sidomukti, Kraksaan, Probolinggo, Java East;
4. Exhibit P-4: Photocopy of ID card in the name of Abdul Aziz H. Hafidz, SPD,

address at Jalan Semiru Number 85, Village Summersari,  
Jember, East Java;

5. Exhibit P-5: Copy of ID cards on behalf of the DRS. Muslim Thalabudin KH.,  
address at the Middle Pakondang Hamlet, Village Pakandang,  
RT / RW 009/002, Rubaru, Sumenep, Madura, East Java;

6. Exhibit P-6: Photocopy of ID card in the name of Moh. Tafri H, located in Hamlet  
Kotteh, Village Galis, RT / RW 002/010, Galis, Pamekasan,  
Madura, East Java;

25

7. Exhibit P-7: Photocopy of ID card in the name of H. Parmuji, located in Hamlet  
Hamlet, Village Wonosari, RT / RW 001/003, Feather, Waterford

56 253;

8. Exhibit P-8: Photocopy of ID card in the name arises, address at Jojogan, Village  
Mondoretno, RT / RW 001/001, Feather, Waterford 56 253;

9. Exhibit P-9: Copy of ID card in the name of H. Supriyadi, located in Hamlet  
Would, Village Campurejo, RT / RW 005/002, Tretep,  
Waterford 56 259;

10. Exhibit P-10: Photocopy of ID card in the name of Salim, located in the Village Banaran,  
RT / RW 8.2, Tembarak, Waterford;

11. Exhibit P-11: Copy of driver's license on behalf Suparno C, located in the Village  
Mondoretno, RT / RW 009/002, Feather, Waterford 56 253;

12. Exhibit P-12: Photocopy of ID card in the name, Suryadi, address at Kenteng,  
Kelurahan Danupayan, RT / RW 004/002, Feather, Waterford  
56 253;

13. Exhibit P-13: Photocopy of ID card in the name of Hodri, located in the hamlet of Ba Batoh  
Western, Middle Village Kertagena, RT / RW 001/001, Kadur,  
Pamekasan, Madura, East Java;

14. Exhibit P-14: Copy of the Decree of the National Leadership APTI, Number:  
01/Kpts-APTINAS/II/2008, on the Appointment Committee  
Regional Leadership Council (DPD) of Central Java Province,  
dated December 1, 2008;

15. Exhibit P-15: Copy Number of the Entrepreneur Taxable Goods Excise  
(NPPBKC) 0603.1.3.4078, on behalf of the owner Ahmad Mahtuf,  
dated August 16, 2006;

16. Exhibit P-16: Copy Number of the Entrepreneur Taxable Goods Excise  
(NPPBKC) 0603.1.3.3391, upon the owner Mashadi Waluyo,  
dated July 8, 2006;

17. Exhibit P-17: Copy Number of the Entrepreneur Taxable Goods Excise  
(NPPBKC) 0603.1.3.5310, on behalf of the owner Susiowati,  
dated August 16, 2006;

26

18. Exhibit P-18: Photocopy of ID card in the name of Hanif, Occupation: Farmer, address  
Sera Middle Village, RT / RW 008/004, District Bluto  
Sumenep, Madura, East Java;

19. Exhibit P-19: Copy of Draft Government Regulation  
Indonesia Number Year ..... on Security  
Tobacco Products for the Health As addictive substances;
20. Exhibit P-20: Photocopy of Outdoor Advertising Association of Indonesia,  
Number B02.002/OAAI-2010, Subject objection to the ban  
Tobacco Product Advertising, dated February 10, 2010;
21. Exhibit P-21: Wanda Hamilton, Nicotine War: War and The Nicotine  
Drug traders, Yogyakarta, INSIST Press, 2010;
22. Exhibit P-22: Editor: Roem Topatimasang, Puthut EA, Hasriadi Ary,  
Basic Script Writer: Rev. W. Basjir, Isaac Salim, Doni  
Hendrocahyono, Rudyanto H. Setiawan, Kretek Review  
Economy and Culture 4 City, Yogyakarta, Indonesia Self-Reliance  
& Spasimedia, 2010.

In addition to submit written evidence, the Petitioner also filed a 5 (five)  
Experts, namely, Dr. Mudzakkir, SH, M.H., Ir. Purwono, M.S., Dr. Revrison Baswir, S.E.,  
Zaenal Arifin Mochtar, SH, LL.M., And Prof.. Dr. Saldi Isra, SH which has provided  
oral and written testimony at the hearing on Tuesday, February 8, 2011,  
which principally explains as follows:

1. Dr. Mudzakkir, SH, M.H.

A. Norms of constitutional law on which the test

1. Article 27 paragraph (2) of the 1945 Constitution:

Every citizen has the right to decent work and livelihoods  
for humanity,

2. Article 28A of the 1945 Constitution:

Every person has the right to live and sustain life and  
his life.

27

3. Article 28D Paragraph (2) of the 1945 Constitution:

Every person has the right to work and get a reward and treatment  
fair and reasonable in the employment relationship.

4. Article 28D paragraph (1) of the 1945 Constitution:

"Everyone is entitled to recognition, security, protection, and  
legal certainty of fair and equal treatment before the law "

5. Article 28I paragraph (2) of the 1945 Constitution:

"Every person is entitled to be free from discriminatory treatment of  
any basis and are entitled to protection against treatment  
that it is discriminatory "

B. Legal norms of Article 113 paragraph (2) of Law Number 36 Year 2009  
of Health who requested a judicial review

Legal norms are being applied for judicial review of Article 113 paragraph (2), Article  
114, and Article 199 paragraph (1) of Law Number 36 Year 2009 on  
Of Health.

Legal norms are being applied for judicial review and other relevant legal norms

More quoted him as follows:

LAW OF THE REPUBLIC OF INDONESIA

NUMBER 36 OF 2009

ABOUT

HEALTH

Article 2

The development of health held by berasaskan humanity, balance, benefits, protection, respect of the rights and obligations, justice, gender and nondiskriminatif and norms religion.

Explanation:

Article 2

28

Health development must consider the various principles provide direction and implemented through the development of health health efforts as follows:

- (1) the principle of humanity, which means that the development of health should be based on humanity based on the Belief in God Almighty does not differentiate groups with religious and nation.
- (2) the principle of equilibrium means that the development of health should implemented between the interests of the individual and society, between the physical and mentally, and between material and spiritual.
- (3) utility function means that the development of health should provide maximum benefits to humanity and the healthy life of every citizen.
- (4) principle means that the development of health protection should be provide protection and legal certainty to providers and recipients of health services.
- (5) the principle of respect for the rights and liabilities means that the health development with respect for the rights and obligations society as a form of legal equality.
- (6) the principle of justice means that the implementation of health must be provide a fair and equitable to all layers communities with affordable financing.
- (7) the principle of gender and nondiskriminatif means that the development health does not differentiate the treatment of women and boys.
- (8) the principle of religious norms means of health development should be attention and respect and do not distinguish religion embraced the community.

Article 3

Health development aims to increase awareness, willingness, and the ability to live healthy for everyone to manifest degrees public health as high, as an investment for

29

human resource development which is socially productive and economically viable.

Explanation:

Article 3

Realize the degree of public health is an attempt to improve the state of better health than before.

Health status of the highest attainable standard of the a time in accordance with the conditions and situations and the ability of real of any person or the public.

Health efforts should always be cultivated on a continuous improvement basis for a healthy society as an investment in development can live socially and economically productive.

Seventeenth Section

Security addictive substances

Section 113

(1) Safeguarding the use of addictive substances containing materials directed so as not to disturb and endanger the health of individuals, family, community, and environment.

(2) addictive substance as referred to in paragraph (1) include tobacco, a product containing tobacco, solids, liquids, and gases that are addictive use can cause harm to themselves and / or community around him.

(3) Production, distribution, and use of materials containing addictive substances must meet the standards and / or requirements set.

Explanation:

Section 113

Subsection (1)

Self-explanatory.

Paragraph (2)

30

Self-explanatory.

Paragraph (3)

The standards are directed to the addictive substance contained by material can be suppressed to prevent the circulation of counterfeit material. Determination terms of use of materials containing addictive substances intended for suppress and prevent the use of disturbing or harming of health.

Article 114

Any person who manufactures or cigarettes to the region include Indonesia must include health warnings.

Explanation:

Article 114

The definition of "health warning" in this provision is writing a clear and easily legible and can be accompanied by drawings or any other form.

Section 115

(1) Areas with no cigarettes, among others:

- a. health care facilities;
- b. where the learning process;
- c. where children play;
- d. places of worship;
- e. public transport;
- f. workplace; and
- g. public places and assigned elsewhere.

(2) The local government shall establish no smoking area in its territory.

Explanation:

Section 115

Subsection (1)

Specifically for the workplace, public places, and other places can provide special places for smoking.

31

Paragraph (2)

Local governments in the region without cigarettes should be set consider all aspects in a holistic manner.

Article 116

Further provisions concerning the safeguarding of the material containing the substance addictive stipulated by Government Regulation.

Explanation:

Article 116

Self-explanatory.

Article 199

(1) Any person who knowingly manufactures or cigarettes enter into the territory of the Republic of Indonesia with no to include health warnings as the form of images referred to in Article 114 shall be punished imprisonment of 5 (five) years and a fine of Rp 500,000,000.00 (five hundred million rupiahs);

(2) Any person who intentionally violate the no smoking area referred to in Article 115 shall be punished a fine of Rp. 50,000,000.00 (fifty million rupiah).

C. Analysis of the constitutionality of the law being applied Norma Test Material:

First: Position of Law Number 36 Year 2009 on

Health

In Indonesia the national legal system, seen from the aspect of legal materials contained in one Act, any Act which established has a different position, although the formal judicial

The Act has no difference (same). Before

issuance of Law Number 10 Year 2004 on the Establishment

Legislation (PPP) is known there are two types of the Act, namely:

32

1. Act as the legal norms governing the provision of basic

mempokoki or underlying the formation of another Act as a continuation of the principal Act. This Act also referred to as the general (genus), which contains the principles Public and general provisions set in a specific area in state administration, and

2. Act governing the legal norm as a continuation of Act which contains the principal provisions. This Act also referred to as a special nature (species) as set the field tetentu as part of the scope of regulation Act provisions governing the subject.

The consistency of the formulation of legal norms and the formulation of general principles of law in laws and regulations governing the continuation of legal norms Act which contains the basic provisions can be made clear, instrumentatif precise and accurate and easier to test the synchronization vertical and horizontal synchronization and harmonization of policies law with other laws and regulations. In short, Gatra establishment of national legal systems became clear and the formation of sussistem national law is also getting easier. It also eases in material testing and testing in a formal and legislative activities other reviews. Act governing the basic provisions in the field implementation of the Act states as a unifying or integrating into the national legal system of Indonesia building. Sad to say, policies that lead to the issuance of legal reform Law Number 10 Year 2004 on the Establishment Regulation Legislation has ignored the existence of the principal Act or set the basic provisions in the state administration not used anymore. Even in the development discourse on establishment of the Act says "the Act in that the material is set further into the Act, the Act should be revoked, because it is not needed anymore ". Discourse performed along with the emergence of the idea to remove the Act

33

Number 4 Year 2004 regarding Judicial Power (formerly Act No. 14/1970 concerning Principal Provisions on Judicial Power). Questions asked related to the testing material is now whether the Law Number 36 Year 2009 on Health has position as an Act to regulate the provisions health or the principal Act a quo stand-alone and parallel to the Other Act which regulates the health field?

As far as experts examine and assess the law through legal products the issuance, may Experts conclude that the legislature has taken policy to place all of the Act have the status the same and equal (both formal and juridical juridically material).

In the span of history in the field of health law, the original Act

on health as the Act which contains provisions on the subject  
 mempokoki health field or formation underlying legislation  
 advanced in the health sector, namely the Act No. 9 of  
 1960 concerning the Principles of Health, later replaced by Law  
 Law Number 23 Year 1992 on Health (no phrase "pokokpokok",  
 in terms of this Act has been revoked and as much merger  
 8 the Act), then replaced by Law No. 36  
 Year 2009 on Health (no phrase "points"). Legally  
 Formally, the Law on Health certainly did not put as  
 Principal Act as Health Act of 1960.  
 Means, Health Act does not mempokoki or become the basis  
 formation of another Act that his position as Law  
 Invite a continuation of the Basic Law.  
 However, according to experts, although the legislative policy to delete the phrase  
 "Points", not a formal juridical basis of law continued  
 formation of another Act in the health sector, but juridically  
 material of the Law on Health serves as Undang34  
 Invite the principal or underlying formation mempokoki Law  
 Other Act as the Act continued in the health sector. On the basis of  
 these thoughts, then the Law on health contains material  
 legal norms of a general nature (genus) and the general principles of law (general  
 public)  
 subsequently became the basis of the formulation of legal norms and principles of law  
 in Act continued in the health of a special nature  
 (Sub set specific health materials), namely Law No. 6  
 year 1963 on Health Workers, Law Number 18 Year  
 2009 on Animal Husbandry and Animal Health, Law No. 29  
 Year 2009 on the Practice of Medicine, Law Number 44 Year  
 2009 on the Hospital, and the Act and regulation legislation  
 others in the health sector.  
 On the basis of the above description, Law Number 36 Year 2009 on  
 Health becomes the parent Act (genus) or the Act  
 'Umbrella' (umbrella act) as the reference rule of law in legislation  
 Another set of health and regulatory  
 its implementation.  
 Legal norms are being applied for judicial review daam a quo case was published in  
 Seventeenth Section of the Security addictive substances consist of 4 (four)  
 chapter. In accordance with a system of legal norms in the formulation of  
 Security addictive substances, legal materials contained in the Seventeenth Chapter  
 should contain material that regulates the addictive substance, but the material  
 set it regulates tobacco and tobacco products.  
 Legal norms governing security diktif substance consisting of two  
 Article, and regulate cigarettes as much as 2 chapters and a paragraph set  
 about tobacco. Setting of tobacco and cigarettes in the  
 security of addictive substances, according to experts, not in accordance with the  
 formulation of system



legal norms and feels very very awkward (not systematic / ambiguous), let alone accompanied by the threat of criminal penalty is severe enough imprisonment for 5 years and a fine high 500 million [Article 199 paragraph (1)].  
35

Second: The formulation of legal norms in the Act on health being applied for judicial review

Legal norms in Article 113 paragraph (2):

Section 113

(1) Safeguarding the use of materials containing addictive substances directed so as not to disturb and endanger the health Individuals, families, communities and the environment.

(2) addictive substance as referred to in paragraph (1) include tobacco, containing tobacco products, solid, liquid, and gas addictive nature of its use can result in losses for themselves and / or surrounding community.

(3) Production, distribution, and use of materials containing substances addictive must meet the standards and / or requirements is set.

Explanation:

Section 113

Subsection (1)

Self-explanatory.

Paragraph (2)

Self-explanatory.

Paragraph (3)

The standards are directed to the addictive substance contained by material can be suppressed to prevent the circulation of counterfeit material.

Determination of requirements for the use of materials containing addictive substances intended to suppress and prevent the use of the disturbing or detrimental to health.

36

As an Act to regulate basic terms, the formulation legal norms and principles of law contains general provisions of law which mempengaruhi or overarching or underlying the establishment of norms others in the health sector.

Legal norms are being applied for judicial review contained in Article 113 paragraph (2) which states that the addictive substances including tobacco, products that containing tobacco, solids, liquids, and gases that are addictive use can cause harm to themselves and / or community around him.

The formulation of legal norms is an element of vagueness or errors in the formulation of legal norms, it will be evident when associated with the legal norms contained in Article 113 paragraph (1) the contain provisions:

"Securing the use of materials containing addictive substances directed so as not to disturb and endanger the health of individuals,

family, community, and environment".

Formulation of legal norms in Article 113 paragraph (1), is correct, namely load legal norms of a general nature which may be more basic settings further in the implementation of the Act or its implementing regulations.

Meaning or understanding of the addictive substance is not described in this article illustrate and

also not explained in the general provisions in Article 1. But in general understanding of the addictive substance known that significantly general / common / genus, because

refers to an adjective, ie "addictive". In various dictionaries and writing ([www.bnpjabar.or.id/index.php?option..zat-adiktif](http://www.bnpjabar.or.id/index.php?option..zat-adiktif) and [www.scribd.com](http://www.scribd.com) >...>

Study Guides, Notes, & Quizzes, can be loaded some understanding of the addictive substances, among others:

1. Is a substance or chemical that could overwhelm the nerve cells in the brain especially the reward circuit or pleasure with dopamine pathways, which are substances chemical properties that govern pleasure, attention, awareness and other functions.

37

2. Drugs and addictive substances are active ingredients that when consumed by living organisms can cause biological work as well as cause dependence or addiction is difficult to stop and have an effect like use them continuously that if it can be stopped give effect to tired extraordinary or unusual pain.

3. Drugs and active ingredients which when consumed by an organism life can lead to employment as well as the biology of addictive or addiction that is difficult to stop and the effect you want to use it continuous if it is stopped to give effect to outstanding fatigue or excruciating pain.

From the definition or understanding may disimpulkan that the meaning of "substance addictive "is a meaningful public / genus and does not refer to objects or particular objects or does not just apply to one object or one object only.

As the formulation of legal norms in compliance with the rules of the formulation of norms

law is good and right.

However, the formulation of legal norms contained in Article 113 paragraph (2), which is quoted more:

Addictive substances referred to in paragraph (1) include tobacco, a product containing tobacco, solids, liquids, and gases that are addictive that its use can cause harm to themselves and / or surrounding communities.

Formulation and content of legal norms is not in sync with the legal norms contained in Article 113 paragraph (1), because it does not put addictive substances as understanding of the definition in general, but

devoted only (plants) and products containing tobacco

tobacco with the arrangement of the sentence ".... including tobacco, products that containing tobacco, solids, liquids, and gases that are addictive use can cause harm to themselves and / or community

around it ".

38

The structure of the formulation of legal norms contained in Article 113 paragraph (2) is directed only against the tobacco and any of its products are contain elements of tobacco in all its forms (solid, liquid, and gas).

The elements of Article 113 paragraph (2) can be described as follows:

The first element, the addictive substance as referred to in paragraph (1)

Both elements, including tobacco, a product containing tobacco, solids, liquids, and gases that are addictive

The third element, the use of which may cause harm to himself and / or surrounding community.

A description of the elements:

The first element; addictive substances (referred to are the ingredients that contain substances

addictive as the object of securing its use is directed so as not to disturb and endanger the health of individuals, families, society, and environment).

The second element; include tobacco, products that contain tobacco, dense, liquids, and gases that are addictive. The formulation of this second element formulation awkward, difficult to understand as the arrangement of the legal language of good and true

and therefore incoherent and out of sync with the material from first element. The contents of the second element of the explanation of addictive substances

begins with using the word "include ...". Should be after the word

"Include ..." followed by the mention of all kinds of objects, plants, or medicinal which includes the security category of addictive substance use directed so as not to disturb and endanger the health

Individuals, families, communities and the environment. While the formula

The second element is only addressed to as if only one type namely tobacco, products that contain tobacco, solids, liquids, and gases which is addictive. Have two interpretations of terms as follows:

39

a. One type, namely tobacco alone with any of its products (ie tobacco, containing tobacco products, solid, liquids, and gases that are addictive).

b. Some types that are addictive, that is

1) tobacco,

2) a product containing tobacco,

3) solid,

4) liquids, and

5) gas

Judging from the structure of language, which referred to the second element is with all forms of tobacco products (ie products that contain tobacco, solids, liquids, and gases) as a letter, not on jenisjenis mentioned in the letter b. Because the arrangement of the type / shape that is

addictive incorrect (wrong), should all mention of the adjective objects that are addictive, such as solids, liquids, and gases. The mention behalf of certain special items ie tobacco and products containing element of tobacco in the second element is not right and wrong, because tobacco and tobacco products that contain elements not addictive substances, while the addictive nature of tobacco is not with the tobacco, but the substances contained in tobacco (nicotine-containing element). If the law makers intended to mention the plants that contain elements of the addictive substance or addictive nature, should be mentioned all plants that contain addictive substances, and if it intends to refer to certain substances that are addictive, should use the name or type of substance and if you are referring to the physical type of the object contain addictive substances, should use the type of the object (Solid, liquid and gas).

Formulation of the second element of Article 113 paragraph (2), according to experts, is formulation is not precise (wrong) and confusing, and mengandung element of uncertainty in the formulation of legal norms and the text unclear purpose and goal formulation of legal norms. Norms that

40  
so this is clearly not in accordance with the principles of formation of legal norms A good and true, contains elements of discriminatory and incompatible with basic rights of a person who would wear such legal norm that is interest groups of farmers (growers) and tobacco group business community that the type of business process raw materials from tobacco.

The third element, the use of which may cause harm to himself and / or surrounding community. The use of the word "loss" has broad and general meaning which may include losses in material and losses are immaterial. In view of this Act set in health sector, should not use the word "loss", but rather other matches in terminology in the field of health, for example "Health damage" or "cause health problems" and the sentence other right in the field of health care for himself or the community around him.

Legal norms in Article 114:

Legal norms in Article 114 diktup full as follows:

Article 114

Any person who manufactures or cigarettes to enter the territory Indonesia must include health warnings.

Explanation:

Article 114

The definition of "health warning" in this provision is writing a clear and easily legible and can be accompanied drawings or any other form.

Formulation of Article 114 appears suddenly, for no prologue legal norms that preceded it, but the offense is accompanied by

sanctions imposed by imprisonment of 5 (five) years and a fine of of Rp 500 million. Article 114 Entry of legal norms are irrelevant and not synchronous, since the seventeenth section of the Security Title addictive substances, but the content of Article 114 regulates the health warnings on

41

imported cigarettes and tobacco products, in terms of known that tobacco and cigarettes substance is not addictive, but cigarettes contain nicotine which is addictive substances. The presence of legal norms contained in Article 114 [as well as legal norms contained in Article 113 paragraph (2)] as part of the Act of Health which regulates the Security addictive substances, are worth questionable and obviously forced that causes confusion in the setting of norms and inappropriate and contrary asasas legal establishment and the establishment of a system of legal norms The Act.

Legal norm contained in Article 114 point is an obligation for every person who manufactures cigarettes to give warning health on cigarette production or import cigarettes from abroad into the territory of Indonesia.

Furthermore, in his explanation explained about the notion of "warning health "is a health warning in the form:

- a. Writing clear and readable, and
- b. can be accompanied by pictures or other forms

Thus, the shape of health warnings made in written form a clear and easy to read, but it can (should) with pictures or other forms (Eg, caricatures). The emphasis on the obligations of Article 114 is inclusion of health warnings, while the form of warnings made in writing (writing that is easy to read) or be in pictures or any other form. Imperatifnya nature is "the inclusion of warning health ", while the shape peringatannya (optional) can be done in writing (the writing is clear and easy to read) and can be accompanied by drawings or any other form.

With the health warnings, the buyer and who used tobacco has obtained the warnings about the dangers of smoking and if the buyer is fixed choose to buy cigarettes and suck it, then the risk will be suffered if  
xxxxxx

42

buyers still buy and smoke cigarettes and actually occurred as a result be your own responsibility.

Legal norms in Article 199:

Legal norms in Article 199 paragraph (1) More cited as follows:

Article 199

(1) Any person who knowingly manufactures or enter cigarettes into the territory of the Republic of Indonesia with not include health warnings shaped image

referred to in Article 114 shall be punished imprisonment 5 (five) years and a fine of not more Rp500.000.000, 00 (Five hundred million rupiahs);

(2) Any person who intentionally violate the no smoking area referred to in Article 115 shall be punished a fine of many Rp.50.000.000 (fifty million rupiah).

Formulation of legal norms contained in Article 199 paragraph (1) is the norm criminal law known as criminal law in law administration. Therefore, the norms of criminal law in Article 199 paragraph (1) dependent (dependent) to the legal norms contained in Article 114 namely "Any person who manufactures or cigarettes to enter the territory Indonesia must include health warnings ". To find out material norms of criminal law, the advance will be explained unsurunsurnya:

- a. deliberately
- b. produce or put cigarettes into the territory of the Unitary Republic of Indonesia
- c. with health warnings do not include the form of images referred to in Article 114

Prohibited acts are not to include health warnings shaped images (as referred to in Article 114). Whereas

43

Article 114 states that "Any person who manufactures or insert cigarettes into Indonesian territory must include a warning health ", it means that nature is the duty lists imperatifnya health warning. Warning about the form of images, arranged in The explanation cited Article 114: What is meant by "warning health "in this provision is clearly written and easily readable and can be accompanied by a picture or any other form.

Warning in the form of images is not the legal norms contained in Article 114 of enactment through the Official Gazette, but published in explanation of the enactment of Article 114 in the Supplement The state. In legal doctrine, known that he meant "legal norms" is the legal norms contained in the articles of the Law the enactment in the State Gazette that his position as primary law. While the explanation of article as a secondary law, namely gives an explanation of the legal norms contained in the articles.

Therefore, the positive law is binding as a legal norm contained in the articles of the Act, then if there are provisions criminal sanctions are referred to the legal norms contained in pasalpasal.

The position description of the article is to explain the legal norms contained in the article, so that the existence of these explanations norma legal intents and purposes become clear and bright and not interpreted other than what is meant by the former law them.

If there are legal norms that contains criminal sanctions provisions of the norm refer to the explanation section of the Act, then the rule of law

criminal is clearly contrary to the principle of legality because it regulates criminal sanctions to those who violate the article description and explanation article was not the norm.

Supposedly, the formulation of criminal law norms in Article 199 paragraph (1):  
44

Any person who knowingly manufactures cigarettes or insert cigarettes into the territory of the Republic Indonesia does not list a Health Warning shaped drawings referred to in Article 114 shall be punished imprisonment maximum of 5 (five) years and a fine of not more Rp500.000.000 (Five hundred million rupiahs);

On the basis of these considerations, according to experts, the norms of criminal law contained in Article 199 paragraph (1) has been contrary to the norm law to which it refers is Article 114 which only requires to to include health warnings on cigarette manufacturers and importers, while the norm contained in Article 199 paragraph (1) is converted into lists their obligation "Health Warning In Picture Form".

Formulation of criminal law norms of Article 199 paragraph (1) is clearly in conflict with the principle of legality, because the set of criminal sanctions against those who not violate the norms of criminal law, but only broke explanation article which is not a criminal law norm. Even if the manufacturer or importing cigarettes have health warnings lists, but do written (clear and easy to read), but does not include images, manufacturers and importers of cigarettes will still be subject to criminal sanctions imprisonment of 5 years and a maximum fine of Rp 500 million.

Formulation of criminal law norms of Article 199 paragraph (1) is contrary with the formulation of the principles of criminal law norms of good and true, contrary to the formulation of technical norms and sanctions of criminal law criminal, contrary to the principle of legal certainty and legal justice in the formulation of criminal law norms.

#### D. Conclusion

On the basis of the above description, according to experts, the legal norm as referred to in Law Number 36 Year 2009 on Health:

a. Article 113 paragraph (2) contains the legal norms that are discriminatory since entering the addictive substance of tobacco as if only just to

45

all forms of processing. Legal norms in Article 113 paragraph (2) is the formulation of legal norms that are not good, tendentious, and no guarantees legal protection against group people who do business related type of business with all types of tobacco products, but there are no norms prohibit tobacco plants and tobacco is not addictive substances, but tobacco containing substances that are addictive to some degree (Nicotine). Legal norms of Article 113 paragraph (2) are discriminatory, because not include other types of plants that contain addictive substances. Legal norms that are discriminatory as it clearly does not fit

with the principles of formation of legal norms of good and true as regulated in Law Number 10 Year 2004 about Pembentukan legislation and violates the rights basic groups of people who obtain insurance protection by Act of 1945.

b. Article 114 contains the norms which oblige the producers and importer to include health warnings in the product tobacco and cigarettes imported into the territory of Indonesia which is placed on the addictive substance is not appropriate and contain elements of *dikriminatif* because tobacco products are otherwise permissible / lawful law (not including products that are prohibited) required to lists their health warnings, while other products contain the same or similar addictive cigarettes and has a power damage to human health are not required to list health warnings in the product. Explanation of Article 114 contains the explanatory material that causes it to be no rule of law clearer and more unclear if associated with the provision of sanctions crime as referred to in Article 199 paragraph (1).  
c. Article 199 paragraph (1) contains material criminal law and criminal sanctions norm associated with the legal norms of Article 114 but there is *kekiruan* extremely fatal because the insert explanatory material

46  
Article 114 as a norm which, if violated criminal law imposed *lam* sanctions imprisonment of 5 years and a maximum fine of Rp 500 million. Explanation of an article (published in State Gazette) not a legal norm, but his position as the authentic interpretation of (official) Law maker of the article in question. Understanding inclusion of health warnings referred to in Article 114 is not the same as the notion "does not include a warning ... shaped a picture of health as defined in Article 114 " referred to in Article 199 paragraph (1). Formula thus clearly inconsistent with the principles of the formulation of legal norms criminal and obscure meaning or understanding of legal norms in referenced article, and is bright and clear violation of the principle of legality and legal certainty are protected by the Constitution of 1945.

2. Ir. Purwono, M.S.

· As of Experts on tobacco, the cultivation of Experts explain about conversion tobacco plants to other plants;

#### TOBACCO

- Tobacco (*nicotianae tabacum* L.) including the family Solanaceae;
- Broadly divided into:
  - a. Tobacco dry season (*Voor-Oogst*);
  - b. Tobacco rainy season (*Na-Oogst*).
- Utilization of the major tobacco is to cigarettes;
- Tobacco popularized by Europeans and traded as a medicine sedative because the content *alkaloidnya*, namely *nikotina*;



- Tobacco is not native to Indonesia. Tobacco is a plant that has long been cultivated by the community;

#### NIKOTINA

- Nikotina is one type of alkaloid produced by plants tobacco;

47

- Nikotina is a product of secondary metabolism have been established through nicotinic acid with the precursor compounds (essentially constituent aspartic acid) à photosynthesis and respiration as long as there must have been formed nikotina;

- Alkaloids are a class of nikotina: anabasina and anatabina;

#### Biosynthesis PLANT ON TRACK

##### Alkaloids and addictive substances

- Alkaloids are nitrogenous base class of compounds which are generally heterocyclic. Disentesis alkaloids in secondary metabolic processes. For useful plants to protect themselves from interference organisms nuisance because it was bitter;

?? Brother (addiction) is contaminated an avocation (to forget things other) (Big Indonesian Dictionary);

?? Addictive substance is any chemical compound that can cause addiction

?? Several types of alkaloids can cause addiction (addictive), namely by affect the composition of the central nervous system causing dependence (Vickery and Vickery, 1981);

?? Examples of alkaloids that are addictive, among others: Nikotina, Morfina, Cocaina, and

Caffeine;

48

?? Effect of alkaloids against human consumption depending on the type and dose;

#### TOBACCO DISTRIBUTION AREA IN INDONESIA

##### PROPORTION OF TOBACCO

##### TYPE OF TOBACCO BY PLACE

?? Deli tobacco;

?? Tobacco Waterford;

?? Tobacco Vorstenlanden: Yogya, Solo, and Klaten;

49

?? Besuki;

?? Madura Tobacco;

?? East Lombok tobacco;

#### REASON FOR A BUSINESS TYPE PLANT

?? Suitability of land and climate;

?? Land area;

?? Mastery of technology;

?? Availability of inputs;

?? Culture à agricultural science is the science that contain elements culture (agriculture);

?? Market certainty;

?? Economic benefits;

#### TOBACCO CROP CONVERSION TO ANOTHER?

- ?? Land suitability, the type, fertility, high places, and climate;
- ?? Level of mastery of the technology by farmers;
- ?? Labor availability;
- ?? Assurance market. Where commodities produced will be sold;
- ?? Certainty of income;
- ?? Are alternative crops capable of providing income security for tobacco;
- ?? All of the above must be met if you want to do the conversion;

#### EXAMPLES OF CONVERSION

?? Success: cassava to sugarcane in Lampung

- Age is relatively the same;
- Sugar cane planting one can harvest 4 times while planting cassava one one crop;
- The results secured by the bailout of sugar at a price set Government;

- There are relatively low-interest loans for sugarcane;

?? Failure: the cultivation distance

- Cultivation techniques have not been fully possessed;

50

- How difficult harvest;
- There is no guarantee and no certainty of market prices;

#### CONCLUSION

?? In biophysical conversion of tobacco to other crops can be done if the type of plant to be developed has the ability to grow and produced in the area of tobacco;

?? In socio-economic:

- Changes in behavior and culture of the farmer;
- Farmers should be nurtured on cultivation techniques that will developed in the region;
- Guarantee a definite market absorbs the farmer;
- There is a guarantee farmers' incomes are commensurate with tobacco farming with the same period of concession.

#### CONVERSION PROCESS

?? In accordance with Law Number 12 Year 1992 concerning Cultivation, farmers have the freedom to choose the type of planting and pembudayaannya. This means that conversion should be done at the initiative of farmers;

?? If the choice of crops did not materialize because of the provisions of the Government,

then the Government is obliged to strive for farmers concerned to obtain a certain income security. In this case the program The government should not be detrimental to farmers.

3. Dr. Revrisond Baswir, S.E.

?? Experts give expert testimony as to the economic and business issues;

?? Experts expressed the opinion regarding tobacco and tobacco products from economic and business review. Experts pointed out that rarely become

attention or observation that behind the campaign on the dangers Smoking also there are things that have nothing to do with health issues. Rarely are thinking that maybe behind it all a bout of certain businesses;

?? About the dangers of smoking, according to experts there are three aspects highlighted relating to business and economic struggle that may occur.

51

First, the struggle between the interests of fellow tobacco companies themselves whether large or small businessman or entrepreneur white cigarettes, clove cigarettes. Second, competition between employers in the country context, namely domestic tobacco companies with international tobacco companies. Third, there is the possibility of the fight business is no longer just between fellow cigarette factory, but including other industries; ?? Experts cite a book written by Wanda Hamilton titled "Nicotine War" that there was a battle between the tobacco companies with business pharmaceutical firms. The third fight is affecting business campaign pros / cons of tobacco products. At the most basic level, about fellow cigarette factory, the fight took place between cigarette factory manufactures that produce white cigarettes with clove cigarettes. On Initially, the pros / cons about the dangers of smoking is associated with about levels nicotine in a cigarette product. So at first, symptoms of the transition of clove cigarette smoke toward white. Here begins the difference between manufacturers who produce cigarettes with a manufacturer that produces white smoke, so how then looked at cigarette factories Cigarettes are gradually trying to transform its products from clove cigarettes to lower nicotine cigarettes. But when viewed developments in Indonesia, it turned out so far cigarette manufacturers Cigarettes can still survive, including by offering products that not completely white cigarettes, but cigarettes with nicotine levels very low or even called menthol cigarettes, and so on;

?? In the fight to the two levels, namely the struggle between firms cigarettes in the country to abroad, then here will that Indonesia has witnessed remarkable achievements since the cigarette consumption in Indonesia dominate most of the cigarettes produced by companies in the country, either kreteks and white cigarettes, so there may be battle of the levels of nicotine it contains a global dimension. That multinational companies wishing to enter the Indonesian market and

52

dominate the cigarette market in the country. That at a certain cigarette manufacturers in Indonesia, the fight ended with even taken it over the cigarette factory by a national manufacturer that comes from abroad, so that the penetration into the Indonesian market is not only done by

market their products, but even carried out by taking over, acquired, a national company;

?? Battles of the third stage, can occur not only between cigarette manufacturers and white cigarettes, between national and multinational companies, but also occurs in the context of the country. One common symptom of business that characterizes the current business struggle between nations is that no little effort made in the countries of the world into three in particular, entrepreneurs with capital of the world into three, with products that may also be made even in the country, but because of the efforts that conducted by using the name, brand, or a way to make a copyright-designed or designed in the advanced industrial countries certain then organization of that effort had to be done by paying royalties to the countries of origin of the company. For example, hospitality, home dining, cafe outlets, fuel services, and so on. Attempts were dimodali, provided the product, in fact most of the sources also domestically, but because he was present by using the brand and serve customers in ways that designed, designed, and / or may stated the copyright in another country, the efforts were forced to paying royalties. According to expert estimates, it can happen within the context cigarette factory fight, whether it will do with fellow brand between cigarette smoking or pharmaceutical products by doing large-scale campaign on the dangers of smoking and there was a shift of clove cigarettes to white cigarettes, or stop smoking altogether, sliding it into pharmaceutical products substitute for cigarettes. Then what happens, could have been killed domestic trademarks and taken it over business opportunities that the trademark originating from industrialized countries certain advanced;

XXXXXX

53

?? If the citizens of Indonesia currently smoked cigarettes made Indonesia, the majority of its profits will fall into the economy Indonesian. But once we smoked the products originating from other countries, can not, profits will also fall into the hands of state concerned. Especially if you then stop smoking altogether, switching to pharmaceutical products to nearly 100% comes from industrial countries forward, then because of its brand, copyright, originating from developed countries, then by itself it its profits would fall into the state concerned;

?? Here should be taken into account that this fight is not solely related issues, for example, about health, about human rights, and so on, but in it, chances are there are also elements relating to the battle between corporate giants, whether among domestic and foreign cigarette manufacturer or the manufacturer of cigarettes and pharmaceutical companies, namely how to seize nicotine as products are marketed to the public with the methods

different;

?? Experts cite the book "Nicotine War" which explains that the way consume nicotine is very diverse, ranging from smoking in conventional, can use the pill, could use a patch, could replace it with candy. This product has been produced by firms pharmaceutical. Therefore it should be assumed, that behind the campaign against These cigarettes, regardless of health issues, there is great power of firms pharmacy real motive was to capture the nicotine. Not to stop their consumption altogether, but diverted to consume them from the conventional way: smoking, to new ways of relating to pharmaceutical products, whether it be pills, patches, injections, and the like. Pharmaceutical companies is ongoing, large possibility, a campaign is not anti-nicotine, but the anti-how to consume nicotine from conventional to new ways yes, more profitable business for pharmaceutical companies.

54

4. Zaenal Arifin Mochtar, SH, LLM.

?? Experts as an expert in the field of the constitution and the rights of citizens, to discuss three

things in case a quo. First, the reading of the articles contain the phrase "tobacco, tobacco products containing ... 'in the Act Of Health. Second, the principle of non discrimination in the making of rules. Third, potential violations of the rights due to discrimination;

READING

?? Theoretically there are six modalities for judicial review and interpretation (Bobbit, 1985):

1. Historical;
2. Textual (comparison with the sound of another article);
3. Structural (logic institutionalization of art);
4. Doctrinal (the doctrine that has been received);
5. Ethical (ethos or spirit);
6. Prudential (analysis of the cost of [cost and benefit] social).

ARTICLE HEALTH Act

?? Article 113 paragraph (2) Health Act are in Part Seven

Twelve Security regarding addictive substances;

?? Readings above article is of course linked to security use of addictive substances;

?? The logic of the articles on the security of this addictive substance use intact include: (1) the provision of security, (2) concerning the addictive substance itself, (3)

standards and requirements that must be met in producing, mengedar, and use, (4) standardization of special cigarettes, (5) the creation of free zone cigarettes, and (6) Further provisions are delegated to the Regulation The Government.

READING

?? First, insert the phrase "tobacco, products that use

tobacco ... ", in particular in Article 113 paragraph (2) to be inappropriate because, structurally, "institutionalization" of this article is actually taking

55

categorize forms of addictive substances are regulated in paragraph (1). Moreover, categorization

addictive substances showed good categorization of solid, liquid, or gas;

READING comparison

?? The article that really is structurally similar to the text is, for example,

Article 9 which reads: (1) Every person is obliged to come to realize,

maintain, and improve community health status that

as high. (2) The obligation referred to in paragraph (1),

implementation efforts include individual health, health efforts

community, and health-oriented development;

?? In subsection (2) of this constellation of categorization become much more precise than

in Article 113 paragraph (2);

THE PRINCIPLE OF NON-DISCRIMINATION

?? The principle of non discrimination on the rule-making aimed at two things:

The first, on a discriminatory impact (substance). Second, the concept that own (form);

?? Article 113 paragraph (2) may not be substantively problematic, but in

already pose a formal model of discrimination because it only lists

of tobacco and tobacco products;

IMPACT OF TOBACCO FARMERS 'RIGHTS

?? Rights of the most easily accessible in the context of the overall impact

is the economic, social and cultural rights of tobacco farmers. Moreover,

some of it does provide the potential impact on the rights

economic, social, and cultural development;

ESC RIGHTS

?? Some special features;

?? Core content (minimum core content);

?? State obligation;

?? Human rights indicators;

?? Article 6 point 1:

State party to the present Covenant recognize the right to work, including the right everyone to the opportunity to make a living by work

56

freely chooses or accepts, and will take steps

adequate to safeguard this right.

?? Article 6 point 2:

The steps to be taken by States Parties to the present Covenant to

achieve the full realization of this right shall include technical assistance

and vocational education and training programs, policies, and techniques

to achieve economic development, social and cultural as well as the steady

full employment and productive, with conditions

ensure political and economic freedoms fundamental to the individual.

?? It must be remembered, the ESC determined the Covenant, concerning Part II of Article 4,

"The States Parties to the present Covenant recognize that, in the enjoyment hakhak guaranteed by the state in accordance with this Covenant, the state can only be wearing a limitation of these rights in accordance with the provisions of law, along this line with the nature of these rights and solely done to improve the general welfare in a society democratic ";

?? That is, the act discriminates against tobacco (which is a work product economics of tobacco farmers), with credit to be as if was the only product that air-addictive substances have strong potential provide adverse stigma farmers' rights in the work of its economy;

#### CONCLUSION

?? The reading of it shows things that are not appropriate, either structural and textual;

?? This formulation showed the existence of discrimination rules;

?? The things that then have a potential violation of economic, social, and Peasant culture especially if associated with the obligation of the state.

?? By monitoring the status of legislation and policies designed to meet the economic and social needs of a country's Populations, ... Such acts or omissions may be Considered a violation of the state's obligation to progressively implement measures for the fulfillment of ESC rights. (HRRRC)

57

5. Prof. Dr. Saldi Isra, SH

#### PROBLEMS OF THE TESTED

?? Article 113 paragraph (2) of Act No. 36 of 2009:

Addictive substances including tobacco, products that contain tobacco, dense, liquids, and gases that are addictive to its use may cause losses for themselves and / or surrounding community.

?? Article 114 of Law No. 36 of 2009:

Any person who manufactures or cigarettes to the region include Indonesia must include health warnings.

The explanation:

The definition of "health warning" in this provision is writing a clear and easily legible and can be accompanied by a picture or shape other.

?? Article 199 of Law No. 36 of 2009:

(1) Any person who knowingly manufactures or cigarettes enter into the territory of the unitary Republic of Indonesia with no to include health warnings as the form of images referred to in Article 114 shall be punished imprisonment of 5 (five) years and a fine not exceeding Rp. 500,000,000.00 (five hundred million rupiahs);

(2) Any person who intentionally violate the no smoking area referred to in Article 115 shall be punished a fine of Rp. 50,000,000.00 (fifty million rupiah).

SPIRIT injuring NONDISKRIMINATIF

?? B Konsiderans letter states:

That each activity in order to maintain and enhance public health degree at the highest implemented based on the principle nondiskriminatif, participatory, and sustainable in order the formation of human resources in Indonesia, as well as increased resilience and competitiveness of the nation for national development.

58

#### FORMS OF DISCRIMINATION ON THE GROUP

?? Article 1 paragraph 3 of Law Number 39 Year 1999 on Human Rights states:

Discrimination is any restriction, harassment, or ostracism directly or indirectly based on human differences on the basis of religion, ethnicity, race, ethnic group, class, social status, status economic, gender, language, political conviction, resulting in the reduction, deviation or deletion recognition, implementation or use of human rights and fundamental freedoms in the lives of both individuals and collectively in the political, economic, legal, social, cultural, and other aspects of life.

#### INDIRECT DISCRIMINATION

?? Indirect discrimination Occurs Pls there are rules, regulations or procedures operating, the which have the effect of discriminating against Certain groups of people (<http://www.irr.org.uk/statistics/discrimination.html>);

?? Discrimination can result in threats to the rights of citizens as provided in Article 28A of the 1945 Constitution, namely that every person entitled to live and to defend life and living; and Article 28I paragraph (2) that everyone is entitled to free treatment discriminatory on the basis of anything and are entitled to protection discriminatory treatment against it.

#### PRESERVE HAM HAM BUT OTHER injured

?? Konsiderans remember mention of Article 28H (1) of the 1945 Constitution that every person

right to live in prosperity and spiritual, living, and get good environment and healthy as well as receive services of health. (This provision does give attention to the right to healthy life, but negates the other ham);

?? Pencederaan human rights, among which are:

- Article 28A of the 1945 Constitution which states that everyone is entitled to live and to defend life and living.

59

- Article 28I paragraph (2) of the 1945 Constitution which states that every person is entitled

free from discriminatory treatment on the basis of anything and entitled to protection against treatment that is was discriminatory.

#### CHARACTER NORMS

?? Based on the character of the formulation of norms as argued by experts



previously, there are ambiguities and errors in the preparation of the norm, experts argued that the inclusion of the phrase "tobacco and products containing tobacco "as something that is forced. In the view of Prof. Dr. Jan Michiel Otto et al in the article Using Legislative Theory to Improve Law and Development Projects (in Journal Regel Mat, 2004) says that very common there is outside influence in the process of formation Act. The formulation of paragraph Tobacco imposed, it can be derived of interests outside formers Act;

#### LEGISLATION AND THE OPPRESSIVE DESPOTIC

?? In the context of legislation, to this day there is suspicion emergence Law Oppressive laws or despotic. Related to this, Jeremy Waldron in his book The Dignity of Legislation (1999), for example, revealed concerns, that legislation and legislatures have a bad name in the legal and political philosophy, a name sufficiently disreputable to cast doubt on Their credentials as respectable source of law;

#### CONCLUSION

?? The provisions of Article 113 paragraph (2) of Law Number 36 Year 2009 can be said to be discriminatory. In addition, provision is potentially legal uncertainty.

[2.3] Considering whereas the Government filed a written statement dated August 26, 2011 the Court received on Tuesday, October 4, 2011, which principally explains as follows:

60

#### I. APPLICATION OF THE APPLICANT

- a. Whereas according to the Petitioners, the test article in the Act Number 36 Year 2009 on Health, intends to obtain protection, guarantees of justice, and legal certainty for the applicant;
- b. Whereas according to the Petitioners, the provisions of Article 113 paragraph (2), Article 114

and description, and Article 199 paragraph (1) of the Act a quo contrary to the provisions of Article 27, Article 28A, Section 28D and Article 28I of the 1945 Constitution, as it has threatened jobs tobacco farmers, industry smoking and its workforce, including the Petitioners. A quo provision is not provide legal certainty of fair and are discriminatory because only regulates the tobacco / cigarette;

- c. Whereas according to the Petitioners, the provisions of a quo, causing injustice because it only lists one type of agricultural plant species Tobacco is considered harmful for the wearer and surrounding communities (referred to as an addictive substance), while plants such as marijuana, coffee and lain lain (which also contains addictive substances) are not listed / included in Act No. 36 of 2009 on Health;

- d. Whereas according to the Petitioners a quo provision injustice because it only requires the inclusion of "health warnings" on cigarettes only. Supposed "health warning" also applies to food

and other beverages that contain addictive substances that may / may threaten of health. For example soft drinks, sports drinks / energy, coffee, tea, beer, wine and other alcoholic beverages as well as products containing other addictive substances;

e. Whereas according to the Petitioners in conjunction with Article 114 Explanation of Article 114 in conjunction

Article 199 paragraph (1) provision of a quo has no arguments and logic strong law why should arrange necessary to include "Health warning.";

f. Whereas according to the Petitioners, the provisions of a quo, pemuatannya very imposed by the makers of the Act, in particular by the Government, the more the provisions of a quo would be an umbrella law / legal foundation

61

by the Government to give birth to draft Government Regulation (RPP) on Protection of Tobacco Products as addictive substances for Health in lieu of Government Regulation Number 19 Year 2003 on Security Cigarettes for Health;

g. In short according to the Petitioners, the provisions of a quo has provided distinction, the treatment that is not fair to everyone, including the Petitioners as tobacco farmers in Indonesia. It thus not fit for purpose and nature of the constitution which guarantees the existence fairness (justice), certainty (certainty or zekerheid) and the usefulness or usefulness (utility), therefore according to the Petitioners a quo provision considered contrary to the provisions of Article 27 paragraph (1) and paragraph (2), Article 28A and Article 28I and the opening (preamble) of the 1945 Constitution.

## II. POSITION OF LAW (LEGAL STANDING) THE APPLICANT

In accordance with the provisions of Article 51 paragraph (1) of Law Number 24 Year 2003

regarding the Constitutional Court, stating that the applicant is a party assume the rights and / or impaired by its constitutional authority enactment of the Act, namely:

- a. individual Indonesian citizen;
- b. customary law community unit along still alive and in accordance with development of society and the principle of the unitary Republic of Indonesia stipulated in the law;
- c. public or private legal entities; or
- d. state institutions.

The above provisions asserted in explanation, that what is meant by "Constitutional rights" are rights set forth in the Constitution Republic of Indonesia Year 1945, so that a person or a party Applicants may be accepted as having legal domicile (legal standing) in a petition for judicial review of Law against the Constitution Republic of Indonesia Year 1945, it must explain and prove:

62

- a. qualifications in the petition a quo referred to in Article 51

paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court;  
 b. rights and / or authorities referred to in the qualification that  
 deemed to have been impaired by the enactment of the Act are tested.  
 c. constitutional rights and / or constitutional authority as a result  
 enactment of the law petitioned for review.

Furthermore, the Constitutional Court Decision Number 006/PUU-III/2005 and  
 Number 11/PUU-V/2007 decision and subsequent decisions, has  
 provide understanding and cumulative limits on constitutional rights and /  
 or authorities arising from the enactment of a law-

Act pursuant to Article 51 paragraph (1) of Law Number 24 Year 2003 on  
 The Constitutional Court must meet 5 (five) provided that:

- a. the constitutional rights granted by the 1945 Constitution;
- b. that the Petitioner's constitutional rights are deemed by the Applicant has  
 harmed by an Act which were tested;
- c. Petitioner that the losses in question are specific  
 (Special) and actual or at least potential in nature which, according to the reasoning  
 reasonable will certainly take place;
- d. a causal relationship (causal verband) between losses and  
 enactment of a law petitioned for review;
- e. the possibility that the petition is granted  
 constitutional impairment argued will not or no longer occur.

For the things mentioned above, it is questionable according to the Government  
 interests of the applicant, if it was right as the party considers  
 rights and / or authorities are impaired by the enactment of constitutional provisions  
 Article 113 paragraph (2), Article 114 and explanation, and Article 199 paragraph (1)  
 Law

Law Number 36 Year 2009 regarding health and also whether there  
 constitutional impairment of the Petitioners in question is specific (special)  
 and actual or at least potential in nature is based on logical reasoning  
 will surely occur, and whether there is a causal (causal  
 verband) between losses and the enactment of the Act being applied to  
 were tested.

63

According to the Government, the petition of the petition is clear and wrong addresses  
 because of the provisions of petition to be tested is related to  
 security of addictive substances, the scope of addictive substances and setting about  
 production,  
 circulation and use of addictive substances, in other words a quo provision is not  
 related or at least not intended to reduce, disrupt  
 or hinder the applicant to utilize the farm  
 planted to tobacco.

From the above description, according to the Government, the petition of the Petitioners  
 unclear and vague (obscuurlibels), especially in constructing the  
 constitutional rights and / or authorities are impaired upon entry into force  
 provisions petitioned for review of the above, therefore according to  
 Government, the legal position (legal standing) the applicant does not meet

qualifications as defined in Article 51 paragraph (1) of the Act Number 24 Year 2003 regarding the Constitutional Court or by decisions of the Constitutional Court earlier (see Decision No. 006/PUU-III / 2005 and Decision No. 11/PUU-V/2007). However, if Your Honor Chair / Panel of Judges of the Constitutional Court argued, the Government surrender completely to His Excellency the Chairman / Members of the Panel of Judges Constitution to consider and assess, whether the Petitioners have legal standing or not.

### III. EXPLANATION OF THE APPLICATION FOR TESTING LAW NUMBER 36 OF 2009 ON HEALTH

Relative petition for judicial review provisions of Article 113 paragraph (2), Article 114 and

explanation, and Article 199 paragraph (1) of Law Number 36 Year 2009 on Health, which states:

#### Section 113

(1) Safeguarding the use of addictive substances containing materials directed so as not to disturb and endanger the health of individuals, family, community, and environment.

(2) addictive substance as referred to in paragraph (1) include tobacco, a product containing tobacco, solids, liquids, and gases that are addictive

64

that its use can cause harm to themselves and / or surrounding communities.

(3) Production, distribution, and use of materials containing addictive substances must meet the standards and / or requirements set.

#### Article 114

Any person who manufactures or cigarettes to the region include Indonesia must include health warnings

#### Elucidation of Article 114

The definition of "health warning" dalam this provision is writing a clear and easily legible and can be accompanied by a picture or shape other

#### Article 199 paragraph (1)

Any person who knowingly manufactures or put cigarettes into within the unitary Republic of Indonesia to not list shaped a picture health warning referred to in Article 114 sentenced to imprisonment of 5 (five) years and a maximum fine of Rp. 500 million (five hundred million rupiahs).

The foregoing is considered contrary to the provisions of Article 27 paragraph (1) and paragraph (2), Article 28A, Section 28D, as well as the Preamble and Article 28I

(Preamble) of the 1945 Constitution, which states:

#### Article 27

(1) All citizens shall be equal before the law and government and shall uphold the law and government no exception.

(2) Every citizen has the right to decent work and livelihoods for humanity.

Article 28A

Every person has the right to live and to defend life and his life.

65

Article 28D

(1) Every person has the right to recognition security, protection, and certainty just laws and equal treatment before the law.

(2) Every person has the right to work and receive benefits and treatment fair and reasonable in the employment relationship.

(3) Every citizen has the right to equal opportunities in of government.

(4) Every person has the right to citizenship status.

Article 28I

(1) The right to life, the right not to be tortured, the right to freedom of thought and the right

conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be prosecuted on the basis of legal which applies retroactively are human rights that can not be reduced in any event.

(2) Every person entitled to be free from discriminatory treatment of any basis and are entitled to protection against treatment that it is discriminatory.

(3) cultural identity and rights of traditional communities be respected in the times and civilizations.

(4) The protection, advancement, upholding, and fulfillment of human rights is the responsibility of the state, especially the government.

(5) To uphold and protect human rights in accordance with the principle a democratic constitutional state, the human rights pefaksanaan guaranteed, regulated, and set forth in legislation.

Against the norm substance petitioned for review by the Petitioners, in this case the provisions of Article 113 of Law Number 36 Year 2009 on Health, the Government testimony and arguments referring to the statement Government in the petition for judicial review with the register number 19/PUUVIII / 2010 filed by brother Bambang Sukarno.

66

Here's the rest of the information submitted is added, complete, and perfect description of the previous government, as the following:

A. Against substance petitioned for review by the Applicant above, the Government may submit an explanation of philosophical and sociological perspectives on the existence of provisions that petitioned for review, as follows:

1. Why only tobacco and products containing tobacco are regulated as an addictive substance in the Act a quo

- a. Article 113 paragraph (2) of the Act a quo stated that the "substance addictive as referred to in paragraph (1) include tobacco, containing tobacco products, solid, liquid, and gas addictive nature of its use can cause harm to himself and / or surrounding community. "The provision is a quo details are stated with the word "include", meaning that in addition to tobacco and tobacco-containing products, the Government acknowledges there are still other addictive substances.
- b. The only restriction on tobacco regulation and the products containing tobacco in the Act a quo because of substance other addictive that have high levels of addiction / addiction is set high in a separate regulation, which is marijuana that has been set in Law Number 35 Year 2009 on Narcotics and Law Number 5 Year 1997 on Psychotropic Substances, while the addictive substances in alcoholic beverages is regulated in Presidential Decree No. 3 of 1997 on the Supervision and Alcoholic Beverage Control, which followed up with Minister of Health Decree No. 282/Menkes/SK/II/1998 about Alcoholic Beverage Production Quality Standards. (Vide evidence-T1)
- c. In addition to marijuana, tobacco as a crop can lead to addiction / addictive because it contains nicotine in large number of which is about 18.5 million micrograms per kilogram of weight tobacco. Nicotine is a major component in plant  
67  
tobacco (*Nicotiana tabacum*) that have addictive properties or may lead to addiction / addiction in people who consume them by way of a specific use, for example by burning or inhaled the smoke.
- d. The government acknowledges the existence of plants other than tobacco are also contain nicotine, such as potatoes, tomatoes and peppers but with a much lower level that is less than 10 micrograms per kilogram of weight and eggplant crops with higher levels of 100 micrograms per kilogram weight of eggplant. Low levels of content nicotine on the four types of plant above will not cause effects of addiction / addiction for people who consume them. With Thus, seen from the effects of addiction / addiction it creates, The Government believes that regulation of tobacco and products containing tobacco is a very urgent and Indonesia urged to save the nation, especially younger generation of addiction / addiction of tobacco and products tobacco.
- e. In principle, regulation of tobacco and products containing tobacco in the Act a quo aims to do security on consumption, rather than eliminating tobacco or products containing tobacco as being applied by the Petitioners. The principle of this arrangement different from the principle

settings of other addictive substances such as marijuana. Cannabis as a plant agriculture that can lead to addiction / addiction has been banned to be planted.

f. Tobacco control policies are needed because the economic costs social impacts of tobacco consumption continues to rise and the burden of this increase is largely borne by the poor. From the research of Dr.. Kosen, et al (2009), contained in the factsheets mentioned Promkes Ministry of Health that if the assumption of no cost of hospitalization, then the total cost issued by the community relating to tobacco

68

amounted to Rp. 15.44 Trillion. Total outpatient costs for illness related to tobacco amount of Rp. 3.11 trillion, so that Total costs for inpatient and outpatient Rp. 18.55 Trillion.

(Vide evidence-T2)

g. According to researcher Dr. Kosen, et al (2009) contained in Promkes factsheet stated that the total economic losses Indonesia's population consumes in a year due productproducts tobacco reached 338.75 trillion, or more than six times Government tobacco excise revenue of only Rp. 53.9 trillion.

The loss is calculated from the amount of money spent on buy cigarettes, medical expenses related diseases cigarette consumption, cost lost because it does not work when ill, and incomes not received from family members who died because of associated diseases due to consumption of tobacco products. (Vide evidence-T3)

h. Law Number 36 Year 2009 on Health

line / not contrary to Article 27 UUD 1945, because it is associated with regulation of tobacco products legislation a quo only perform "safety and health protection" is not "Ban". So there is no clause that the Act a quo hinder or prohibit tobacco farmers over employment and livelihood.

i. Law Number 36 Year 2009 on Health has been in line with Article 28A of the Constitution of the Republic Indonesia Year 1945, which states that "every person is entitled to live and to defend life and living. "

In life, people have the right to maintain it in a way maintain health. Smoke generated by cigarette smoke can detrimental to health, can interfere with a person defined in maintain life, so it is natural if

The government attempted to protect the public, especially regarding health to defend his life with

69

do security the use of materials containing substances addictive.

j. Law Number 36 Year 2009 on Health also

accordance with the mandate of Article 28B paragraph (2) of the 1945 Constitution which

states that "every child has the right to survival, growing, and growing, and is entitled to protection from violence and discrimination. "this Act in philosophy aims to protect children from the dangers of using tobacco products.

The data showed that the prevalence of smokers in the novice children increased from time to time. Increased prevalence of smokers in the age group 15-19 years, from 7.1% in 1995 to 19.9% in 2007, up by 18%. Enhancement highest in the youngest age groups, namely 10-14 year from 0.3% to 2.0% or increased 7-fold during the period 12 years (1995-2007). Even more worrisome is age started smoking more and younger. Children aged 5-9 year has begun with the highest prevalence of smoking in age group > 15 years, ie from 0.4% in 2001 to 1.9% in 2007, or nearly 5 fold. Based on the Global Youth Tobacco Survey in 2006 which was organized by WHO indicate if the 24.5% boys and 2.3% of girls aged 13 to 15 years in Indonesia are smokers, where 3.2% of the number of smokers has been in a state of addiction and addiction. (Vide evidence-T4)

k. Law Number 36 Year 2009 on Health also accordance with the mandate of Article 28H Paragraph (1) of the 1945 Constitution which

states that "every person is entitled to live in welfare and mind, residing, and get a good environmental and healthy and receive medical care. "With a healthy environment, free from exposure to smoke cigarettes, by inhaling the air of a healthy, then the quality of life someone is going to increase.

70

l. Law Number 36 Year 2009 on Health also in line with the mandate of Article 28I paragraph (2) of the 1945 Constitution which states that "every person is free from harassment that is discriminate on any basis and are entitled to protection discriminatory treatment against it. "settings substances addictive, which is meant here is not the case that tobacco discriminatory, because the regulation of addictive substances that others have regulated separately in the other Act specifically. In addition, the purpose of the Act a quo is doing "Safety and health protection," not "ban", so not discriminatory.

m. Law Number 36 Year 2009 on Health also accordance with the mandate of Article 28I Paragraph (5) of the 1945 Constitution which



states that "to uphold and protect human rights human beings in accordance with the principle of a democratic constitutional state, then implementation of human rights guaranteed, regulated, and poured in laws and regulations. "Here, that the Act a quo made in order to uphold human rights, namely rights at health sector.

n. Law Number 36 Year 2009 on Health also accordance with Article 28J Paragraph (1) of the 1945 Constitution which states that "every person shall respect the human rights of others in the orderly life of the society, nation and the state. "In Here we see that a person's rights to obtain A good environment and healthy living must also be respected in order to respect the human rights of others in accordance with the mandate of Article 28J

paragraph (1) of the 1945 Constitution.

o. Law Number 36 Year 2009 on Health in line by Act No. 12 of 1992 on the System

Cultivation, where in Chapter II of the Planning and Cultivation, Article 6 paragraph (1) states that "farmers have the freedom to determine the choice of plants and 71

cultivation. "settings in Article 113 of Law a quo relating to the use of tobacco products and no clause on the prohibition of tobacco. With Thus there is no contradiction between both the Act a quo.

p. Law Number 36 Year 2009 on Health also in line with Law Number 39 Year 1999 on the Right Of Human Rights. In Article 9 paragraph (3) states that "every has the right to good environment and healthy. "Law Invite a quo is a clear implementation of Article 9 paragraph (3), to provide protection for the people of the dangers tobacco products.

q. Law Number 36 Year 2009 on Health also in line with Law Number 23 Year 2002 on Child Protection. In Chapter III Rights and Duties of the Child, contained in Article 4 which reads "every child has the right get a life, grow, develop, and participate in reasonable in accordance with the dignity, humanity, and get protection from violence and discrimination. "

r. Based on the above description, it appears that the Act a quo made in line with government objectives to make regulations in order to protect the public, especially children from exposure to smoke Others cigarettes (AROL) is shut off, because it contains 4000 harmful chemicals are among the 69 hazardous chemicals The causes of cancer, heart disease, death syndrome sudden infant (SIDS) and pulmonary disease by applying

region without a cigarette (Source of data: TCSC and IAKMI Year 2009). Infants and children exposed to cigarette smoke of others will experience lung growth is slower, more prone to lung infections, and middle ear infections and asthma relapse. Poor health at an early age will affect the health status at the time an adult.

72

s. That Law Number 36 Year 2009 on Health also in line with Law Number 32 Year 2009 on Protection and Environmental Management. In Chapter X Rights, Obligations, and the prohibition contained in Article 65 which reads "every person has the right to good environmental and healthy as part of Human Rights. "With a healthy environment, free from exposure to smoke cigarettes, by inhaling clean air and healthy, then the quality one's life will increase.

t. That based on the statement in the trial process can not be proved the existence of losses suffered by the Applicant as a result enactment of the Act a quo. This is in accordance with the provisions of Article 51 paragraph (1) of Law Number 24 Year 2003 on Constitutional Court explained that the rights and / or constitutional authority arising from the enactment of a legislation must meet five conditions, one of which is "The possibility that the petition is granted then the constitutional impairment argued will not or no longer to happen. "By granting the petition of the Petitioner, not the is also an assurance that tobacco companies will not losses or bankruptcy, because it can caused by cigarette company's management is concerned, rising raw material prices, quality or the quality of tobacco, and other so, not because of the enactment of Act a quo.

2. Why only products that contain tobacco (cigarettes), which must include health warnings as stipulated Article 114 of the Act a quo and explanations, whereas lain products containing addictive substances is not required to include health warnings

a. The inclusion of health warnings on packaging products containing tobacco aims to educate and protection of public health.

73

b. Health warnings are a form of education as well as information remind the public about the dangers of smoking to health. Written warnings in cigarette packs that exist so far, no give a correct information, clear and honest about conditions and warranties of goods and / or services for as required under Law No. 8 Year 1999 on

Consumer Protection, Article 4, letter c, which reads "the right consumers are right to correct information, clear and honest warranties regarding the condition of the goods and / or services. "Thus, health warnings to protect the rights of every people to get information about health consequences, addictive nature and mortal threat posed by the consumption tobacco.

c. In Article 4 letter d of Law Number 8 Year 1999 on Consumer Protection stated that "the right of consumers to obtain the correct and honest information on the conditions and security products and services guaranteed by law. "correspondingly with such provision, then Article 114 of Act a quo a real implementation of government protection of the rights consumers to get the correct information from the product contain addictive substances.

d. Health warnings in the form of drawings and writings increase awareness about the relationship of smoking to health impacts and specific knowledge about the effects of smoking on health higher in countries that include the impact of specific on health warnings. In Canada, where the warning health-shaped image was required, 84% of smokers see health warning labels as a source of health information. In addition there are three countries in ASEAN which have imposed health warnings on packs of cigarettes for tobacco production in domestic and imported cigarettes, namely Thailand, Brunei Darussalam, and Malaysia.

74

In Thailand, in Section 12 of The Tobacco Products Control Act BE 2535 (1992) mentioned that the health warnings on packs of cigarettes are not less than 50% of the front cover and back. (Vide evidence-T5)

While in Brunei Darussalam in the regulation of Tobacco Order, 2005 (S 49/05) Tobacco (Labeling) Regulations, 2007, warning health must be printed in English and Bahasa Melayu with a broad picture warnings should not be less than 50%. (Evidence-T6)

In Malaysia, the Malaysian Regulations PU (A) 315/2008 Act Food 1983, the Guard Regulations of Tobacco Products (Pindaan) 2008 in Rule 15 regarding warnings Pindaan Kesihatan on smoking stipulated that the parcel size image health warnings on the front of packs of cigarettes by 40% and 60% on the back of cigarette packs. (Vide evidence-T7)

While in Australia is being drawn up draft regulations on cigarette packaging and health warnings. Health warning which is an image by 75% in the front of the background back in black. (Vide evidence-T8)

In addition, Indonesia imported cigarette production to countries those involved adhere to regulations in the country applying it. The tobacco industry has experienced produce shaped picture health warnings for cigarettes export, comply with regulations in the destination country, the legal basis new in Indonesia, the tobacco industry should perform nasionalpun same thing if you do not want to say to apply a double standard and discrimination against people in his country. In addition, implementation of health warnings on cigarette packs shaped image will raise the position of Indonesia in the eyes of the world during this always been the caretaker. (Example picture warnings on packs cigarettes as attached [vide evidence-T9])

75

e. Policy on regulation of packaging and labeling ban statement is misleading product information that creates a false impression as if the product is safe for consumption. Description "Mild", "light", "ultra light", and the like are intended to cover health hazards associated with tobacco consumption. Paper wrapped in cigarette tar and nicotine levels implies low with the label "light", "mild", or "ultra tight" is a tendentious and misleading.

f. Associated with other addictive substances, for the production, use, circulation, and arrangements are set out in regulation legislation itself, namely the Act No. 35 of 2009

on Narcotics and Law Number 5 Year 1997 on

Psychotropic. While the addictive substances in alcoholic beverages has been stipulated in Presidential Decree No. 3 of 1997 on

Supervision and Control of Alcoholic Beverages, which followed by Minister of Health No.

282/Menkes/SK/II/1998 on Standards of Quality Beverage Production Alcoholic.

g. In addition there is a difference between setting addictive substances (Tobacco / cigarette) with other addictive substances (marijuana and addictive substances

in alcoholic beverages). Setting of tobacco products in

Health Act of its "security and protection

public health ", while setting other addictive substances in nature

"Prohibition". Therefore, the juxtaposing of alcohol, narcotics, psychotropic drugs with tobacco-related products with a warning health is inappropriate and misplaced.

h. Based on the above description, according to the Government health warnings on tobacco product packaging and is in order to provide protection and education

to the public on the dangers of tobacco products for health.

Therefore, according to the Government on the a quo provision has been

76

in line with the mandate of the Constitution, namely in the context of fulfilling information needs and enjoyment of the right to health.

i. Besides the things mentioned above, the Act a quo is legal implementation of government programs in the field health as mandated by the constitution. The existence of Law Invite a quo instead provide legal certainty for implementation these programs and does not alter the legal position for the Petitioners.

j. Jikalaupun, Even if, assuming the seumpamanyaupun Applicant shall be deemed true and the petition granted by the Constitutional Court, then according to this Government can cause loss of legal protection programprogram subsequent government protection and education of public health.

3. According to the Petitioners setting criminal sanctions in Article 199 paragraph (1) of the Act a quo has no arguments and logic strong legal and discriminatory because it only gives sanctions on products that contain tobacco (cigarettes) are not to include health warnings

The government can issue the following explanation:

a. The provisions of Article 199 paragraph (1) is a logical consequence of provisions of Article 114 which is the prohibition (the imposition of liability inclusion of health warnings).

b. Article 114 of Act a quo and describes and Article 199 paragraph (1) should be seen as one unified whole. Government article argues that the explanation is a unity that is not can be separated from the article in question. Explanation of article not a norm that stands alone. Thus, in view of Article 114 should be viewed along with an explanation as a unified whole as a norm of law. Related with the imposition of criminal in Article 199 paragraph (1), that it 77

it is precisely because the reference is the norm as listed in Article 114 the following explanation.

c. The government does not agree that the provisions of a quo is discriminatory as to measure it is if the formulation contains the elements that go beyond authority, arbitrary, and based on things related with ethnicity, race, religion. A quo provision in line with Law Number 39 Year 1999 on Human Rights and Conditions ICCPR has been ratified by Law No. 12 Year 2005 regarding Ratification of International Covenant on Civil and Political Rights (International Covenant on Civil Rights and Politics).

d. Tobacco company, PT Sampoerna in his web states that all tobacco products are addictive, and

can be very difficult to quit smoking or stop using other tobacco products. PT Sampoerna also stated that Smoking causes many serious diseases, including diseases cardiovascular (heart disease), lung cancer, and obstructive disease Chronic (emphysema, chronic bronchitis). Therefore, PT Sampoerna in its web provision requiring states to support health warnings on the packaging of consumer products, providing accurate information about the dangers of smoking to health on consumers is an important target of the regulation of tobacco and should be a major component of Government policy against tobacco. (See the proof-T10)

e. Sampoerna statement in the web is also in line with statement of its parent organization, Philip Morris International in its web that states "Smoking Causes many serious diseases including cardiovascular disease (heart disease), lung cancer, and chronic obstructive pulmonary disease (emphysema, chronic bronchitis). Smokers are far more Likely to Become Sick with one of these diseases than non-smokers. Smoking is also addictive and can

78 be extremely Difficult to stop. These are the views of every leading medical and scientific organizations around the world. And They are the views of Philip Morris International. "Besides the Philip Morris web International is also mentioned "All tobacco products are addictive, and it can be very Difficult to quit smoking cigarettes or to stop using other tobacco products. Such public health authorities as the World Health Organization (WHO), the U.S. Surgeon General, and the UK Generous College of Physicians, have concluded That nicotine is the addictive component in tobacco. "(vide evidence-T11)

f. Based on the above description, according to the Government provisions of Article 113 paragraph (2), Article 114 and explanation, and Article 199 paragraph (1) of the Act a quo has been found not contrary to the provisions of Article 27, Article 28A, Section 28D, and Article 28 of the 1945 Constitution and not harm the rights and / or authority constitutional rights of the Petitioners. Precisely a quo provision aims in order to provide protection and health education community on the dangers of tobacco products on health.

Besides the things mentioned above, the Government may submit responses on the testimony of experts proposed by the Applicant as follows:

1. Against Specification Expert, Prof.. Muzakkir

The government disagreed with the expert testimony stating that formulation of legal norms in Article 113 paragraph (2) of the Act a quo discriminatory because it put an addictive substance as if only Just with all forms of tobacco processing results. Legal norms in the a quo provision is also tendentious and do not provide a guarantee legal protection of groups of people who do business the type of tobacco-related business with all types and

its products. Legal norms are not in accordance with the principles of the formation legal norms of good and right as stipulated in the Act No. 10 of 2004 and melanggar basic right group of people who protection guaranteed by the 1945 Constitution.

79

The government argues that the rule of law in Article 113 paragraph (2) Act a quo is not discriminatory, because the provisions in Act a quo does not provide restrictions on the categories of substances addictive as the only tobacco, the Act a quo was stated a claim that the tobacco and products tobacco contains an addictive substance, but the Act a quo also acknowledges the existence of other addictive substances other than tobacco. Penormaan the merely mention tobacco and tobacco products due to other addictive substances have been regulated in many other Act. Need note that in the formation of a legislation should avoid over-lapping arrangement between the regulations of the with other regulations. The Government will thus remain in opinion that the provision of a quo was in line with the principles establishment of legislation in accordance with the Act No. 10 of 2004 and no violations of basic rights for a group particular person, because of the a quo provision is not based on the spirit "Ban", a quo provision does not prohibit or restrict the rights of people to work both as producers and tobacco farmers or laborers manufacturers of tobacco products, although the Act a quo did not use nomenclature of "guarantees" are firm but the Act a quo provide protection for those who work as farmers, manufacturers, and tobacco factory workers.

The Government also disagreed with the expert testimony stating that Article 114 of Act a quo appears suddenly, because it does not existing legal norms prologue that preceded it. Inclusion of Article 114 does not irrelevant and out of sync because of title in section 17 of Act a quo security is an addictive substance, but the content of Article 114 set concerning health warnings on tobacco products and imported cigarettes. According to the Article 114 of Act a quo does not appear to itself, because if you look at the sequence of the provisions set forth in Chapter VI of Health efforts on securing the seventeenth substances addictive, then clearly the set is the substance of tobacco products

80

or cigarettes. The substance of Article 114 which regulates the inclusion of health warnings on cigarette packs have been in line with section title about addictive substances as cigarettes, which is one of tobacco products contain nicotine contained in tobacco leaf, which is the substance addictive.

## 2. Against Specification Expert, Purwono (Agronomists)

The government disagreed with the expert testimony stating that the biophysical, land conversion from tobacco to other crops could be done if discovered which plants will be able to evolve and have

ability to succeed in the area of tobacco. In addition farmers must be developed on technical mastery of the new plant, then it must be assured markets if indeed the farmer must move to other commodities. This guarantee shall also concerned with the income that is commensurate with tobacco farming that in the same period that the results are the same. If the government or party others suggest or create a program to convert tobacco into other crops, the government is obliged to seek concerned in order to obtain guarantees farmers a certain income, farmers should not be harmed.

The Government remains on his opinion as stated previously, that the Act does not prohibit the planting of a quo regulate tobacco or tobacco crop conversion to other crops. Government continues to guarantee legal protection for farmers who will grow tobacco. The government argues that expert testimony subjective that there is no legal basis, the expert can not shows a single provision in the Act a quo that prohibits planting tobacco, thereby to expert testimony can ruled out because the Act a quo did not set about prohibition of tobacco or tobacco crop conversion to other crops.

In accordance with the development of science and technology, now the Scientists have successfully used tobacco plants that have been genetically modified to produce drugs for

81

enhance the immune system and inflammatory diseases, including diabetes / diabetes. A team of scientists from several research institutions Europe has participated in a study that is part of the Pharma-Planta project. Under the leadership of Professor Mario Pezotti University of Verona, they set up a transgenic tobacco plants would produce biologically active substances of IL-10 (interleukin 10), an anti of inflammation. (See the proof-T12)

### 3. Against Specification Expert, Revrison Baswir

The government disagreed with the expert testimony stating that there are 3 (three) aspects that may occur related to the economic struggle tobacco products and businesses. The first is the struggle of interests between fellow entrepreneurs cigarettes. Second, competition between employers in the country contexts, namely domestic businesses with tobacco companies international level. And third, the fight between the entrepreneur industry businesses cigarettes with other industries.

The government argues that expert testimony has no basis clearly and solely a mere concern. Information Experts had nothing to do with the provisions stipulated in the Act Invite a quo in which the Act a quo, in principle, it aims to protect public health and protect people's right to of health.

### 4. Against Specification Expert, Zaenal Arifin Mochtar

The government disagreed with the expert testimony stating that entering phrase "tobacco", which uses tobacco products in particular to Article 113 paragraph (2) is structurally incorrect because institutionalization of this chapter, particularly subsection (2) actually categorize



forms of addictive substances set out in paragraph (1). Whereas in section 17 Act a quo set about the "security addictive substance, so that reading of this article should be linked to safeguarding use of addictive substances. Experts also stated that Article 113 paragraph (2) Act a quo is discriminatory in nature, which only include the word

82

tobacco and tobacco products. This gives the potential impact to the economic social and cultural rights of tobacco farmers. The Government argued that Article 113 paragraph (2) is not a form of category of addictive substances per se, but a quo provision is part of the security settings addictive substances that explain the range of addictive substances referred to in the previous paragraph. The model formulation used in a quo provision is reasonable in the formulation of regulations legislation and is a bridge to the next setting.

Without the formulation of Article 113 paragraph (2) this would likely cause uncertainty about the scope of addictive substances that will be set next.

While the nature of discrimination as expert testimony, government remains the opinion that the Act a quo did not discriminatory, as noted previously.

5. Against Specification Expert, Saldi Isra

The government disagreed with the expert testimony stating that Article 113 paragraph (2) of the Act a quo is discriminatory, since only mention a specific product, namely "tobacco." There is something norms imposed in the provision. Second, experts claim that the Act A quo law aims to preserve human rights, particularly the right to get a good environment and healthy living. However, maintenance Desired by the Human Rights Act forming a quo was injure other human rights as well, at least the right to life and sustain life and the right to not get treatment is discriminatory. If this provision is maintained, then the millions of farmers tobacco will lose or lose the opportunity to get livelihood or maintain a decent life.

The Government remains on the opinion which has been stated previously that the Act a quo while not discriminatory against human rights violations as expert testimony, the Government argues that the Act a quo did not violate human rights. Need Note that the concept of human rights, setting the individual human rights can not defeat the communal nature of human rights. Act a quo

83

in addition to respecting individual rights to retain the right to life and life also protect the human rights are communal rights community to obtain a healthy living environment and the right to of health. Expert testimony stating that millions of farmers will lose the opportunity to earn a living or maintain a decent living if the Act a quo effect is a concern that is exceedingly irrational, because once again the Act a quo will not restrict or prohibit the planting of tobacco products or cigarette factory to remain manufacture of cigarettes.

Here we also convey information from the Government in the form of expert

afitdafit:

1. Prof. Dr. H.M. Laica Marzuki, SH (Former Judge of the Constitution)

Experts held that the petition is unfounded and unreasonable laws because those articles contain a quo that the phrase "... Tobacco, tobacco products containing ..." not at all violate the Constitution because the articles referred aimed at protecting the citizens from harm and threats of tobacco addictive substances. It meant is the policy of (legal policy) forming the Act, which an authority under the constitution and laws, so it does not seems reasonable when setting legislation is considered contrary to the 1945 Constitution.

Experts also argue that setting a group of narcotics and psychotropic has been arranged specifically and separately in the Act No. 35 Year 2009 on Narcotics; so in Act No. 6

Of 1997 on Psychotropic Substances. Not true, that setting addictive substances with respect to tobacco and tobacco products regulated in a discriminatory, because the regulation applied samengaan. It meant forming a constitutional law, namely agency of the legislative authority granted by the 1945 Constitution.

That the criminal sanctions provided for in Article 199 paragraph (1) of the Act a quo, which is based on Article 114 of Act a quo only

84

relating to criminal offenses that result in tangible and real. Word

"May" in Article 114 of Act a quo is not an imperative,

so that the word "may" not immediately binding. Only valid binding for dader when his actions have resulted in tangible and real. (See the proof-T13)

2. Dr. Seto Mulyadi, P. Si, Si M. (Chairman of the Board of Trustees National Commission for Protection Children)

Experts argue that the addictive nature of cigarettes containing more than 4000 hazardous substances that can cause various diseases, disability until the death in humans, including children. Children are exposed to secondhand smoke will easily become dependent on cigarettes and will also eventually become loyal customers on cigarettes.

Board of Trustees of the National Commission for Child Protection had handled the children who become smokers at an early age. One of Aldi (2.5 years) who lived in Banyuasin. He became acquainted with cigarettes since the age of 11 months because the surroundings are filled with cigarette smoke from people adults around them.

Cases of children who reported smoking at an early age is quite a lot in various regions, and the need for good energy and a significant financial cost to overcome the dependence on the children. They do not never know what the content and impact of tobacco products which they because there is no use of tobacco control at all.

Though cigarettes should be treated specially because it includes commodities a legal but dangerous.

Considering that secondhand smoke is very harmful to humans, including children, which in addition lead to dependency, disease and disability in iuaa children can result in up to death. So it is clear that cigarettes as a tobacco-containing products is necessary to obtain

a very serious oversight from the Government through the Government Regulation and the Act. (Vide evidence-Q14)

85

#### IV. CONCLUSION

Based on the above explanation, the Government appealed to the Honor Chair / Panel of Judges of the Constitutional Court to examine, decide and adjudicate a petition to Law Number 36 Year 2009 on Health of the Constitution of the Republic of Indonesia Year 1945, can provide a decision as follows:

1. Stating that the Petitioners have no legal status (legal standing);
2. Reject the petition of the Petitioners for the whole or at least a petition stating the Petitioner can not accepted (niet ontvankeijk verklaard);
3. Receive Statement of the Government as a whole;
4. To declare that the provisions of Article 113 paragraph (1), paragraph (2) and paragraph (3) Law

Law Number 36 Year 2009 on Health is not in conflict with the provisions of Article 27 paragraph (1) and paragraph (2), Article 28A and Article 28I and the opening (preamble) of the Constitution of the Republic Indonesia Year 1945.

However, if Your Honor Chair / Panel of Judges of the Constitutional Court other opinion, please wise decision and fairly as possible (ex aequo et bono).

[2.4] Considering whereas to respond to the arguments of the petition of the Petitioner, the House of Representatives have filed a written statement received by the Court on Friday, November 12, 2010 which in principally explained as follows:

A. PROVISIONS OF LAW NUMBER 36 OF 2009 CONCERNING HEALTH (THE FOLLOWING HEALTH Act) WHICH  
Petitioned the Constitution STATE OF Ahun 1945  
The Petitioners filed the petition a quo testing on Law Health to the 1945 Constitution, namely:

86

- Article 113 paragraph (2), which reads:

"Addictive substance as referred to in paragraph (1) include tobacco, a product containing tobacco, solids, liquids, and gases that are addictive that its use can cause harm to themselves and / or surrounding communities "

- Article 114 as well as the explanation, which reads:

"Any person who manufactures or cigarettes to enter the territory Indonesia must include health warnings "

The explanation:

"The definition of" health warning "in this provision is writing a clear and easily legible and can be accompanied by drawings or other forms. "

- Article 199 paragraph (1), which reads:

"Any person who knowingly manufactures or cigarettes enter into the territory of the Republic of Indonesia with no to include health warnings as the form of images

referred to in Article 114 shall be punished imprisonment of 5 (five) years and fine of not more Rp.500.000.000, 00 (five hundred million rupiahs). "

B. RIGHTS AND / OR THE CONSTITUTIONAL AUTHORITY CONSIDERED ITS ENTRY INTO THE APPLICANT has been harmed by the Act HEALTH

The petitioners in the petition a quo, argued that the right constitutional has been harmed and violated by the enactment of Article 113 paragraph (2), Article 114 and Article 199 and the explanation is paragraph (1) of the Health Act against the 1945 Constitution, as follows:

1. Whereas, the legal position of the Petitioners in the case a quo, qualify as an individual Indonesian citizens (including group of people who have similar interests) who have been harmed rights and / or authorities with the enforcement provisions along the phrase "... tobacco, tobacco products containing ,..." in the provisions of Article 113 paragraph (2), Article 114 as well as explanations and 87

Article 199 paragraph (1) the Health Act. (See the petition a quo point 3 it. 5)

2. Whereas, the Petitioners have harmed the rights and / or authority constitutional provisions along with the phrase "... Tobacco, tobacco products containing ,..." from Article 113 paragraph (2), Article 114 and Article 199 and the explanation is paragraph (1) of Health, as guaranteed by Article 27 paragraph (2), Article 28A and Article 28D Paragraph (2) 1945 Constitution, so that this provision implies that every person including tobacco farmers, tobacco industry and its workforce as well The applicant has the right to work by gaining rewards as well as fair and decent treatment for life. (Vide petition a quo clause 9 things. 7)

3. Whereas, the Petitioners also argue with the enforcement provisions along the phrase "... tobacco, tobacco products containing ,..." from Article 113 paragraph (2), Article 114 and Article 199 and the explanation is paragraph (1) Health Act has impaired the rights and / or authority constitutional, because this provision does not provide legal certainty fair and equal legal treatment before the law, so contradictory to Article 28D paragraph (1) of the 1945 Constitution. (Vide petition a quo point 17 thing. 10)

4. Whereas, the Petitioners stance with the enactment of the formulation of norms has been detrimental to the rights and / or authorities, because it is discriminatory that is contradictory to Article 28I Paragraph (2) of the 1945 Constitution. Terms phrase "... tobacco, products that contain tobacco ,..." clearly discriminatory because it only kind of tobacco which expressly stated that contain addictive substances in the applicable them. (See the petition a quo clause 18 things. 11)

5. Whereas, Article 114 in conjunction with the elucidation of Article 114 in conjunction with Article 199 (1) of the Act

Health has no arguments and logic of a strong legal why should regulate the necessity to include the "warning health ". And about the "health warning" does not only apply for cigarettes, but it should also apply to food and other beverages

88

containing addictive substances that can / can threaten health. (Vide petition a quo point 27 thing. 16)

6. Whereas, the criminal provision applies when the cigarette does not include "Health warning" also does not have a reason / argument and logic Strong law. This is because the threat of health products food / beverage others who also may / may not threaten the health of weighing criminal gets what is stipulated in Article 199 paragraph (1) of Of Health. (See the petition a quo clause 28 things. 17)

7. That, as well as the provisions of Article 199 paragraph (1) of Health, according to the Petitioners the threat of imprisonment of 5 (five) years is clearly Excessive (redudent), because the criminalization of the problem administrative per se, let alone cigarettes are legal products in Indonesia. In Moreover, the phrase "... the form of images referred to in Article 114 ... "is very different from the provisions of Article 114 of Health Act, because the provisions of Article 144 of Health Act determines that warnings health is the writing that is clear and easily legible and can be accompanied pictures or other forms, while in the provisions of Article 199 paragraph (1) of the Act a quo only shaped the image. So the formulation of article 199 paragraph (1) of the Act a quo is not perfect, because it is not clear and strict accordance with the principle that the lex certa principle of criminal law, so does not provide a fair legal certainty. (See the petition a quo grain 29 things. 17)

8. Whereas, the cultivation of tobacco in Indonesia is not including the prohibited and the farmer has the right to determine what type of plants selected accordance with Law Number 12 Year 1992 concerning Cultivation Crops. In other words, tobacco is a legal product, but why restricted during tobacco sales have not banned in Indonesia mengh Angus should be no regulation of tobacco products as sources of income that is still legal. (Vide clause 34 petition a quo case. 20)

89

9. Whereas, the provisions of Article 113 paragraph (2), Article 114 as well as explanations and Article 199 paragraph (1) of the Act a quo, which according to the Petitioners violates constitutional rights and the rights of the Petitioners, not accordance with the spirit and the spirit of the 1945 Constitution and conflicting or violate the provisions of Article 27 paragraph (2), Article 28A, Article 28D paragraph (1) and paragraph (2) and Article 28I paragraph (2) of the 1945 Constitution, which reads as follows: Article 27 paragraph (2) of the 1945 Constitution:

"Every citizen has the right to work and to worthy of humanity ".

Article 28A of the 1945 Constitution:

"Everyone has the right to live and to defend life and life ".

Article 28D paragraph (1) of 945:

(1) Every person has the right to recognition, security, protection, and legal certainty of fair and equal treatment in the presence the law.

(2) Every person has the right to work and get a reward and fair treatment and decent working relationship.

Article 28I paragraph (2) of the 1945 Constitution:

"Every person is entitled to be free from discriminatory treatment of any basis and are entitled to protection against treatment it's discriminatory. "

C. DESCRIPTION House of Representatives

Against the arguments of the applicant as described in the petition a quo, the House of Representatives in the delivery of first outlining his view concerning the legal status (legal standing) can be explained as follows:

6. The Status Law (Legal Standing) of the Petitioners

The qualifications must be met by the Petitioners as parties have stipulated in the provisions of Article 51 paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court (hereinafter abbreviated as the Act

The Constitutional Court), which states that "The petition is

90

parties who consider the rights and / or authorities impaired by the enactment of the Act, namely:

- a. individual Indonesian citizen;
- b. customary law community unit along still alive and in accordance with the development of society and the principle of the Unitary Republic of Indonesia as regulated in the Act;
- c. public or private legal entities; or
- d. state institutions. "

Rights and / or authorities referred to the provisions of Article 51 Paragraph (1) is, affirmed in its explanation, that "the Referred to as "constitutional rights" are rights provided for in Constitution of the Republic of Indonesia Year 1945. "Explanation of Terms Article 51 paragraph (1) is asserted, that the only rights that are explicitly provided for in the 1945 Constitution is included "constitutional rights". Therefore, according to the Constitutional Court Act, in order person or a party may be accepted as the Petitioners that have legal status (legal standing) in a petition for Law against the 1945 Constitution, it must first be explain and prove:

- a. qualifications as the Petitioners in the petition aquo referred to in Article 51 paragraph (1) of the Act Number 24 Year 2003 regarding the Constitutional Court;
- b. rights and / or authorities referred to in the "Explanation of Article 51 Paragraph (1)" deemed to have been harmed by enactment of the Act.

Regarding the loss of constitutional parameters, the Constitutional Court has provide understanding and constitutional limitations on losses arises because the force of an Act must meet 5 (five) condition (see the Decision on Case Number and Case Number 006/PUU-III/2005 011/PUU-V/2007) is as follows:

91

- a. the rights and / or authorities of the Petitioners that granted by the 1945 Constitution;
- b. that the rights and / or authorities of the Petitioners is considered by the Petitioner have been impaired by a Act which were tested;
- c. that the constitutional rights and / or constitutional authority of the

Applicant in question is specific (special) and the actual or at least potential in nature is based on logical reasoning will certainly take place;

d. a causal relationship (causal verband) between losses and enactment of Law petitioned for review;

e. the possibility that the petition is granted the constitutional rights and / or authorities argued will not or no longer occur.

If these five conditions are not met by the Petitioners in Act test case a quo, then the Petitioners do not qualified legal domicile (legal standing) as the part of The applicant.

Responding to the petition of the Petitioners a quo, the House holds that the applicant should be able to prove in advance whether right of the Petitioners as parties who consider the rights and / or impaired its constitutional authority over the entry into force provisions petitioned for review, especially in constructing the loss of the rights and / or authorities as the impact of the enactment of the provisions petitioned for review.

Against the legal status (legal standing), the House of Representatives handed entirely to the Chairman / Judge of the Constitutional Court mulya to consider and assess whether the applicant have legal status (legal standing) or are not as governed by Article 51 Paragraph (1) Law on Court 92

Constitution and by the Constitutional Court Case Number 011/PUU-V/2007 006/PUU-III/2005 and Case Number.

#### 7. Testing the Health Act

The petitioners in the petition a quo, argues that the right constitutional provisions have been impaired by the enactment of Section 113 paragraph (2), Article 114 and Article 199 paragraph explanation and (1) of Health and no longer in line with the soul and spirit of the 1945 Constitution.

Against the views of the Petitioners, the House gave following caption:

1) That, philosophy and constitutional basis of the manufacture of the Health Law is that health is a human right and wrong welfare of the elements that must be realized in accordance with citacita Indonesian nation as stated in the Preamble 1945 Constitution, therefore, every activity and every effort to improving community health status is the highest needs to be done as closely as possible to the establishment of resource Indonesia's human quality, thereby improve the competitiveness of the nation.

2) Whereas, one of attempt to make this happen, was formed Health Act which aims as stated in Article 3 Health Act, namely "Development of Health aims to increase awareness, willingness, and ability to live healthy each person in order to manifest the degree of public health as high, as an investment for resource development people who are socially and economically productive ".

3) That, one of attempt to achieve the objective as listed in Article 3 of the Act a quo, then in provisions of Article 113 paragraph (1), paragraph (2) and paragraph (3) Health Act explicitly set the security settings on the use of materials addictive substances including tobacco, products that contain

93

tobacco, solids, liquids and gases that are addictive use can cause harm to themselves and / or surrounding communities. Therefore, regulation of tobacco plants in Health Act is intended to protect rights of others, including children and public health, especially communities would be negatively affected tobacco use in the form of cigarettes. Health Law in fact aims to provide protection to children from substance abuse addictive like cigarettes in line with Law No. 23 Year 2002 on Child Protection that requires the Government to provide protection to the health of children.

4) Whereas, the draft petition of the Petitioner was clearly just a description assumption concerns the possibility of the applicant to perform tobacco farms and businesses because of conflict with the conditions in field and the provision of regulatory oversight legislation, which legally can not be used as a basis to overturn the laws, and not based by existence of constitutional rights relied upon at all. By Therefore, in the absence of a constitutional basis prove the loss of their constitutional rights, please postulate the Petitioner ignored and considered not prove at all existence of constitutional impairment of the Petitioners.

5) That, the argument which states that the Petitioners have been impaired constitutional rights guaranteed by Article 28A, Article 28D paragraph (2), Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution with effect of Article 113 paragraph (2), Article 114 as well as explanations and Article 199 paragraph (1) Health Act. Against the argument that the House of Representatives holds that the Petitioners a quo assumption is incorrect, In view of Article 113 paragraph (2), Article 114 as well as explanations and Article 199 paragraph (1) Health Law is a rule or regulation (legal policy) of a general nature (general and abstract) on

94

use of materials containing addictive substances applicable to whoever becomes addresat (fixed) as stipulated in The Act. In this case the policy setting is limits of any addictive substance whether in solid form, liquids and gases are directed so as not to disturb and endanger the health of individuals, families, communities and the environment.

6) Whereas, the petition of the Petitioners' argument stating that the right constitutional feel has been harmed by the enactment of Section 113 paragraph (2) the Health Act which was considered discriminatory, contrary to the Act Namely the old Health Act No. 23 of 1992 on Health in the assumption that the Petitioners have set



about cigarette raw materials derived from tobacco. That Petitioners' argument against it, the House argued that the as mentioned in the dictum "Considering" the Introduction to Law Number 36 Year 2009 on Health, Law Number 23 Year 1992 regarding Health is no longer appropriate with the development, demands, and legal needs in the community that need to be removed and replaced with a new Health Act, namely the Law Number 36 Year 2009 it must have been through the process better by considering the formulation considerations from different perspectives, namely from the perspective of philosophical, sociological, juridical, cultural and Indonesia. The provisions referred to clearly does not show the slightest presence of the inhumane treatment same / discriminatory.

7) Whereas, the petition of the Petitioners' argument stating that Article 113 paragraph (2) of the Health Act, which reads "an addictive substance as referred to in paragraph (1) include tobacco, products that containing tobacco, solids, liquids and gases that are addictive that its use can cause harm to himself

95

and / or the surrounding communities' constitutional rights have been adversely the Petitioners as tobacco farmers who are satusatunya livelihoods are threatened by the entry into force of life provision, not just tobacco farmers are threatened work but all activities relating to production tobacco will be threatened perikehidupannya, in this case the Applicant assumed a quo article contrary to Article 27 paragraph (2) of the 1945 Constitution.

The argument against the view that Parliament is not true provisions of Article 113 paragraph (2) Health Act provide treatment that is not the same among Indonesian citizens, given the meaning discriminatory, as according to Ateng Syafrudin (1991) principle equation (egalite) mean that "the same things should be treated equally ". In this case the norm of the above applies in general by not discriminate based on religion, ethnicity or other on legal subjects which are not addressat settings as understanding as set forth in Form diskriminsi Law Number 39 Year 1999 regarding Human Rights, in Article 1 number 3 on the definition of discrimination is any restriction, harassment, or ostracism, both direct and indirect limit / differentiate based on human differences on the basis of religion, ethnicity, race, ethnic group, class, social status, economic status, gender, language, political beliefs, which result in a reduction, or elimination of recognition irregularities, implementation or use of human rights and freedoms basis in both individual and collective life in the field political, economic, legal, social, cultural, and other aspects of life.

8) Whereas, tobacco plants containing addictive substances that need to be regulated its use as referred to in Article 113 paragraph (2) of the Act Health is also contained in recognized international reference in

around the world in order of production, distribution and use should be

XXXX

96

meet the standards and / or requirements set.

Tobacco control through compliance and / or terms

use has been sufficiently recognized, it is evident from the data

in the year 2008 there are 160 countries have ratified

Framework Convention on Tobacco Control (FCTC).

9) Whereas, the provisions of Article 114 of Health Act is clearly not for

discriminating business but to make the adjustment

concerning the safeguarding of the health impact of smoking

according to its intended destination in the norm of the Health Act. Provision

was not directed at the subject of law but rather is intended

on the "actions". In this article a quo was about to give

adequate protection against the interests of the parties

which by law must be protected in this case the community of

influence / impact of addictive substances, especially tobacco for health with

to include health warnings referred visually.

Provisions shall not restrict and does not provide treatment

different between the legal business in Indonesia,

remember the deeds said to have occurred when diksriminasi

treats are not the same in the same things. Likewise

case with explanation Health Law Article 114 reads

"Is a" health warning "in this provision

is writing a clear and easily legible and can be accompanied

pictures or other forms ", the provisions referred to are the criteria

and technical provisions regarding the inclusion of health warnings

by providing a clearly written and easy to read, can

also accompanied by pictures or other forms.

10) Whereas Article 199 paragraph (1) Health Act is intended to

provide a balance between justify tobacco products in

Indonesia and legal protection to the parties that must

protected by due to smoking. This provision is conducted fairly

by placing the parties in the same manner with no

97

discrimination at all, as the reasons stated

Respondent in the previous point. Therefore not correct provisions

is considered to be discriminatory. This provision also does not mean

contrary to the principle of life and the life of a person

as provided in Article 28A of the 1945 Constitution relating

with a person's right to life and right to maintain

of life. That is, the constitutional guarantee against action

or efforts that would eliminate a person's life

against the law and protect against all actions, or attempts

who want to eliminate, restrict, or reduce the right to life

and a person's life.

11) Whereas, the petition of the Petitioners' argument stating that tobacco is a legal product, but why sales are limited for tobacco has not been banned in Indonesia should be no menghangus regulation of tobacco products as a source of income which is still legal. In this case the applicant argued cultivation of tobacco in Indonesia not including things that are prohibited and farmers have the right to determine what type of plants selected in accordance by Law Number 12 Year 1992 concerning Cultivation Crops.

Petitioners' argument against it, the House argued that the provisions of the Health Act does not prohibit the sale of tobacco in Indonesia, this provision would delegate responsibility to the government to implement the health insurance public by regulating the use of materials containing addictive substances detrimental to health, including tobacco (vide Constitutional Court Decision No. 6/PUU-VII/2009, p. 279). Similarly, with reference to the Constitutional Court Decision Number 6/PUU-VII/2009, pages 277-279, the Constitutional Court has examine in depth the scientific findings of World Health Organization (World Health Organization / WHO) regarding the negative impacts 98

tobacco on the health of smokers and nonsmokers.

Court appreciates the initiative of WHO encourages all member states unanimously agreed Framework Convention on Tobacco Control (Framework Convention Control of Tobacco) in 2003 as a Treaty

In tackling the international impact of tobacco on health of mankind. Court also examine in depth the "Package Six Strategic" is defined by WHO in 2008 that consists of: (i) Monitoring the prevalence and progress of efforts reduction of tobacco consumption, (ii) Protection of the public against tobacco smoke, (iii) Optimization of support to stop smoking, (iv) Be aware of the negative impact of tobacco, (V) elimination of advertising, promotion and sponsorship of tobacco, and (vi) Reach tobacco tax increase to address the tobacco epidemic The (vide John Crofton and Simpson Davids, Tobacco: a Global Threat, 2002).

12) That, based on these arguments, the House holds that there is no contradiction between Article 113 paragraph (2), Article The explanation and 114 and Article 199 paragraph (1) of the Act Number 36 Year 2009 on Health with Article 27 paragraph (2), Article 28A, Article 28D paragraph (1) and paragraph (2) and Article 28I paragraph (2) 1945 Constitution.

Thus Parliament would ask the Chairman / Council of Judges of the Constitutional noble gave the following verdict:

1. Stating the Petitioners a quo has no legal status (legal

standing), so the petition a quo should be declared unacceptable (Niet ontvankelijk verklaard);

2. Stating the petition a quo rejected for entirely or at least declare the petition a quo is unacceptable;

3. Description House of Representatives declared acceptable to all;

4. To declare that the provisions of Article 113 paragraph (2), Article 114 as well as explanations and

Article 199 paragraph (1) of Law Number 36 Year 2009 on Health  
99

not contrary to Article 27 paragraph (2), Article 28A, Article 28D paragraph (1) & paragraph (2) and Article 28I paragraph (2) Act 1945;

5. To declare that the provisions of Article 113 paragraph (2), Article 114 as well as explanations and

Article 199 paragraph (1) of Law Number 36 Year 2009 on Health  
still have binding legal force.

[2.4] Considering whereas the Court has read the statement of Parties  
Related principally explains as follows:

[2.4.1] dr. drh. Mangku Sitepoe provide a written statement received  
Court Registrar's Office on Monday, February 14, 2011;

- That the removal of Article 113 paragraph (2) Health Act does not  
can be tolerated because it is an act of treason, and  
not just a criminal offense or act against  
law;

- Terms of Article 114 and Article 199 of Health Act is  
one form of consumer protection in which to include  
pictorial warnings then the consumer will get a message that  
explicit and visual impact of hazards arising from  
use of these products.

[2.4.2] National Commission on Child Protection (Komnas PA) gives  
written request received by the Court on Thursday, 17  
February 2011;

- Whereas Article 113 paragraph (2), Article 114 and Article 199 of Law  
Health is for the fulfillment of state obligations to  
citizens from the threat of health hazards, diseases and disabilities  
and death caused by tobacco and tobacco products, which  
scientifically been proven true. The provisions of Article 113 paragraph (2),  
Article 114 and Article 199 of Health Act is the realization of rights  
constitutional child, because:

(A) the protection and fulfillment of all the people (right to health), especially  
children are still vulnerable to health and the right of all people over  
100

the highest health standards that are guaranteed in Article 28H Paragraph (1) and  
Article 28B paragraph (2) of the 1945 Constitution;

(B) The protection and fulfillment as well as answers to the global epidemic  
tobacco (the globalization of the tobacco epidemic), so that Article 113  
paragraph (2), Article 114 and Article 199 of Health Act as

form of the state's responsibility for compliance with health rights guaranteed in Article 28B paragraph (2) and Article 28H paragraph (1) of the 1945 Constitution;

(C) protection and fulfillment of all people to life (right to life) and the rights of survival (right to survival) are nothing but an

The main rights (supreme rights) which is guaranteed in Article 28A of the 1945 Constitution,

therefore based on scientific evidence that consumption of products tobacco and cigarette smoke exposure is the cause of death and cause various diseases;

(D) The protection and fulfillment of children's rights (rights of the child) above life, survival, and protection from violence and discrimination is guaranteed in Article 28A and Article 28B paragraph (2) of 1945.

· Whereas Article 113 paragraph (2) the Health Act menormakan tobacco and tobacco products as addictive substances that do securing the use of a norm which guarantees the right continuity life, growth and development rights, and rights to protection from violence and discrimination is guaranteed in Article 28B paragraph (2) of the 1945 Constitution. This is to

provide norms and standards of control that children are protected from dangers of nicotine addiction;

· Section 114 Health Act governing health warnings as controlling the use of cigarettes to provide norms and control standards that children are protected from the dangers of nicotine addiction;

· Section 199 Health Act as the norms of criminal law force others to obey the norms of Article 114 of Health Act.

[2.4.3] Jakarta Residents Forum have submitted requests received by the Court on Thursday, February 17, 2011, 101

explained that the Related Party as the party applying for Related to protecting the constitutional rights of citizens, especially the guaranteed in Article 28B paragraph (2) of the 1945 Constitution and protect law enforcement

of Article 113, Article 114 and Article 199 of Health Act intended to protect consumers from the dangers of cigarette addiction that material derived from raw tobacco.

[2.5] Considering whereas the Court at the hearing Tuesday, 8 February 2011, has informed the Petitioner, the Government, the Council House of Representatives, and the Related Parties to submit written conclusions at least 1 (one) week from the trial day Tuesday, February 8, 2011, referred to;

That the applicant submit written conclusions dated 14 February 2011, the Court received on Monday, 14 February 2011 which essentially remains in his stance;

[2.6] Considering whereas to make a description in this decision,

then everything that happens at the hearing sufficiently designated in the news trial event and an integral part of this decision;

### 3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the petition of the Petitioners is the substantive test of Article 113 paragraph (2) all the phrases

"... Tobacco, tobacco products containing ,...", Article 114 and its

The explanation, and Article 199 paragraph (1) of Law Number 36 Year 2009

of Health (State Gazette of the Republic of Indonesia Year 2009 Number

144, Additional State Gazette of the Republic of Indonesia Number 5063, hereinafter

referred to as Law 36/2009) of Article 27 paragraph (2), Article 28A, Article 28D

paragraph (1)

and paragraph (2), and Article 28I paragraph (2) of the Constitution of the Republic

Indonesia Year 1945 (hereinafter referred to as 1945 Constitution);

102

[3.2] Considering whereas prior to considering the purpose thereof,

Constitutional Court (hereinafter referred to as the Court) will consider

advance the following matters:

a. authority of the Court to examine, hear and decide

petition a quo;

b. legal status (legal standing) of the Petitioners;

Against both cases, the Court argued as follows:

Authority of the Court

[3.3] Considering whereas pursuant to Article 24C Paragraph (1) of the 1945

Constitution which

again mentioned in Article 10 paragraph (1) letter a of Law Number 24 Year

2003 regarding the Constitutional Court, as amended by Act

Number 8 Year 2011 on Amendment of Law Number 24 Year

2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia

Year

2011 Number 70, Additional State Gazette Republic of Indonesia Number 5226,

hereinafter referred to as the Constitutional Court Law) and Article 29 paragraph (1)

letter a of Law No.

48 Year 2009 on Judicial Power (State Gazette of the Republic

Indonesia Year 2009 Number 157, Additional State Gazette

Indonesia Number 5076), one of the Court's constitutional authority is

tested against the Constitution Act 1945;

[3.4] Considering whereas the petition a quo is about testing Law

Law 36/2009 Law in this case against the 1945 Constitution, so that the Court has

authority

to examine, hear and decide upon the a quo;

The Status Law (Legal Standing) The Petitioners

[3.5] Considering whereas pursuant to Article 51 paragraph (1) of the Constitutional

Court and its

The explanation, which can act as Petitioner in testing a

Law against the 1945 Constitution are those who consider the rights and /

or authorities affected by the enactment of the Act

petitioned for review, namely:

103

- a. individual Indonesian citizens (including groups of people who have an equal interest);
- b. customary law community unit along still alive and in accordance with development of society and the principle of the Unitary Republic of Indonesia stipulated in the Act;
- c. public or private legal entities; or
- d. state institutions;

Thus, the Petitioner in the testing of the Act against the Constitution 1945 to explain and prove first:

- a. position as the applicant as referred to in Article 51 paragraph (1) Constitutional Court Law;
- b. existence of constitutional rights and / or authorities granted by Caused by the 1945 enactment of the Act which petitioned for review;

[3.6] Considering whereas since the Court's Decision Number 006/PUU-III / 2005 dated May 31, 2005 and Decision Number 11/PUU-V/2007 dated 20 September 2007 and subsequent decisions have held that constitutional rights and / or authorities referred to in Article 51 Paragraph (1) of the Constitutional Court must meet five conditions, namely:

- a. the rights and / or authorities granted the applicant by the 1945 Constitution;
- b. rights and / or constitutional authority by the applicant is considered impaired by the enactment of Law petitioned for review;
- c. constitutional rights and / or authorities must be specific and actual or at least potential are based on logical reasonable will certainly take place;
- d. a causal relationship (causal verband) between the constitutional rights and / or authorities referred to the enactment of the Law petitioned for review;

104

- e. the possibility that the petition is granted, then constitutional rights and / or authorities such as the postulated will not or no longer occur;

[3.7] Considering whereas the Petitioners argue as individual citizens Indonesia country (including a group of people who have similar interests) that constitutional rights have been impaired by the enactment of Article 113 paragraph (2)

along the phrase "... tobacco, products that contain tobacco, ...", Article 114 and an explanation, and Article 199 paragraph (1) of Law 36/2009;

Article 113 paragraph (2): an addictive substance as referred to in paragraph (1) include tobacco, tobacco-containing products, solids, liquids, and gases addictive nature of its use can cause harm to himself and / or the surrounding communities;

Article 114: Any person who manufactures cigarettes or enter into

Indonesia region must include health warnings.

Explanation of Article 114: The definition of "health warning" in this provision is clearly written and easily readable and can be accompanied by a picture or any other form.

Article 199 paragraph (1): Any person who knowingly manufactures or inserts cigarettes into the territory of the Republic of Indonesia with health warnings do not include the form of images referred to in Article 114 shall be punished imprisonment of five (5) years and a maximum fine of Rp 500,000,000.00 (five hundred million rupiahs); That the Petitioners are the number 1 through number 5 in the main is as caretaker of Indonesian Tobacco Farmers Association (APTI) in the region each striving to empower farmers and tobacco the rights of tobacco farmers;

That the Petitioners number 6 through number 9 and number 16 are tobacco farmers who feel their livelihoods are threatened as a result 36/2009 Act a quo;

That the Petitioners number 10 and number 11 is a laborer or in cigarette factory workers who worked for his family and finance the education of their children who feel threatened to lose jobs 105

or at least threatened to decrease the level of welfare or due to the enactment of Law 36/2009 a quo;

That the Petitioners number 12 through number 15 is the the small cigarette company owner who threatened industrial businesses and jobs or at least will reduce the level of welfare as a result 36/2009 Act a quo;

Petitioner argues that the a quo Law 36/2009, in essence has detrimental to the rights and / or authorities as follows:

- Any person, including the Petitioners, have the right to work with obtain benefits and fair treatment and proper for life as stipulated in Article 27 paragraph (2), Article 28A, and Article 28D Paragraph (2) UUD 1945;

- Act 36/2009 a quo does not provide a fair and legal certainty

The same legal treatment before the law as set forth in Article 28D paragraph (1) of the 1945 Constitution;

- Law 36/2009 of the Petitioners a quo that discriminates against to Article 28I Paragraph (2) of the 1945 Constitution;

Whereas under the provisions of Article 51 paragraph (1) of the Constitutional Court and the terms

constitutional rights and / or constitutional authority as described above, Court argued as follows:

a. That the applicant qualifies as an individual applicant Indonesian citizens (including groups of people who have equal interest);

b. That as individual Indonesian citizens (including groups people who have similar interests), the Petitioners have the right



constitutional as stipulated in the 1945 Constitution, particularly Article 27 paragraph (2) concerning the right to work and to live for humanity, Article 28A of the right to live and sustain life and life, Article 28D paragraph (1) on the right to recognition, security, protection and legal certainty of fair and equal treatment in before the law, Article 28D paragraph (2) concerning the right to work and get remuneration and fair and decent treatment in employment and occupation, and Article 106

28I paragraph (2) of the right to be free from discriminatory treatment of whatever basis and are entitled to protection against treatment discriminatory, which according to the applicant, aggrieved by effect of Article 113 paragraph (2) along the phrase "... tobacco, products that containing tobacco, along with explanations ...", Article 114 and Article 199 paragraph (1) of Law 36/2009;

c. That the Petitioners in essence making a living to live and sustain life in areas related to tobacco and products containing tobacco which by Act 36/2009 a quo declared as an addictive substance whose use may cause harm to himself and / or the surrounding communities so that there should be directives, standards,

and / or security requirements for its use. The Petitioners concerned about the provision because at least will lower the income level or their welfare. Therefore, the prima facie the applicant at least potential based on logical reasoning will certainly suffered losses as a result of constitutional enactment of Law 36/2009 a quo. Further, on this matter will considered in the basic application;

d. That there is a causal (causal verband) between the loss the Applicant with the provisions of Law 36/2009 a quo especially regarding tobacco and tobacco-containing products that are considered by the Applicant at least will threaten the income and welfare them, and if the Petitioners' petition is granted, it is believed that constitutional rights of the Petitioner that making a living to live and sustain life in areas related to tobacco and products that contain tobacco, will not or no longer disadvantaged. That the description of the above considerations, the Court believes the Petitioner has the legal (legal standing, legitima persona standi in judicio) to file the petition a quo.

[3.8] Considering whereas since the Court has the authority to hear petition a quo, and the Petitioners have the legal status (legal 107

standing) then the Court will further consider the principal the petition;

Principal Petition

[3.9] Considering whereas the Petitioners in their petition filed substantive testing of Article 113 paragraph (2) of Law 36/2009 along the phrase "...

tobacco,  
products that contain tobacco, ...", Article 114 and its explanation, and Article 199 paragraph (1) of Law 36/2009, which essentially questioned constitutionality of articles of the Law 36/2009 which regulates and sets that contain tobacco and tobacco products as substances addictive which can cause production losses and should be regulated, circulation, and its use, and set the obligation for manufacturers and importers of cigarettes to include health warnings, as well as the imposition of sanctions for manufacturers and importers of cigarettes that do not include health warnings; Whereas Article 113 paragraph (2) of Law 36/2009 states, "an addictive substance as referred to in paragraph (1) include tobacco, products that containing tobacco, solids, liquids, and gases that are addictive use can cause harm to themselves and / or community around it ";  
Whereas Article 114 of Law 36/2009 states, "Every person who produce or put cigarettes into Indonesian territory shall mention health warning ";  
That the explanation of Article 114 of Law 36/2009 states, "The meaning with a "health warning" in this provision is written clearly and easily readable and can be accompanied by pictures or other forms ";  
Whereas Article 199 paragraph (1) of Law 36/2009 states, "Every person who intentionally produce or put cigarettes into the territory of Unitary Republic of Indonesia with no health warnings the form of images referred to in Article 114 shall be punished imprisonment maximum of 5 (five) years and a maximum fine of Rp 500,000,000.00 (five hundred million dollars) ";

108

[3.10] Considering whereas the Court has examined the written evidence that filed by the Applicant (Exhibit P-1 through Exhibit P-22) for prove their arguments, the full list described in section Sitting on top of Case;

That the Court has heard and read the expert who filed by the Petitioners, which essentially states the following:

1. Dr. Mudzakkir, SH, M.H.

- Whereas Article 113 paragraph (2) of Law 36/2009 are:
- Contains legal norms that are discriminatory because the insert addictive substances like tobacco only course with all forms of processing and does not include other types of plants that contain addictive substances. Therefore, clearly not in accordance with principles of formation of legal norms of good and true as regulated in Law Number 10 Year 2004 on the establishment of legislation and violate the basic rights of people who obtain insurance group protection by the 1945 Constitution;
- The formulation of legal norms is not good, tendentious, and not guarantees legal protection against group

people who do business related to tobacco with all kinds of products, but there are no norms prohibit tobacco plants and tobacco is not addictive substances, but tobacco containing substances that are in some degree be addictive (nicotine);

- Whereas Article 114 of Law 36/2009 which was placed on the addictive substance is inappropriate and discriminatory because it contains elements of tobacco products declared permissible / lawful (not including products prohibited) are required to include health warnings, while other products containing addictive substances of the same or similar cigarettes and has a damaged power to human health is not required to include health warnings in the product;

109

- Explanation of Article 114 of Law 36/2009 contains material that causes legal norms it becomes unclear, and the more it is unclear if associated with the provision of criminal sanctions as referred to in Article 199 paragraph (1) of Law 36/2009;

- Article 199 paragraph (1) of Law 36/2009 contains material criminal law and sanctions the norm of criminal law norms associated with Article 114 of Law 36/2009 but there are extremely fatal mistake because material entering the Elucidation of Article 114 of Law 36/2009 as the norm which if violated criminal law shall be liable to imprisonment maximum of 5 years and a maximum fine of Rp 500 million. Explanation of a article (published in State Gazette) is not a legal norm, but his position as the authentic interpretation (formally) the promulgation of Law of the article in question. Definition of inclusion health warnings referred to in Article 114 of Law 36/2009 not the same as the notion "does not include a warning ... shaped a picture of health as defined in Article 114 ... ", As referred to in Article 199 paragraph (1) of Law 36/2009.

Such a formulation is clearly not in accordance with the principles of the formulation norms of criminal law and obscures the meaning or sense of norm law in the article referenced, and is bright and clear violation of principle of legality and legal certainty that is protected by the 1945 Constitution;

- Supposedly, the formulation of criminal law norms in Article 199 paragraph (1) of 36/2009 are as follows:

"Any person who knowingly manufactures cigarettes or enter cigarettes into the territory of the Republic of Indonesia with no to include health warnings as the form of images referred to in Article 114 shall be punished imprisonment of 5 (five) years and maximum fine of Rp 500,000,000.00 (five hundred million rupiah) ";

110

2. Ir. Purwono, M.S.

?? In biophysical conversion of tobacco to other crops can be done if the type of plant to be developed has the ability to grow and produced in the area of tobacco;

?? If the conversion of tobacco to other crops is done, then there are factors socio-economic need to be considered: (i) a change in behavior and peasant culture, (ii) farmers have nurtured about cultivation techniques which will be developed in the region, (iii) the guarantee of a definite market absorb the farmers, (iv) there is no guarantee farmers' incomes are commensurate with tobacco farming in the same concession period;

?? Pursuant to Law Number 12 Year 1992 on Plant Cultivation, farmers have the freedom to choose the type of planting and pembudayaannya. This means that the conversion should be done at the initiative of farmers;

?? If the choice of crops did not materialize because of the provisions of the Government,

then the Government is obliged to strive for farmers concerned to obtain a certain income security. In this case, the program The government should not be detrimental to farmers.

3. Dr. Revrisond Baswir, S.E.

?? Citing a book written by Wanda Hamilton titled "Nicotine War", about the dangers of smoking, there are three aspects related to the highlighted fight the economic and business that may occur. First, the fight interest among tobacco companies themselves are major employers against the small businessman or entrepreneur white smoke against employers clove cigarettes. Second, competition between employers in the country context, namely domestic tobacco companies with international tobacco companies. Third, business battle between cigarette companies with other industries of pharmacy; ?? If the current Indonesian citizens consume cigarettes made in Indonesia, the most of its profits will fall into the economy of Indonesia. But

if using tobacco products of other countries, can not but, the advantage will fall into the hands of the country concerned. Moreover, if then stop smoking altogether, switching to pharmaceutical products are almost 100% derived from the advanced industrial countries, it is because of its brand, copyright, 111

come from developed countries, by itself profits will fall to the country concerned;

?? It should be taken into account that this fight is not solely related with issues related to human rights issues of health alone, but in it, big There is also the possibility of elements associated with the struggle between corporate giants, whether fellow domestic and foreign cigarette manufacturers or between cigarette manufacturers and pharmaceutical companies, namely how to seize nicotine as the products are marketed to communities with different methods;

4. Zaenal Arifin Mochtar, SH, LLM.

?? Insert the phrase "tobacco, tobacco products that use ...", particularly in Article 113 paragraph (2) of Law 36/2009 be inappropriate because, structurally, "institutionalization" of this article is actually taking categorize forms of addictive substances set out in paragraph (1). Moreover, categorization categorization addictive substances showed either solid, liquid, or gas;

?? Article 113 paragraph (2) of Law 36/2009 may not be substantively problematic, formally but had caused discrimination model because only include tobacco and tobacco products from;

?? Part II of Article 4 of the Covenant ESC determines that, "States Parties to the Covenant recognize that, in the enjoyment of the rights guaranteed by state in accordance with this Covenant, the state can only wear restriction of these rights in accordance with the provisions of law, as long as it is consistent with the nature of these rights and solely for improve the general welfare in a democratic society ".

That is, the act discriminates against tobacco (which is a work product economics of tobacco farmers), with credit to be as if was the only product that air-addictive substances have strong potential provide adverse stigma farmers' rights in the work of its economy;

112

5. Prof. Dr. Saldi Isra, SH

?? Inclusion of the phrase "tobacco and tobacco-containing products" as something imposed. Citing the views of Prof. Dr. January Michiel Otto, et al. in writing Using Legislative Theory to Improve Law and Development Projects (in Journal Regel Mat, 2004), it is said that very common there is outside influence in the process of formation Act. Verse formulation Tobacco imposed, it can be derived of interests outside formers Act;

?? In the context of legislation, to this day there is suspicion emergence Law Oppressive laws or despotic. Related to this, Jeremy Waldron in his book The Dignity of Legislation (1999) expressed concerns, "That legislation and legislatures have a bad name in legal and political philosophy, a name sufficiently disreputable to cast doubt on Their credentials as respectable source of law ";

?? Therefore, the provisions of Article 113 paragraph (2) of Law 36/2009 can be said discriminatory. Moreover, the provision has the potential to cause uncertainty the law.

[3.11] Considering whereas the Government has given a written statement a more contained in the Sitting Case, which principally stated as follows:

To Article 113 paragraph (2) of Law 36/2009

· That the details of the a quo provision is expressed by the word "Cover", meaning that in addition to tobacco and products containing tobacco, the government admitted there were still other addictive substances that have level of addiction / addictive high that it is set in a separate regulation, namely Law Number 35 Year 2009 on Narcotics, Law Law No. 5 of 1997 on Psychotropic Substances, and the Presidential Decree No. 3 of 1997 on the Supervision and Control of Beverage Alcoholic who followed up by Minister of Health No.

113

282/Menkes/SK/II/1998 on Standards of Quality Production of Alcoholic Beverages. Thus, the Act a quo is not discriminatory;

- In principle, regulation of tobacco and products containing tobacco in the Act a quo aims to do security on consumption, rather than eliminating tobacco or products which contains tobacco. Act a quo simply do "Safety and health protection," not "ban". So there is no clause that the Act a quo to obstruct or prohibit the tobacco farmers to employment and livelihood;
- Against Article 114 of Law 36/2009 and the explanation
- The inclusion of health warnings on the packaging of products containing Tobacco aims to make education and health protection community;
- Written warnings in cigarette packs that exist so far, no give a correct information, clear and honest about the condition and guarantee the goods and / or services due as required by the Act Law No. 8 of 1999 on Consumer Protection;
- To Article 199 paragraph (1) of Law 36/2009
- Terms quo is a logical consequence of the provisions of Article 114 of Law 36/2009 and its explanation, which should be seen as an integral intact. The government argues that the explanations of article is a unitary which can not be separated from the article in question;
- Terms a quo is not discriminatory as to measure it is if the formulation contains the elements that go beyond authority, arbitrary, and based on matters related to the tribe, race, and religion.

XXXX

114

[3.12] Considering that the House of Representatives (DPR) has given More written information contained in the Case of the Sitting essentially states the following:

- That is not true the provisions of Article 113 paragraph (2) of Law 36/2009 provides unequal treatment among citizens of Indonesia, given the discriminatory meaning, as according to Ateng Syafrudin (1991), the principle equation (egalite) mean that "things should be treated the same the same ". In this case a quo prevailing norms in general with no discriminate on the basis of religion, ethnicity, or other, subject to the law;
- That the tobacco plants containing addictive substances that need to be regulated its use as referred to in Article 113 paragraph (2) of Law 36/2009. It is also contained in the international reference that is recognized around the world to the production, circulation, and its use must meet the standards and / or requirements set. Tobacco control through compliance and / or condition their use has been sufficiently recognized, it is seen from the data in the year 2008 there are 160 countries has ratified the Framework Convention on Tobacco Control (FCTC);
- Whereas Article 114 of Law 36/2009 clearly not to discriminate among actors effort yet to make arrangements concerning the safeguarding of impact of smoking to health according to its intended destination in the norm of Law

36/2009. The provision was not aimed at the subject of law, but aimed at the "actions". Article a quo would provide protection adequate to the interests of the parties according to law society must be protected in this case from the influence / impact of addictive substances, especially

cigarettes for health by including a visual warning health question. Provisions shall not restrict and does not provide differential treatment between the legal business in Indonesia, given the so-called diksriminasi act has occurred is if treats are not the same in the same things;

- That the Elucidation of Article 114 of Law 36/2009 is the criteria and conditions inclusion of health warnings about the technical by providing

115

writing a clear and easily legible, may also be accompanied by pictures or other forms;

- That the Article 199 paragraph (1) of Law 36/2009 is intended to provide balance between justify tobacco products in Indonesia and legal protection to the parties that must be protected by the due cigarettes. This provision is conducted fairly by placing the parties equally with no discrimination at all.

[3.13] Considering whereas the Court has read the statement of Parties More related to decompose in the Sitting Case, which in principally explained as follows:

1. Description dr. drh. Mangku Sitepoe

- That the provisions of Article 114 and Article 199 of Law 36/2009 is one one form of consumer protection in which to include pictorial warnings then the consumer will get a message that explicit and visual impact of hazards arising from use of these products.

2. Description of the National Commission for Child Protection (Komnas PA)

- Whereas Article 113 paragraph (2), Article 114 and Article 199 of Law 36/2009 is for the fulfillment of state obligations to the people of health hazards, diseases, and disability as well as deaths caused by tobacco and tobacco products, which scientifically been proven true;

- Terms of Article 113 paragraph (2), Article 114 and Article 199 of Law 36/2009 is a realization of the constitutional rights of the child as stipulated in Article 28A, Article 28B paragraph (2), and Article 28H paragraph (1) of the 1945 Constitution.

3. Description of Jakarta Residents Forum

- Article 113, Article 114 and Article 199 of Law 36/2009 is intended to protect consumers from the dangers of cigarette addiction raw materials derived from tobacco.

116

Court's opinion

[3.14] Considering that after hearing and reading the captions and

conclusion of the Petitioners, the statements of the Government, the Parliament statement, statement Related Party, the expert testimony presented by the Petitioners, and written statements of Experts presented by the Government, as well as written evidence presented by the Petitioner, as described above, the Court argues as follows:

[3.14.1] Whereas the main problem that must be considered and decided by Court in this case is the constitutionality of Article 113 paragraph (2) along the phrase "... tobacco, tobacco products containing ,...", Article 114 and its explanation, and Article 199 paragraph (1) of Law 36/2009 which postulated contrary to Article 27 paragraph (2), Article 28A, Article 28D paragraph (1) and paragraph

(2), and Article 28I paragraph (2) of the 1945 Constitution;

[3.14.2] Whereas Article 113 of Law 36/2009 has petitioned and been Court decided in Decision No. 19/PUU-VIII/2010, November 1, 2011 with the ruling, "Declare reject the petition for all ";

[3.14.3] Whereas the material content of the paragraph, chapter, and / or the inside Act which has been tested, unless another or different reasons, not can be petitioned again (vide Article 60 of the Constitutional Court Law, Article 42 of Regulation

Number 06/PMK/2005 Constitutional Court concerning a guideline for examining Testing Act);

[3.14.4] Whereas the Court is, in fact the reasons for Petitioner in petition No. 19/PUU-VIII/2010 same as the reasons for the Petitioner in the petition a quo as far as Article 113 paragraph (1), paragraph (2), and paragraph (3) of Law 36/2009, so that considerations Court in Decision No. 19/PUU-VIII/2010, dated 1 November 2011 throughout the chapters that have been tested, namely Article 113 paragraph (1), paragraph (2), and subsection (3) of Law 36/2009 mutatis mutandis also be a consideration in the decision a quo. Therefore, the Petitioners' petition must be declared ne bis in ditto;

117

[3.14.5] Whereas Elucidation of Article 114 and Article 199 and paragraph (1) Law 36/2009, constitutional issues that must be answered by the Court, in Essentially, that is, whether the obligation inclusion of health warnings on cigarette is discriminatory, does not guarantee a decent living, and not provide a fair legal certainty;

[3.14.6] Whereas the discrimination, the Court remains of the opinion legal considerations as stated in Decision No.

19/PUU-VIII/2010, November 1, 2011, which mutatis mutandis be Similarly consideration in the decision a quo which principally that the discrimination law relates only to the subject matter of law, and not a legal object. Cigarettes are not subject to the law as a supporter of the rights, but as an object law in the form of objects;



[3.14.7] Whereas the Petitioners' argument relating to Article 114 of Law 36/2009 and its explanation which essentially states that the inclusion of health warnings on tobacco products can only cause no guarantee of a decent livelihood, the Court argued that the inclusion of health warnings is to fulfill the rights consumer or prospective consumer tobacco products to obtain information health as provided in Article 28F of the 1945 Constitution, and is not intended or intended to obstruct or prohibit much less clear rights of the applicant to obtain a decent livelihood through businesses in the fields associated with smoking or cigarettes. In fact, no amount of any provision, either in Law 36/2009 and legislation Another, which prohibits the applicant to seek a decent living through efforts in the areas related to tobacco or cigarettes. The Petitioners still be able to produce and trade in cigarettes with the fixed put health warnings on tobacco products, although obligations include health warnings may indirectly will be able to affect the income of the applicant;

[3.14.8] Whereas the phrase "health warning" in the Elucidation of Article 114 of Law 36/2009 is the writing that is clear and easily legible and can be accompanied by drawings

118

or any other form. Meanwhile, Article 199 paragraph (1) of Law 36/2009 provides criminal threats against the producers and importers of cigarettes that do not to include health warnings referred shaped image in the Elucidation of Article 114 of Law 36/2009. According to the Petitioners, the provisions Article 199 paragraph (1) of Law 36/2009 is connected to the Elucidation of Article 114 of Law 36/2009 incomplete, vague, and indecisive, because in the Explanation Article 114 of Law 36/2009 of health warnings because it is alternative use the phrase "... and can be accompanied by pictures ...", whereas in Article 199 paragraph (1) Law 36/2009 absolutely must include a warning health-shaped image. Thus, according to the Petitioners that is contrary to the principle of *lex certa* who became one of the principles criminal law, so it does not provide legal certainty;

Against the Petitioners' argument, the Court argued that fulfillment of normative elements of criminal law that requires or prohibits to do something is when there are penal provisions for noncompliance obligation or prohibition. Without the ban criminal provisions or liabilities will not have the legal effect at all because rules can not be enforced by the use of state power.

The ban is only meant as an appeal only. The existence of criminal provisions in the Article 190 through Article 201 of Law 36/2009 is necessary because the Act also contains certain obligations and restrictions.

Moreover, in the Law 36/2009 also stipulates civil servant investigator civilians who were given special authority to conduct investigations of criminal offenses

in health sector (vide Article 189 of Law 36/2009). Thus the criminal provisions in the Law 36/2009 is a necessity because indeed the Act a quo set certain restrictions. Practice establishment of a separate Act of the provisions require and / or prohibit a certain act and criminal provisions on violators is a norm that does not violate the principle the formation of legislation. In the criminal justice system Indonesia recognized the existence of criminal provisions contained in the Criminal Code and outside the criminal provisions in the Criminal Code. Although this practice is not good

119 according to experts of the applicant, Dr. Mudzakkir, SH, M.H., because no systematic and comprehensive, but does not cause it does not necessarily constitutional;

[3.14.9] Whereas the absence of academic texts that make the establishment Act also does not cause less than perfect is not necessarily Act without the academic manuscript is void. The ambiguity of a norm which is caused due to lack of academic texts the duty of judges to give meaning through interpretation of the law. This is in accordance with the position of the Act of a general nature and obligation of judges to interpret the general norm at the time applied in concrete cases. Against a norm of multiple interpretations and in one of its interpretation has the potential to harm the rights of citizens state protected by the Constitution so that the Act may conflict with the Constitution, the Court in some decision to narrow the interpretation of these norms so as not to occur violation of the Constitution by providing position against the constitutional norm as far as interpreted by commentators certain (conditionally constitutional);

[3:14:10] Whereas, according to the Court, there are norms ketidaksinkronan interpretation could potentially harm the rights of citizens, namely Article 114 of Law 36/2009 and the explanation which states that what is meant by "Health warning" is "writing a clear and easily legible and can be accompanied by pictures or other forms ". However, Article 199 paragraph (1) of Law 36/2009 states that, "Any person who knowingly manufactures or insert cigarettes into the territory of the Republic of Indonesia with health warnings do not include the form of images referred to in Article 114 shall be punished imprisonment ..."; That the word "may" in the Explanation of Article 114 of Law 36/2009 is meaningful alternative to the inclusion of health warnings in the form writing a clear and easily legible may be accompanied or not accompanied pictures or other forms, while Article 199 paragraph (1) Law 36/2009 can

120 interpreted imperative that health warnings should be included in addition to writing

also form an image;

That the Court agreed with the proposed expert

Petitioner, Dr.. Mudzakkir, SH, MH, which essentially states that which meant "legal norms" are norms contained in the articles on an enactment Act are listed in the Gazette

Countries whose position as the primary law, while the explanation of article is a secondary law which gives an explanation for the rule of law contained in the articles. Therefore, the binding as the law are positive legal norms contained in the articles of the Law

Act. Thus, if there are criminal sanctions provisions, which is referenced legal norms contained in these articles. Position Description

article is to explain the legal norms contained in the article, so with the explanation that the intent and purpose of the rule of law be clear and bright and not be interpreted other than what is defined by forming the law. If there are legal norms which contains

criminal sanction provisions refer to the Explanation section norm of

The Act, then the norms of criminal law is clearly contrary to

principle of legality because the set of criminal sanctions to those who violate

Explanation of article, because the explanation article was not the norm. Therefore, the

according to Dr. Mudzakkir, SH, MH, should be the formulation of criminal law norms

in Article 199 paragraph (1) of Law 36/2009 is, "Any person who knowingly

produce or put cigarettes into the territory of the Unitary

Not include the Republic of Indonesia with a health warning in the form

drawings referred to in Article 114 shall be punished imprisonment of 5

(Five) years and a maximum fine of Rp 500,000,000.00 (five hundred million rupiah) ";

Whereas the provisions of Article 114 of Law 36/2009 and its

The explanation of the basis for the criminal provisions contained

in Article 199 paragraph (1) of Law 36/2009, the Court argues that the provision

Article 114 of Act a quo, especially on the word "shall" can still be

121

lead to different interpretation when referring to the Elucidation of Article 114 of Law 36/2009 particularly on the phrase "and can", which is full as follows:

Article 114: Any person who manufactures or enter

Indonesia cigarette into the region must include

health warning.

Explanation of Article 114: The definition of "health warning" in

this provision is clear and easy writing

legible and can be accompanied by a picture or any other form.

That the Court needs to clarify the provisions of Article 114 of Law 36/2009

and explanation to ensure the fulfillment of legal certainty and the principle

legality of Article 199 paragraph (1) of the Act a quo, and to ensure that

these provisions have the final and binding nature;

That the word "may" in the Explanation of Article 114 of Law 36/2009 which

associated with understanding "must include health warnings"

in Article 114 of Law 36/2009 contains two different senses

well as the cumulative and alternative. In fact, the explanation of an article

it is necessary to explain the formulation of a firm in order to interpret the word "must include the health warning" in the provisions Article 114 of Act a quo becomes more clear and explicit, so it does not lead to other interpretations. Hence the formulation of Article 114 Explanation Act a quo which states, "The meaning of" warning health "in this provision is clearly written and easily readable and can be accompanied by pictures or other forms "created an interpretation that is not clear and firm, especially when associated with the provision of criminal sanctions listed in Article 199 paragraph (1) of Law 36/2009 which refers to Article 114 of Law 36/2009 and its explanation. Thus, the word "shall include health warning "in the provisions of Article 114 of Act a quo shall be interpreted to include health warnings in the form writing a clear and easily legible and accompanied by a picture or shape other. It thus can be done by removing the word "may" in Elucidation of Article 114 of Law 36/2009;

122

That although the intent of the petition is to nullify provisions of Article 114 of Law 36/2009 and the explanation as well as Article 199 paragraph (1) of 36/2009 with the aim to eliminate the liability of manufacturers and importers cigarettes to include health warnings in the form of writing that is clear and images simultaneously because it is considered contrary to the 1945 Constitution, but according to the Court, an alternative explanation arising from Article 114 of Law 36/2009 should be given a definite meaning so as not to conflict with equitable principles of legal certainty as guaranteed in Article 28D paragraph (1) 1945 Constitution. According to the Court, Article 114 of Law 36/2009 and the explanation must meant that the obligation for manufacturers and importers of cigarettes is include a warning in the form of clear text and images. Case thus related to the guarantee and protection of the rights of every person to obtain information as the provisions of Section 28F of the 1945 Constitution which More states, "Every person has the right to communicate and obtain information to develop personal and social environment, as well as the right to seek, obtain, possess, store, process, and convey information by using all kinds of channels available ";

That the mandatory health warnings with a picture or any other form, will further ensure the fulfillment constitutional rights of citizens of Indonesia, especially the consumer and / or potential consumers of cigarettes to obtain information about the dangers smoking, as consumers and / or prospective customers, in addition to consisting of people who have literacy, also composed of those who not or do not have literacy. Even for those who having certain physical disabilities such as blindness require warning information so that the health warnings can be also added in the "form other ", for example by using braille, as listed

in the Elucidation of Article 114 of Law 36/2009;

That the further provision regarding the inclusion of warning health in writing a clear and easily legible and accompanied pictures or other forms, such as the scale size of health warning signs  
123

those in tobacco products, the full authority of the Government to set in accordance with laws and regulations;

[3.15] Considering whereas based on legal considerations in above, the Court argued, the petition of the Petitioners argued by law for the most part.

#### 4. CONCLUSION

Based on the assessment of facts and laws as described in above, the Court concluded:

[4.1] The Court has authority to adjudicate the petition a quo;

[4.2] The petitioners have legal standing (legal standing) to filed the petition a quo;

[4.3] Principal Petition of the Petitioners on Article 113 paragraph (2) of the Act 36/2009 along the phrase "... tobacco, products that contain tobacco ,..." is the ne bis in idem;

[4.4] Principal Petitioners' petition on Article 114 and its The explanation and Article 199 paragraph (1) of Law 36/2009 justified by the law.

Under the Constitution of the Republic of Indonesia Year 1945 and Law Number 24 Year 2003 concerning Constitutional Court as amended by Law No. 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Republic of Indonesia Number 5226), and the Law Law Number 48 Year 2009 regarding Judicial Power (State Gazette Republic of Indonesia Year 2009 Number 157, Supplement Republic of Indonesia Number 5076);  
124

#### 5. DECISION

Hearing,

States:

- To grant the petition of the Petitioners for the most part;
- Application of the petition on Article 113 paragraph (2) of the Act Number 36 Year 2009 regarding Health (State Indonesia Year 2009 Number 14, Additional State Gazette Indonesia Number 5063) as long as the phrase "... tobacco, products that containing tobacco ,..." unacceptable;
- The word "may" in the Explanation of Article 114 of Law Number 36 Year 2009 regarding Health (State Gazette of the Republic of Indonesia Year 2009 Number 14, Additional State Gazette of the Republic of Indonesia No. 5063) contrary to the Constitution of the State Republic of Indonesia Year 1945;

· The word "may" in the Explanation of Article 114 of Law Number 36 Year 2009 regarding Health (State Gazette of the Republic of Indonesia Year 2009 Number 14, Additional State Gazette of the Republic of Indonesia No. 5063) does not have binding legal force, so that Explanation of Article 114 of Law Number 36 Year 2009 on Health (State Gazette of the Republic of Indonesia Year 2009 Number 14, Republic of Indonesia Number 5063) More to be, "What is meant by" health warning " in writing that this provision is clear and easy to read and accompanied by pictures or other forms ";

· The phrase "form images" in Article 199 paragraph (1) of the Act Number 36 Year 2009 regarding Health (State Indonesia Year 2009 Number 14, Additional State Gazette Indonesia Number 5063) contrary to the Constitution Republic of Indonesia Year 1945;

· The phrase "shaped picture" of Article 199 paragraph (1) of Law Number 36 Year 2009 regarding Health (State Gazette of the Republic of Indonesia 125 Year 2009 Number 14, Additional State Gazette of the Republic of Indonesia No. 5063) does not have binding legal force, so that Article 199 paragraph (1) of Law Number 36 Year 2009 on Health (State Gazette of the Republic of Indonesia Year 2009 Number 14, Supplement Republic of Indonesia Number 5063) be, "Every person who knowingly manufactures or put cigarettes into within the territory of the Republic of Indonesia with no to include health warnings referred to in Article 114 shall be punished imprisonment of 5 (five) years and a fine maximum of Rp. 500,000,000.00 (five hundred million rupiahs);

· Reject the petition of the Petitioners for the addition and the rest;

· To order the promulgation of this Decision in the Official Indonesia as it should.

Hence the decision was in the Consultative Meeting by Nine Constitutional Court Justices, namely Moh. Mahfud MD as Chairman and concurrent Member, Achmad Sodiki, Harjono, Anwar Usman, Maria Farida Indrati, Ahmad Fadlil Sumadi, Hamdan Zoelva, M. Akil Mochtar and Muhammad Alim, respectively as a Member, on Tuesday the eighteenth day of October of two thousand eleven, and was pronounced in the Plenary Session of the Constitutional Court open to the public on Tuesday, one month of November of two thousand eleven by eight Constitutional Justices, namely Moh. Mahfud MD as Chairman concurrent Member, Achmad Sodiki, Harjono, Anwar Usman, Maria Farida Indrati, Sumadi Fadlil Ahmad Hamdan Zoelva, and M. Akil Mochtar, respectively as Members, assisted by Mandy Budi Wasito as Registrar Substitute, and attended by the applicant or their proxies, the Government or its representative, the Legislative Assembly or its representative, and the Related

Parties  
or its representative.  
126  
CHAIRMAN,  
Signed.  
Moh. Mahfud MD  
JUSTICES,  
Signed.  
Achmad Sodiki  
Signed.  
Harjono  
Signed.  
Usman Anwar  
Signed.  
Maria Farida Indrati  
Signed.  
Ahmad Fadlil Sumadi  
Signed.  
Hamdan Zoelva  
Signed.  
M. Akil Mochtar  
Registrar,  
Signed.  
Mandy Budi Wasito