DECISION

Number 110/PUU-X/2012

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Hearing constitutional cases at the first and final level, has passed a decision in the case of Judicial Review of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] 1. Name : **Dr. H. Mohammad Saleh, S.H., M.H.**
Occupation : Supreme Court Justice
Address : The Supreme Court
Jalan Medan Merdeka Utara 9-13 Central Jakarta
as----------

Petitioner 1;

2. Name : **Dr. Drs. Habiburrahman, M.Hum.**
Occupation : Supreme Court Justice
Address : The Supreme Court
Jalan Medan Merdeka Utara 9-13 Central Jakarta

as----------

Petitioner 2;

3. Name : **Dr. Imam Subechi, S.H., M.H.**
   Occupation : Supreme Court Justice
   Address : The Supreme Court
   Jalan Medan Merdeka Utara 9-13 Central Jakarta

as----------

Petitioner 3;

4. Name : **Imron Anwari, S.H., Spn., M.H.**
   Occupation : Supreme Court Justice
   Address : The Supreme Court
   Jalan Medan Merdeka Utara 9-13 Central Jakarta

as----------

Petitioner 4;

5. Name : **Suhadi, S.H., M.H.**
   Occupation : Supreme Court Justice
   Address : The Supreme Court
   Jalan Medan Merdeka Utara 9-13 Central Jakarta

as----------

Petitioner 5;

6. Name : **H. Kadar Slamet, S.H., M.Hum.**
   Occupation : Supervisory Appellate Judge
   Address : The Supreme Court
   Jalan Medan Merdeka Utara 9-13 Central Jakarta
   as----------

Petitioner 6;

7. Name : **I Gusti Agung Sumanatha, S.H., M.H.**
   Occupation : Appellate Judge
   Address : The Supreme Court
   Jalan Medan Merdeka Utara 9-13 Central Jakarta
   as----------

Petitioner 7;

8. Name : **Drs. Abdul Goni, S.H., M.H.**
   Occupation : Judge of the Religious Affairs Court
   Address : The Supreme Court
   Jalan Medan Merdeka Utara 9-13 Central Jakarta
   as----------

Petitioner 8;

9. Name : **Mien Trisnawati, S.H., M.H.**
   Occupation : Deputy Head of the Metro District Court

Address : Jalan Sutan Sjahrir Metro, Lampung

as----------

Petitioner 9;

In this case by virtue of Special Power of Attorney dated October 22, 2012 and Special Power of Attorney Number 056/PP.IKAHI/X/2012 dated October 22, 2012 granting authority to 1) **Dr. Lilik Mulyadi, S.H., M.H.,** having his address at the North Jakarta District Court, Jalan Laksamana RE Martadinata Number 4, North Jakarta; 2) **Teguh Satya Bhakti, S.H., M.H.,** having his address at The Semarang State Administration Court, Jalan Abdulrahman Saleh Number 89, Semarang; and 3) **Rr. Andy Nurvita, S.H.,** having his address at the Salatiga District Court, Jalan Veteran Number 4, Ledok Salatiga City, either jointly or severally acting for and on behalf of the principals;

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

[1.3] Having read the petition of the Petitioners;

Having heard the statements of the Petitioners;

Having heard and read the statements of the Government;

Having heard and read the statements of the People's Legislative Assembly;

Having read the statements of the Relevant Party, Indonesian Child Protection Commission (*KPAI*);

Having examined the evidence of the Petitioners;

Having read the conclusions of the Petitioners and the Government;

2. FACTS OF THE CASE

[2.1] Whereas the Petitioners filed a petition with the letter of petition dated October 24, 2012, which was received at the Registrar's Office of the Constitutional Court (hereinafter referred to as the Registrar's Office of the Court) on October 24, 2012, based on Deed of Petition File Receipt Number 402/PAN.MK/2012 and recorded in the Constitutional Case Registry under Number 110/PUU-X/2012 dated November 1, 2012, which was revised and received at the Registrar's Office of the Court on November 29, 2012, which principally describes the following matters:

I. AUTHORITY OF THE CONSTITUTIONAL COURT

1. The Petitioners filed a petition to the Constitutional Court to conduct judicial review of Article 96, Article 100 and Article 101 of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution).

2. Referring to the provision of Article 24C paragraph (1) of the 1945 Constitution *juncto* Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 concerning the Constitutional Court (Constitutional Court Law), one the Court's authorities is to review Laws against the 1945 Constitution.

Article 24C paragraph (1) of the 1945 Constitution, among other things,

states that:

> *"The Constitutional Court shall have authority to hear at the first and final level, the decision of which shall be final, to conduct judicial review of Laws against the Constitution,…."*

Article 10 paragraph (1) sub-paragraph a of the Constitutional Court Law, among other things, states that:

> *"The Constitutional Court shall have authority to hear at the first and final level, the decision of which shall be final":*
>
> *a. to conduct judicial review of Laws against the 1945 Constitution of the State of the Republic of Indonesia, …."*

3. Whereas to review a Law as referred to in the provision of Article 24C paragraph (1) of the 1945 Constitution is not only to review whether the norm of such Law is inconsistent with the norm of the 1945 Constitution, but also it must be interpreted that the object of judicial review at the Court is the substance of the paragraphs, articles, and/or parts of a Law inconsistent with the 1945 Constitution. The provisions of a Law explain it further that the Petitioners are required to clearly explain "the substance of paragraphs, articles, and/or parts of a Law considered inconsistent with the 1945 Constitution of the State of the Republic of Indonesia" (*vide* Article 51 paragraph (3) sub-paragraph b of the Constitutional Court Law). Almost similar provisions are also found in Article 9 paragraph (1) of Law

Number 12 Year 2011 concerning the Formulation of the Laws and Regulations stating that “In the event that a Law is allegedly inconsistent with the 1945 Constitution of the State of the Republic of Indonesia, its judicial review shall be conducted by the Constitutional Court”.

4. Whereas the provisions filed by the Petitioners are the provisions in legal product of a law, *in casu* Law Number 11 Year 2012 concerning Juvenile Criminal Justice System to be reviewed by the Constitutional Court against the provisions in the 1945 Constitution.

Based on the aforementioned matters, the Constitutional Court has the authority to examine and decide upon the petition for the judicial review of this Law.

II. LEGAL STANDING OF THE PETITIONERS

1. Whereas Article 51 paragraph (1) of the Constitutional Court Law regulates that:

“The petitioners shall be the parties considering that their constitutional rights and/or authorities are impaired by the coming into effect of a Law, namely:

a. Individual Indonesian citizens;

b. Customary law community groups insofar as they are still in existence and in line with the development of the

communities and the principle of the Unitary State of Republic of Indonesia as regulated in Law;

c. Public or private legal entities, or

d. State institutions.

Furthermore, the Elucidation of Article 51 paragraph (1) states that:
"Constitutional rights" shall be the rights regulated in the 1945 Constitution of the State of the Republic of Indonesia.

In addition, the Elucidation of Article 51 paragraph (1) of sub-paragraph a states that:
"Individuals" shall include groups of people having a common interest.

2. Whereas following Decision of the Constitutional Court Number 006/PUU-III/2005 dated May 31, 2005 and subsequent decisions, the Constitutional Court has determined 5 (five) requirements for the existence of constitutional impairment as referred to in Article 51 paragraph (1) of the Constitutional Court Law, as follows:

a. The existence of constitutional rights of the Petitioners granted by the 1945 Constitution;

b. Such constitutional rights are considered to be impaired

by the coming into effect of a Law;

c. Such impairment of constitutional rights must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;

d. There is a causal relationship (*causal verband*) between the impairment of constitutional rights and the Law being petitioned for review;

e. There is a possibility that with the granting of the petition, such impairment of constitutional rights as argued will not or will no longer occur.

3. Whereas the Petitioners are Dr. H. Mohammad Saleh, S.H., M.H. as an individual Indonesian citizen holding the position of Supreme Court Justice at the Supreme Court and/or General Chairperson of the Indonesian Judges' Association (*IKAHI*), together with other administrators, namely Dr. Drs. Habiburrahman M.Hum (Chairperson I), Dr. Imam Subechi, S.H., M.H. (Chairperson II), Imron Anwari, S.H., Spn., M.H. (Chairperson III), Suhadi, S.H., M.H. (General Secretary), H. Kadar Slamet, S.H., M.Hum (Secretary I), I Gusti Agung Sumanatha, S.H., M.H. (Secretary II), Drs. Abdul Goni, S.H., M.H. (treasurer I) and Mien Trisnawati, S.H., M.H. (treasurer II), in accordance with the Articles of Association of *IKAHI* acting on behalf of *IKAHI* (**exhibit P-5**). Therefore, their positions as

individual citizens and/or on behalf of *IKAHI* may be considered as a group of people having a common interest, in this matter, judges associated in *IKAHI,* so that they have met the provision of Article 51 paragraph (1) sub-paragraph a of the Constitutional Court Law and the elucidation thereof.

4. Whereas the Petitioners have the constitutional rights granted by the 1945 Constitution, namely the right to freedom as judges examining, hearing, and deciding upon a case handled by them. The provision of Article 24 paragraph (1) of the 1945 Constitution states that, *"Judicial power shall be independent power to organize judicial administration to uphold law and justice"*, while paragraph (2) states that, *"Judicial power shall be exercised by a Supreme Court and its inferior courts in the jurisdiction of general courts, the religious affair courts, the military tribunal, the state administration courts, and by a Constitutional Court"*.

   This is explained further in the provisions of Article 31 and Article 33 of Law Number 48 Year 2009 concerning Judicial Power (the Judicial Power Law). Article 31 of the Judicial Power Law states that, *"Judges of the courts under the Supreme Court shall be state officials exercising the judicial power in judicial bodies under the Supreme Court",* while Article 3 of the Judicial Power Law states that, *"in performing their duties and functions, Judges and Constitutional Justices shall be obligated to*

maintain the independence of the judiciary".

Based on the aforementioned provisions of the 1945 Constitution and the Judicial Power Law, freedom or independence is given to the institutions exercising the judicial power – namely the Supreme Court and its inferior courts, and the Constitutional Court – to organize judicial administration in order to uphold the law and justice. However, the institutional freedom/independence of the judicial institutions is automatically reflected in the freedom of judges as the actors exercising the intended judicial power.

Therefore, as a logical consequence, judges are officials exercising the judicial power (*rechters als uitvoerder van rechterlijke macht*) (Article 31 of the Judicial Power Law); *judges are obligated to maintain the independence of the judiciary* (Article 3 of the Judicial Power Law) which inherently means that a judge also individually retains his/her independence as a judge, so that a head of a court is not allowed to intervene in a judge's handling a case.

Such provisions indicate that the courts in the General judicature, Religious Affairs judicature, Military judicature, and State Administration judicature as institutions may only exercise the authority through its judges. Therefore, the actions of a court

as a working environment (*ambt*) are personified by judges as position holders (*ambtsdrager*).

The construction of such thought results in a logical consequence that the independence of judicial power and the independence of the judiciary guaranteed by Article 24 of the 1945 Constitution also give the freedom and independence to judges who are authorized to examine, hear and decide upon cases. Therefore, the guarantee of the independence of the judiciary constitutes the constitutional right as well as authority of judges. Without the existence of freedom and independence of judges, the freedom of judicial power and the independence of the judiciary cannot be upheld. On the contrary, any form of dependence and reliance of the judicial institutions will absolutely decrease the freedom and independence of judges to examine, hear and decide upon cases.

Based on the explanations above, the Petitioners have the constitutional rights granted by the 1945 Constitution.

5. Whereas the position and duty of judges as real actors and state officials exercising the judicial power as provided for in the 1945 Constitution above have been restricted by the coming into effect of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System which criminalizes judges.

6. Whereas the constitutional rights and authorities of judges above to obtain the guarantee of freedom and independence of the judiciary which determines the independence of judges have been impaired and such impairment is specific and actual, or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring, with the logical consequence that the Petitioners have a causal relationship (*causal verband*) with the coming into effect of the provisions of Article 96, Article 100, and Article 101 of the Law on Juvenile Criminal Justice System, which respectively read as follows:

Article 96

Any Investigator, Public Prosecutor, and Judge deliberately not performing his/her obligations as referred to in Article 7 Paragraph (1) shall be subject to a maximum criminal sanction of imprisonment of 2 (two) years) or a maximum pecuniary sanction of Rp.200,000,000.00 (two hundred million rupiah).

Its Elucidation:

Self-Explanatory

Subsequently, the provision of Article 100 states that:

Any Judge deliberately not performing his/her obligations as referred to in Article 35 paragraph (3), Article 37 paragraph (3), and Article 38 paragraph (3) shall be subject to a maximum criminal sanction of imprisonment of 2 (two) years.

Its Elucidation:

Self-Explanatory

Furthermore, the provision of Article 101 states that:

Any court official deliberately not performing his/her obligations as referred to in Article 62 shall be subject to a maximum criminal sanction of imprisonment of 2 (two) years.

Its Elucidation:

Self-Explanatory

Whereas such provisions of Article 96, Article 100, and Article 101 of the Law on Juvenile Criminal Justice System have decreased the degree of independence of judges in performing their judicial duties because such criminal sanctions in the provisions of Article 96, Article 100, and Article 101 have allowed for an interpretation that any violation of the formal juvenile criminal law (procedural law) is a criminal act and it must be imposed with a criminal sanction. In fact, from the aspect of law enforcement, such formal juvenile criminal law is clearly and evidently an instrument for judges to uphold, maintain, and guarantee the observance of the formal juvenile criminal law. The consequence for such violation of the formal juvenile criminal law (procedural law) is an administrative sanction because it is categorized as a violation of the Code of Ethics and the Code of Conduct of Judges. Such violation has been supervised by institutions which are still in the same

branch of power, namely the Supreme Court and the Judicial Commission.

In addition, in fact, such administrative sanction in the Law on Juvenile Criminal Justice System has been relatively sufficient without requiring any criminal sanction to criminalize judges which restricts and threatens the independence of judges to decide upon cases. Independence of judges is basically guaranteed by the provisions of Article 24 of the 1945 Constitution and accompanied with the professional immunity (judicial immunity). In principle, the rule of a criminal sanction against judges is clearly inconsistent with Article 24 of the 1945 Constitution since it deprives judges of their constitutional rights. In fact, judges are not immune from the law in performing their judicial duties if they perform their profession and commit criminal acts of corruption, bribery and other criminal acts. However, it does not mean that judges must be criminalized when they commit a judicial error.

7. Whereas, based on the contextual explanations above, it is clear that the Petitioners as judges have a direct interest in performing their judicial duties in relation to the operation of the Judicial Power System as referred to in Article 24 paragraph (1) and paragraph (2) of the 1945 Constitution, and thus the Petitioners, in a *prima facie* manner, have legal standing to file the petition

for judicial review of Article 96, Article 100 and Article 101 of the Law on Juvenile Criminal Justice System.

Whereas all the explanations above indicate that the Petitioners have legal standing as the Petitioners in the petition *a quo*;

III. THE PETITIONERS' REASONS FOR FILING THE PETITION FOR JUDICIAL REVIEW OF THE PROVISIONS OF ARTICLE 96, ARTICLE 100, AND ARTICLE 101 OF LAW NUMBER 11 YEAR 2012 CONCERNING JUVENILE JUSTICE SYSTEM

A. The Politics of Criminalizing Judges, Court Officials in the Law on Juvenile Criminal Justice System

1. Whereas international communities share the great concern for the protection of the rights of the child as reflected in, among things, the existence of Resolution of the United Nations 44/25 – Convention on the Rights of the Child (CRC) (ratified by Presidential Decree 36 Year 1990), Resolution of the United Nations 40/33 – UN Standard Minimum Rules for the Administrations of Juvenile Justice (the Beijing Rules), Resolution of the United Nations 45/113 – UN Standard for the Protection of Juvenile Deprived of Their Liberty, Resolution of the United Nations 45/112 – UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) and Resolution of the United Nations 45/110 – UN Standard Minimum Rules for Custodial Measures 1990 (The Tokyo

Rules). This is based on consideration that children are the mandate and grace of the One Almighty God having the status and dignity as undivided human beings. Children are an inseparable part of the survival of human beings and the continuity of a nation and state.

2. Whereas as a state party to the Convention on the Rights of the Child regulating the principle of legal protection for children, Indonesia has an obligation to provide special protection for children who have legal issues. Therefore, the constitutional rights of the child are expressly stated in Article 28B paragraph (2) of the 1945 Constitution, the complete formulation of which reads as follows: *Every child shall have the right to survive, grow and develop and shall have the right to be protected against violence and discrimination*. Later the regulation of the rights of the child was realized in Law Number 23 Year 2002 concerning Child Protection.

3. Whereas along with the increase in juvenile delinquency, the state has made various efforts to prevent and mitigate such delinquency. However, in relation to an act constituting a criminal act committed by a child, the politics criminalizing children is applied by the implementation of the Juvenile Criminal Justice System set out in Law Number 3 Year 1997 concerning Juvenile Court.

In its development, Law Number 3 Year 1997 concerning Juvenile Court is considered no longer consistent with the legal development and demand of the community since it has not provided comprehensive protection for children who have legal issues, and thus it needs to be revised by a new law. Subsequently, the Government together with the People's Legislative Assembly passed Law Number 11 Year 2012 concerning Juvenile Criminal Justice System on July 30, 2012.

4. Whereas Article 1 sub-article 1 of the Law on Juvenile Criminal Justice System states that referred to as *the Juvenile Criminal Justice System shall be the entire process of case settlement of cases of children faced with the law, starting from the investigation phase up to the guidance phase after serving a criminal sanction.*

5. Whereas the Juvenile Criminal Justice System is intended to maintain a child's status and dignity so that a child has the right to obtain special protection, especially legal protection in the judicial system. Therefore, the Juvenile Criminal Justice System shall focus not only on the imposition of criminal sanctions upon juvenile offenders, but also on the considerations that the intended imposition of criminal sanctions serves as a medium for achieving the protection of such juvenile offenders. It is in line with the purpose of implementation of Juvenile Criminal Justice System achieved by the international world as seen in

the United Nations Rules in United Nations Standard Minimum Rules for the Administration of Juvenile Justice (SMRJJ) or The Beijing Rules, stating that: the juvenile justice system shall emphasize well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders an offence.

6. Whereas based on the explanations in paragraphs number 1 through number 5 above, it can be understood that the Legislators' main consideration for passing the Law on Juvenile Criminal Justice System is to maintain the child's status and dignity so that such child has the right to obtain special protection, especially legal protection in the judicial system. Therefore, law enforcers handling juvenile cases, starting from the investigation phase up to the court hearing are expected to deepen their knowledge on juvenile issues in order that after deciding upon the cases, such child is either physically or mentally ready to face his/her future in a better way.

7. Whereas as a criminal law enforcement system, the Law on Juvenile Criminal Justice System consists of three law enforcement aspects, namely, aspect of substantive criminal law, aspect of formal criminal law, and aspect of criminalization implementation law.

8. Whereas the regulation of provisions on diversion, the minimum age of juvenile criminal responsibility, criminal sanctions and criminal acts indicates the aspect of substantive criminal law in the Law on Juvenile Criminal Justice System, while the regulation of provisions on the procedures for legal proceedings in the investigation phase, the prosecution phase, the hearing examination phase at the court, the phase of passing the decision, the phase of giving the excerpt and copy of decisions indicate the aspect of formal criminal law. The aspect and dimension of investigation at the court, passing of decisions, signing of the excerpt and copy of decisions are conducted by judges as a process of implementing the criminal procedure. Therefore*, it can be said that a Court Official also refers to a "Judge" who may hold a position to perform his/her judicial duties as a Functional Official an sich or as a Functional Official and concurrent Structural Official leading a judicial institution*. Meanwhile, the legal aspect of criminalization implementation can be seen from the regulation of provisions on the implementation of the duties and functions of the correctional center, the Social welfare organization institution, and Juvenile Correctional Center.

9. Whereas in addition to the matters above, the Law on Juvenile Criminal Justice System also regulates criminal provisions for any official of the Police Force, Public prosecutor, Judge, Court

Official and party disclosing information in the provisions of Article 96, Article 97, Article 98, Article 99, Article 100 and Article 101 which fully read as follows:

Article 96:

Any Investigator, Public Prosecutor, and Judge deliberately not performing his/her obligations as referred to in Article 7 Paragraph (1) shall be subject to a maximum criminal sanction of imprisonment of 2 (two) years) or a maximum pecuniary sanction of Rp.200,000,000.00 (two hundred million rupiah).

Article 98:

Any Investigator deliberately not performing his/her obligations as referred to in Article 33 paragraph (3) shall be subject to a maximum criminal sanction of imprisonment of 2 (two) years.

Article 99:

Any Public Prosecutor deliberately not performing his/her obligations as referred to in Article 34 paragraph (3) shall be subject to a maximum criminal sanction of imprisonment of 2 (two) years.

Article 100:

Any Judge deliberately not performing his/her obligations as referred to in Article 35 paragraph (3), Article 37 paragraph (3), and Article 38 paragraph (3) shall be subject to a maximum criminal sanction of imprisonment of 2 (two) years.

Article 101:

Any court official deliberately not performing his/her obligations as referred to in Article 62 shall be subject to a maximum criminal sanction of imprisonment of 2 (two) years.

10. Whereas with regard to the formulation of the criminal provisions of Article 96, Article 98, Article 99, Article 100, and Article 101, if it is seen from the labeling perspective, it indicates that the Legislators have labeled an act performed by any Investigator, Public Prosecutor, Judge, Court Official deliberately not performing his/her obligations (implementing procedures of procedural law) as a crime or a criminal act.

11. Whereas based on the explanations in paragraphs number 6 through number 10 above, the decisions of the Legislators are clear in stipulating an act of a Judge or Court Official deliberately not performing his/her obligations (implementing the procedures of procedural law) in the Law on Juvenile Criminal Justice System under the category of a criminal act and in imposing criminal sanctions. Criminalization politics by the Legislators, in the substantive criminal law) is called criminalization.

B. Substantive Criminal Provisions For Judges in the Provisions of Article 96, Article 100, and Article 101 of the Law on Juvenile Criminal Justice System Do Not Reflect the Principle of Proportional Justice Upon Judges, Therefore, the Formulation of

Such Provisions Is Inconsistent With Article 28D paragraph (1) of the 1945 Constitution.

1. Whereas criminalization of a Judge or Court Official in the provisions of Article 96, Article 100, and Article 101 of the Law on Juvenile Criminal Justice System creates two legal questions, namely:

   (i) What are the criteria the Legislators use to classify an act performed by a judge as a functional official *an sich* or a functional official and concurrent structural official leading a judicial institution (court official) in performing his/her judicial duties, as a criminal act subject to a certain criminal sanction?

   (ii) Has the substance of Article 96, Article 100, and Article 101 already reflected the principles of criminalization in the criminal law?

2. Whereas with regard to **the first question**, the analysis of the issue of course cannot be separated from the integral concept between the criminal policy and the social policy or the national development policy. Therefore, a policy-oriented approach must be adopted to answer the first question.

   Based on such policy-oriented approach, one of the reports in relation to the Symposium on the Renewal of National Criminal

Law in August 1980 in Semarang states that *the issues of criminalizing and decriminalizing an act must be in accordance with the criminal politics adhered to by Indonesian people, namely to the extent that such act is inconsistent with the fundamental values applicable in the public and is considered by the public to be reasonably or unreasonably criminalized for the purpose of achieving public welfare.*

With regard to criminalization, the Symposium on the Renewal of National Criminal Law classifies an act as a criminal act by considering the general criteria as follows:

a. Whether the public do not like or hate such act because it causes a loss or may cause a loss, falls a Victim or may bring a victim;

b. Whether the cost of criminalizing such act is equal to the result which will be achieved, which means that the cost of drafting, supervising and enforcing a Law and any loss incurred by such victim and such perpetrator must be equal to the situation of legal order which will be achieved;

c. Whether such qualification will further increase the unbalanced burden on law enforcement apparatuses or such law enforcement apparatuses based on their capability cannot carry such burden;

d. Whether such act restricts or constrains the goals of Indonesian nation so as to harm the entire community.

In addition to the criteria above, the symposium also considers it necessary to pay attention to the public attitude and perspective regarding whether in a certain act is reasonably reprehensible by conducting a research particularly related to technological advancement and social change. It means that such policy-oriented approach is related to values which will be achieved or protected by the criminal law.

Based on the explanations above, it can be concluded that in formulating policy on the criminal law, a policy-oriented approach which is pragmatic, rational, functional and also a value judgment approach are necessary. Policy-oriented approach is, in essence, a part of social policy, criminal policy, and law enforcement policy. Meanwhile, value judgment approach is, in essence, any effort to re-orientate and re-evaluate socio-political, socio-philosophical, socio-cultural values which underlie and fill normative and substantive contents of the intended criminal law.

(Summarized from Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru* (An Anthology on Criminal Law Policy: Development of the Formulation of New Concepts in the

Indonesian Criminal Code), Jakarta, Prenada Media Group, 2008, pages 27 – 33)

In respect of the matters above, in the context of future renewal (of the criminal law) (*ius constituendum*), ideally, a law (substantive criminal law) must at least meet five characteristics, as follows:

a. the national criminal law is drafted not only for sociological, political, and practical reasons, but it must also be consciously formulated in the framework of *Pancasila* national ideology;

b. the national criminal law in the future may not ignore aspects related to Indonesian human and natural conditions as well as tradition;

c. the future criminal law must be able to adjust itself to universal tendencies growing in the civilized community relationship;

d. the future criminal law must consider preventive aspects;

e. the future criminal law must always be responsive to the development of science and technology in order to improve the effectiveness of its function within the community.

(Summarized from Muladi, *Proyeksi Hukum Pidana Materiel Indonesia Di Masa Mendatang* (Projections for the Future Substantive criminal Law in Indonesia), An Inaugural Speech of Professor of the Faculty of Law of the University of Diponegoro, 1990, Semarang)

3. Whereas moreover, if the aforementioned criminalization criteria are related to the formulation of the provisions of Article 96, Article 100, and Article 101 of the Law on Juvenile Criminal Justice System, it is clear that decisions of the Legislators to criminalize any act taken by a judge as a functional official and/or a structural official leading a judicial institution (court official) in performing his/her judicial duties, are no longer oriented to policies (policy-oriented approach) and values (value judgment approach), but they are focused more on the emotional judgment (*the emotionally laden value judgment approach*) of the Legislators. Such criminalization process results in: (a) the crisis of overcriminalization) and (b) the crisis of overreach of the criminal law) in the entire Juvenile Criminal Justice System.

4. Whereas with regard to **the second question**, the analysis of the issue cannot be separated from the principles of or the bases or foundation of the drafting of laws and regulations. Therefore, the principles of law reflected in the provisions of Article 96, Article 100, and Article 101 of the Law on Juvenile

Criminal Justice System must be seen in order to answer the second question.

5. Whereas the principles which must be reflected in the substance of the laws and regulations are regulated in the provisions of Article 6 of Law Number 12 Year 2011 concerning Formulation of the Laws and Regulations which completely read follows:

paragraph (1): *the substance of the Laws and Regulations must reflect the principles of:*

a. Protection;

b. Humanity;

c. Nationality;

d. Family Spirit;

e. Archipelago;

f. Unity in diversity (Bhinneka tunggal ika)

9. Justice;

h. Equal position before the law and government;

i. Legal order and certainty; and/or

j. Proportionality, harmony and conformity.

paragraph (2): *besides reflecting the principles as referred to in paragraph (1), certain Laws and*

regulations may have contents consisting of other principles in accordance with the legal fields of the relevant Laws and regulations.

Elucidation of paragraph (2):

"Other principles in accordance with the legal fields of the relevant Laws and regulations" shall mean, among other things:

a. the principle of legality, the principle of no sanction without misconduct, and the principle of the guidance of prisoners, the principle of presumption of innocence in the criminal law;

b. the principle of agreement, freedom of contract, and good faith in the contract law of the civil law.

6. Whereas bearing in mind that the Law on Juvenile Criminal Justice System is the laws and regulations in the field of criminal law, thus the substance contained in the provisions of Article 96, Article 100, and Article 101 must reflect the legal principles applicable in the criminal law.

Actually, in the context of criminalization, the principles are basic concepts, ethical norms, and legal principles leading to the formulation of criminal law norms through the drafting criminal laws and regulations. In other words, legal principle is a basic concept, ethical norm, and basic principle of the application of criminal law as a means of crime mitigation.

According to the doctrine, the Legislators need to consider three principles of criminalization, namely: (1) the principle of Legality; (2) the principle of Subsidiarity, and (3) the principle of Equality/Similarity to classify an act as a criminal act and to determine its criminal sanction. These the principles can be used as the criteria for evaluating the sense of justice of the criminal law and the serve the functions to regulate government's policy in the criminal law.

The principle of Legality is a fundamental the principle for stipulating criminalization, serving the function of restricting the scope of criminal law and maintaining the position of the people's law vis a vis the state. The principle of Subsidiarity means that the criminal law must be regarded as the *ultimum remedium* (last resort / ultimate remedy)which uses penal instruments to mitigate crimes, rather than as a *primum remedium* (primary remedy) to deal with criminal issues. Meanwhile, the principle of equality/similarity is intended for creating a clearer and simpler criminal law system so that it can encourage the creation of fair criminal law and to produce appropriate criminal law.

7. Whereas if the aforementioned criteria for criminalization are related to the formulation of provisions of Article 96, Article 100, and Article 101, it is clear that classifying an act as a criminal act

does not include the principles of criminalization, neither does it have any clear purposes of such criminalization. The policy formulated by the Legislators in the Juvenile Criminal Justice System is strongly orientated toward the protection of (child) perpetrators, while it ignores the protection of judges or court officials when they perform their duties and exercise their authorities. The existence of intervention in the form of criminalization of a judge or court official indicates that the Legislators do not follow the principles of proportionality, conformity and harmony, neither are they bases upon the principles of formulation of the laws and regulations, particularly the principle of clarity of purpose [Article 6 paragraph (1) sub-paragraph j, sub-paragraph g and Article 5 sub-article a of Law Number 12 Year 2011 concerning Formulation of Laws and Regulations].

The principle of Justice intended in this petition is the principle of proportional Justice upon any citizen (in this matter for a judge or court official) because an act qualified as a criminal act in such provision is an act within the corridor of applying the formal criminal law and for the purpose of enforcing the substantive criminal law.

The principles of **proportionality, harmony and conformity** intended in this petition are that the substance of regulations contained in the provisions of Article 96, Article 100, and Article

101 does not reflect proportionality, harmony and conformity among individual interests, public interests and the nation and state's interests.

The principle of **clarity of purpose** in this petition is that the formulation of the provisions of Article 96, Article 100, and Article 101 does not have clear Purposes to be achieved.

8. Whereas there are several conclusions which can be drawn from the explanations above. **Firstly**, criminalization of any judge in his/her capacity as a functional official and/or as a structural official leading a judicial institution (court official) in performing his/her duties, is focused more on the emotional judgment (the emotionally laden value approach) of the Legislators. The politics of criminalization is no longer oriented toward policies (policy-oriented approach) and values (value judgment approach). **Secondly**, classifying an act as a criminal act in the provisions of Article 96, Article 100, and Article 101 does not include the principles of criminalization and clear purposes of such criminalization, and thus the formulation of such provisions does not reflect the principle of proportional justice for any citizen, in this matter for any judge in his/her capacity as a functional official and/or as structural official leading a judicial institution (court judicial) in performing his/her judicial duties.

9. Whereas based on the explanations above, it is clear that the provisions of Article 96, Article 100, and Article 101 of the Law on Juvenile Criminal Justice System have breached the principles of guarantee, protection and equal position before the law for a judge or court official in his/her capacity as a party performing his/her duties and exercising his/her authorities and also as a party exercising judicial power in order to uphold the law and justice as regulated in the provision of Article 28D paragraph of the 1945 Constitution stating that, "*Every person shall have the right to the recognition, guarantee, protection, and legal certainty of just laws as well as equal treatment before the law".*

C. Regulation of Substantive criminal Provisions for any Judge in the Law on Juvenile Criminal Justice System Is Inconsistent With Article 1 paragraph (3), Article 24 paragraph (1), Article 24D paragraph (1), Article 24D paragraph (1), and Article 28I paragraph (2) of the 1945 Constitution.

1. Whereas if it is seen from the conceptual framework of the Law on Juvenile Criminal Justice System, the provisions of Article 7 paragraph (1), Article 35 paragraph (3), Article 37 paragraph (3), Article 38 paragraph (3) and Article 62 constitute the formal juvenile criminal law (procedural law). Meanwhile, the provisions of Article 96, Article 100, and Article 101 do not constitute the juvenile substantive criminal law, but they constitute the

substantive criminal law for a judge or court official deliberately not applying the formal juvenile criminal law (procedural law).

2. Whereas the regulation of the substantive criminal provisions for a judge or court official in the provisions of Article 96, Article 100, and Article 101 of the Law on Juvenile Criminal Justice System reflects the existence of Legislators' intervention having direct influences in the form of pressure, duress, threat against a judge in performing his/her judicial duties as a functional official and/or as a structural official leading a judicial institution (court official). Such politics of criminalization potentially violates the principles of independence of the judiciary and independence of judges.

3. Whereas the general criteria for the independence of the judiciary and the independence of judges are reflected in Decisions of the Constitutional Court Number 005/PUU-IV/2006 dated August 23, 2006, Number 28/PUU-IX/2011 dated July 31, 2012, and Number 37/PUU-X/2012 dated July 31, 2012 which completely read as follows:

Whereas in a democratic state based on law as provided for in Article 1 paragraph (3) of the 1945 Constitution stating that "The State of Indonesia is a state based on law", independence of the judiciary and independence of judges are essential elements of such rule of law state or rechtsstaat (rule of law). Since these

principles are important, the concept of separation of powers among the executive power, the legislative power and the judicial power and the concept of independence of the judiciary have been considered as fundamental concepts, and thus such principles become one of the main elements of the constitution and constitute the spirit of such constitution. In fact, when the 1945 Constitution had not been changed and the concept of the separation of powers was not followed, the principle of separation of powers and the principle of independence of the judicial power were already stated and reflected in Article 24 and the Elucidation thereof. Now, after the 1945 Constitution has been changed from the first amendment to the fourth amendment in which the branches of the state powers are separated based on the principle of checks and balances, particularly in the relationship between the legislative and the executive, the separation of judicial power influenced by the other branches of power is more confirmed, thus independence of judicial power is not only functional in nature, but it is also structural in nature, namely by the adoption of the one-stop policy.

...the independence of the judiciary must be protected from any party's pressure, influence and intervention. Independence of the judiciary is an essential precondition to achieve the purposes of a law state and it is a guarantee to uphold the law and justice.

This principle is deeply inherent in and must be reflected in the examination and decision-making process of any case and it is closely related to the independence of the judiciary as the judicial institution which is authoritative, dignified, and reliable. Independence of judges and independence of the judiciary materialize in the freedom of judges either as individuals or as institutions from outside influences in the form of interventions having direct influences, namely persuasion, pressure, duress, threat or retaliation because of certain political or economic interests from the government and controlling political power, certain groups, with rewards or promise of rewards in the form of benefits from a position, economic benefits, or other forms;

Whereas the freedom of judges is closely related to the impartial attitude of judges in the examination or the decision-making. Non-independent Judges cannot be expected to perform their duties neutrally or impartially. Similarly, judicial institutions which are dependent on other organs in certain fields and which cannot manage themselves independently will lead to unneutral attitude in the performance of their duties. Such freedom also has different aspects. Functional freedom contains prohibitions for the other branches of power to intervene in judges' performance of their judicial duties. However, such freedom can never be interpreted to have an absolute nature because it is restricted by the law and justice. Such freedom is also

interpreted in such a way that judges freely pass decisions in accordance with the values they believe through legal interpretation even though such decisions based on such interpretation and belief may go against the parties who have political and administrative power. If such decisions are not in line with the desire of the parties in power, it cannot become the reason for taking a retaliatory action upon judges either as individuals or as authorized judicial institutions ["….when a decision adverse to the beliefs or desires of those with political power, can not affect retribution on the judges personally or on the power of the court" (Theodore L. Becker in Herman Schwartz, Struggle for Constitutional Justice, 2003 page 261)];

Whereas since such freedom is related to the examination and the decision-making in cases handled by judges, in order to obtain one decision which is free from any pressure, influence either physically or, psychologically and any corruption, collusion and nepotism, such freedom of judges is not, in fact, the privilege of judges, but it is the indispensable right or inherent right of judges for the purpose of guaranteeing the satisfaction of human rights of citizens to obtain the independent and impartial judiciary (fair trial). Therefore, on a reciprocal basis, judges are obligated to act independently and impartially to meet the demands of human rights of justice seekers (justitiabelen). It also automatically has the right of judges to have freedom from

such pressure, influence, threat. The 1945 Constitution guarantees it as subsequently stated in the Judicial Power Law and other Laws. The freedom must be interpreted within the limits determined by the law in order to apply the fair law as explained above. Such freedom is also in line with the accountability realized by the supervision. However, the sensitivity level of the freedom of judges is very high because of two mutually opposite parties defending the rights and interests of the parties in dispute. Therefore, in addition to constituting the inherent right of judges, such freedom of judges is also a precondition to realize the impartial attitude of judges in performing their judicial duties. The form of accountability demanded of judges needs a format which can absorb such sensitivity. Lack of prudence in preparing the mechanism of accountability in the form of supervision, and lack of prudence in implementing it, may have bad impacts on the ongoing judicial process. The trust required for demanding compliance with and acceptance of the decisions of judges can now be said to be in a critical condition. However, no matter how small the level of trust is left now, it must be maintained to prevent it from complete disappearance so that the purpose of maintaining honor, dignity, and conduct of judges will in fact become counter-productive and in the end it will lead to legal chaos;"

4. Whereas if such general criteria for the independence of the judiciary and the independence of judges are related to the petition *a quo*, the implications of the politics of criminalization in Article 96, Article 100, and Article 101 of the Law on Juvenile Criminal Justice System on the principles of independence of the judiciary and independence of judges in a rule of law state, will result in the matters which can be described as follows:

A. THE PROVISION OF ARTICLE 96 OF THE LAW ON JUVENILE CRIMINAL JUSTICE SYSTEM:

(1) The implications of the politics of criminalization in Article 96 of the Law on Juvenile Criminal Justice System violate the principles of Independence of the Judiciary and Independence of Judges, so that it is inconsistent with Article 1 paragraph (3) *juncto* Article 24 paragraph (1) of the 1945 Constitution:

First, criminal sanctions in the provisions of Article 96 of the Law on Juvenile Criminal Justice System may make judges feel doubtful and fearful in conducting hearings. The feelings of doubt and fear experienced by judges, in several cases (in the regions) greatly influence their decisions. It

violates the principle of independence of judges which is usually accompanied with the constitutional right of judges to professional immunity (judicial immunity), thus It may be considered inconsistent with Article 1 paragraph (3) *juncto* Article 24 paragraph (1) of the 1945 Constitution.

Second, judges deliberately violating the procedures of the formal juvenile criminal procedure law concerning “diversion must be sought for the claims” shall be subject to cumulatively 2 (two) types of sanctions, namely a criminal sanction and an administrative sanction (provision of Article 95 of the Law on Juvenile Criminal Justice System). Such policy of the legislators of the Law on Juvenile Criminal Justice System may be considered unwise because:

1. It does not reflect the principle of *subsidiarity* of the criminal law, namely as the last substitute means/effort if other means or efforts are inappropriate;

2. (Juvenile) formal criminal law is an instrument for judges to uphold, maintain

and guarantee compliance with (juvenile) substantive criminal law. This instrument firmly follows the principle of independence of the judiciary and the principle of independence of judges. As a logical consequence (for the interest) of upholding the law for the sake of the law itself, any error in the procedures for the (juvenile) formal criminal procedure law concerning “diversion must be sought for the claims” may be categorized as a violation of the Code of Ethics and the Code of Conduct of Judges *in casu* not within the criminal domain;

3. The supervision over any violation of formal criminal law (procedural law) has been exercised by institutions which are still in the same branch of power, namely the Supreme Court and the Judicial Commission.

4. lack of prudence in preparing and implementing the mechanism of accountability demanded of judges may

have bad impacts on the ongoing judicial process;

Whereas, in reality, judges are not immune from the law and the adverse condition in the process of upholding the criminal law is indisputable. However, no matter how significant the reality is, it does not mean that the Indonesian judiciary does not have law enforcers and justice enforcers who still uphold the integrity and honesty, and it also does not mean that judges must be criminalized when they make errors in performing their judicial duties (judicial error).

Whereas actually, the administrative sanction in the Law on Juvenile Criminal Justice System has been relatively sufficient without requiring any criminal sanction because the existence of such criminal sanction in fact potentially restricts and threatens the freedom of judges to decide upon cases. This clearly violates the principle of independence of judges which is usually accompanied with *the constitutional right of judges to professional immunity* (judicial immunity), thus it may be considered inconsistent with Article 1

paragraph (3) *juncto* Article 24 paragraph (1) of the 1945 Constitution.

Third, the action taken by the legislators of the Law on Juvenile Criminal Justice System who have imposed the obligation of diversion through the perspective of criminal law is unwise because it may open a loophole for other parties from outside the judicial power to assess judges in performing their judicial duties or at least whether diversion efforts have been conducted or not by the judges concerned. This clearly violates the principle of independence of the judiciary and principle of independence of judges which expressly determine that any other party from outside the judicial power is prohibited from performing an intervention in judicial affairs, thus it may be considered inconsistent with Article 1 paragraph (3) *juncto* Article 24 paragraph (1) of the 1945 Constitution.

Fourth, diversion which must be sought for sought for claims imposed through the perspective of criminal law in the provision of Article 96 of the Law on Juvenile Criminal Justice System is classic, imperative, very strict, and inflexible. The

criminal sanctions in the provision of Article 96 of the Law on Juvenile Criminal Justice System not only potentially prevents judges from freely making a legal breakthrough (*judicial activism*) in the event of conflict between legal certainty and certainty of just laws (substantive justice), but also it potentially leads to an extremely *formal-legalistic* design of Indonesian judges who always prioritize the purpose of enforcing law for the sake of law itself (procedural justice/legal certainty) over the purpose of upholding law for justice (substantive justice/legal certainty of just laws), **while** in the practice of the criminal judiciary, the normative provision (*das sollen*) is often not in line with the reality (*das sein*) because the truth, in reality, exists outside of the Law. In addition, any criminal case has its uniqueness which in the end must also be specially treated. If the general treatment is given, indeed, it will harm the sense of justice as expressed in the slogan ***summum ius summa injuria*** (the absolute law is the greatest injustice), and there are still some weaknesses in the diversion provision of the Law on Juvenile Criminal Justice System itself, namely:

1. It potentially violates the rights of the child who has legal issues because the legislators of the Law on Juvenile Criminal Justice System do not explicitly regulate the clause, *"A child has admitted that he/she is guilty of committing a criminal act/crime"* as one of determining requirements/considerations to make a diversion.

2. The obligation to make a diversion, in fact, violates the right of the child to the principle of presumption of innocence.

3. The obligation to make a diversion violates the right of the child to fair legal proceedings.

Whereas the mechanism for performing the obligation of diversion imposed through the perspective of the criminal law in the provision of Article 96 of the Law on Juvenile Criminal Justice System clearly violates the Principle of Independence of Judges which is also usually accompanied with the constitutional right of judges to professional immunity (judicial immunity), thus it may be considered inconsistent with Article 1 paragraph (3) *juncto* Article 24 paragraph (1) of the 1945 Constitution.

(2) Implications of the politics of criminalization in Article 96 of the Law on Juvenile Criminal

Justice System violate the Principles of Guarantee, Protection, and Legal Certainty of Just Laws for any citizen, in this matter for any Judge in performing his/her judicial duties, thus it is inconsistent with 28D paragraph (1) of the 1945 Constitution:

However, it must be admitted that there are too many laws and regulations in the form of political products in our country which are obviously written, but whose phrases contained therein have obscure (unclear) meanings. In fact, laws and regulations must be formulated based on the principles of good formulation of laws and regulations one of which emphasizes that the formulation must be clear, thus it does not lead to various interpretations in its implementation. (*vide* Article 5 sub-article f of Law No. 12 Year 2011 concerning Formulation of the Laws and Regulations).

Whereas classifying an act as a criminal act in the provision of Article 96 does not include the principles of criminalization and also such criminalization does not have any clear purposes. The phrase *"deliberately not performing his/her*

obligations as referred to in Article 7 paragraph (1)" in the provision of Article 96 contains an unclear and biased legal norm and may lead to multiple interpretations because the legislators of the Law on Juvenile Criminal Justice System do not regulate expressly the indicator, parameter, clear limitations (guidelines on criminalization) in such provision to determine that *"an act may be allegedly qualified as an element of deliberately not performing his/her obligations as referred to in Article 7 paragraph (1)."*

The obscurity in this phrase is potentially more dangerous (as a criminogenic factor) than an act which will be prevented so that it may harm judges in performing their judicial duties and deciding upon cases, bearing in mind that in the theory and practice of the integrated criminal justice system, Judges never work alone, and the reasons behind the occurrence of violations of the formal criminal procedure law are relative,, arising not only from any unprofessional act performed by Judges in performing their judicial duties.

Whereas the obscurity in this phrase has violated the principles of guarantee, protection and legal

certainty of just laws for any citizen, in this matter for any judge in his/her capacity as a functional official and/or structural official leading a judicial institution (court official) in performing his/her judicial duties, thus it may be considered inconsistent with Article 28D paragraph (1) of the 1945 Constitution.

(3) Whereas the polarized thinking of the Legislators through the provisions of Article 96 violates the Constitutional Right of the Child:

Whereas in line with the provision above, there is also an ambiguity in the polarized thinking of the legislators of the Law on Juvenile Criminal Justice System, namely that on the one hand, the provision for diversion resulting in the existence of criminalization of judges are made in the event that any criminal act committed is imposed with a criminal sanction of imprisonment of less than 7 (seven) years (Article 7 paragraph (2) sub-paragraph a of the Law on Juvenile Criminal Justice System). However, on the other hand, the provision of diversion resulting in the existence of criminalization of judges is not made in the event that any criminal act committed is imposed with a

criminal sanction of imprisonment of 7 (seven) years or more.

In this context, the legislators of the Law on Juvenile Criminal Justice System have been discriminatory, namely by giving a different treatment to handle a child who has legal issues. It can be said that such attitude of legislators of the Law on Juvenile Criminal Justice System does not follow the spirit of the content of the “Considering” consideration section in paragraph a, paragraph b, paragraph c, and paragraph d of the Law on Juvenile Criminal Justice System stating, and also it does not reflect *the principles of justice, legal order* and *legal certainty* as well as *the principles of proportionality, harmony and conformity* (Article 6 sub-article g, sub-article i and sub-article j of Law Number 12 Year 2012 concerning Formulation of Laws and Regulations) and also it is not based on *the principles of protection, justice, non-discrimination, best interest of the child, proportionality, deprivation of freedom, criminalization as the ultimate remedy* and *avoidance of retaliation* (Article 2 sub-article a, sub-article b, sub-article d, sub-article h, sub-

article i, sub-article j of the Law on Juvenile Criminal Justice System) which in the end has implications on the existence of criminalization of judges.

B. THE <u>PROVISION OF ARTICLE 100 OF THE LAW ON JUVENILE JUSTICE SYSTEM</u>

(1) Implications of the politics of criminalization in Article 100 of the Law on Juvenile Criminal Justice System in essence constitute any act which may be categorized as discriminatory, thus it is inconsistent with the provision of Article 28I paragraph (2) of the 1945 Constitution:

First, based on the applicable provisions of the criminal procedure law (*ius constitutum*), if a judge puts a juvenile defendant in detention and later the detention period of such juvenile defendant has expired, such juvenile defendant shall be automatically released from the detention by operation of law. In brief, when the detention period of a juvenile defendant has expired, the principle of the criminal law must be applicable automatically that such juvenile defendant shall be

released by operation of law without requiring any stipulation of the judges to order the release of such juvenile defendant from detention by operation of law and if such juvenile defendant remains in detention, and in fact, the detention period has expired, parties who shall be juridically responsible are not judges, but extra judicial parties who continue the detention. Based on such construction of law, the legislators have made an error in *subjecto* by criminalizing judges for acts they have not committed.

Second, the action taken by the legislators to criminalize judges in order that they are responsible for any act and/or error they have not committed through the provision of Article 100 of the Law on Juvenile Criminal Justice System in essence constitutes an act which may be categorized as discriminatory, thus it may be considered inconsistent with the provision of Article 28I paragraph (2) of the 1945 Constitution stating that: *"Every person shall have the rights to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory*

treatment". In addition, the provision of Article 100 of the Law on Juvenile Criminal Justice System regulating the criminalization of judges is superfluous (*overbodig*) and contradictory, because it should have been the extra judicial parties, rather than the judges, who shall be juridically responsible as they continue the detention as regulated in the provision of Article 39 of the Law on Juvenile Criminal Justice System.

Third, the regulation of provisions on the criminal sanctions against a judge or a court official in the Law on Juvenile Criminal Justice System will create the legalism of judicial institutions in which judges serve as *la bouche de la loi* or judges serve as *sub sumptie autoomat* (an automatic machine). The criminal sanctions against judges will trap and even imprison the way of thinking of the judges in legal positivistic absolutism in completing their judicial duties. Thus, the hearings in the Juvenile Criminal Justice System will become legislative/procedural hearings rather than justice hearings and also decisions made by judges in examining, deciding upon and accomplishing

juvenile criminal cases will emphasize procedural justice more than the substantive justice.

(2) Whereas the polarized thinking of the Legislators through the provision of Article 100 violates the Constitutional Right of the Child:

On the one hand, the Legislators, in an *expresis verbis* manner, regulate the time limit (limitation) for the process of case settlement of the juvenile defendants who are put in detention as provided for in Article 35 paragraph (3), Article 37 paragraph (3) and Article 38 paragraph (3) *juncto* Article 100 of the Law on Juvenile Criminal Justice System resulting in the existence of criminalization of judges. Meanwhile, on the other hand, the Legislators do not regulate, in an *expresis verbis* manner, the time limit (limitation) for the process of case settlement of the juvenile defendants who are not put in detention in the Law on Juvenile Criminal Justice System. In this context, the Legislators have been discriminatory, namely, by giving a different treatment to handle a child who has legal issues.

C. THE PROVISION OF ARTICLE 101 OF THE LAW ON JUVENILE JUSTICE SYSTEM:

(1) Implications of the politics of criminalization in Article 101 of the Law on Juvenile Criminal Justice System violate the Principles of Independence of the Judiciary and Independence of Judges, thus it is inconsistent with Article 1 paragraph (3) *juncto* Article 24 paragraph (1) of the 1945 Constitution:

Judges deliberately violating the procedures for the juvenile formal criminal procedure law concerning the obligation “to give the excerpt of a decision on the day the decision is pronounced” (the provision of Article 101 *juncto* Article 62 paragraph (1) of the Law on Juvenile Criminal Justice System) shall be subject to cumulatively 2 (two) types of sanctions at once, namely a criminal sanction and an administrative sanction (the provision of Article 95 of the Law on Juvenile Criminal Justice System). Such policy of the legislators of the Law on Juvenile Criminal Justice System may be considered unwise because:

1. It does not reflect the principle of *Subsidiarity* of the criminal law, namely, as the last substitute means /effort if other means or efforts are not available;

2. (Juvenile) formal criminal law is an instrument for Judges to uphold, maintain and guarantee compliance with (juvenile) substantive criminal law. This instrument firmly follows the principle of Independence of the Judiciary and the principle of Independence of Judges. As a logical consequence for (the purpose of) upholding the law for the sake of law itself, any error in the procedures for the (juvenile) formal criminal procedure law concerning the obligation “to give the excerpt of a decision on the day the decision is pronounced” may be categorized as a violation of the Code of Ethics and the Code of Conduct of Judges *in casu* not being in the criminal domain;

3. The supervision over any violation of formal criminal law (procedural law) has been exercised by institutions which are still in the same branch of power, namely the

Supreme Court and the Judicial Commission.

4. lack of prudence in preparing and implementing the mechanism of accountability demanded of judges may have bad impacts on the ongoing judicial process;

Whereas in reality, judges are not immune from the law and the adverse condition in the process of upholding the law or judiciary is generally indisputable. However, no matter how the reality is, it does not mean that the Indonesian judiciary does not have law enforcers and justice seekers who still uphold the integrity and honesty, and it also does not mean that judges must be criminalized when they make errors in performing their judicial duties (judicial error).

Whereas in fact, the administrative sanction in the Law on Juvenile Criminal Justice System has been relatively sufficient without requiring any criminal sanction

because the existence of such criminal sanction in fact potentially restricts and threatens the freedom of judges to decide upon cases. It clearly violates the principle of Independence of the Judiciary and the principle of Independence of Judges which are usually accompanied with *the constitutional right of judges to professional immunity* (judicial immunity), thus it may be considered inconsistent with Article 1 paragraph (3) *juncto* Article 24 paragraph (1) of the 1945 Constitution.

Based on the provision of Article 101 of the Law on Juvenile Criminal Justice System, it is clear that the decision of the Legislators to criminalize any judge in his/her capacity as a functional official and/or a structural official leading a judicial institution (court official) in performing his/her judicial duties and other law enforcement apparatuses (Investigators and Public Prosecutors), is no longer orientated to policies (policy-oriented approach) and values (value judgment approach), but they are focused more on

the emotional judgment (*the emotionally laden value judgment approach*) of the Legislators. Such criminalization process results in: (a) the crisis of overcriminalization and (b) the crisis of overreach of the criminal law) in the entire Juvenile Criminal Justice System.

(2) Implications of the politics of criminalization in Article 101 of the Law on Juvenile Criminal Justice System violate the Principles of Guarantee, Protection, and Legal Certainty of just laws for any citizen, in this matter for any judge in performing his/her judicial duties, thus it is inconsistent with 28D paragraph (1) of the 1945 Constitution:

If the demand of the obligation “to give the excerpt of a decision no later than 5 (five) days as from pronouncement of the decision” (the provision of Article 101 *juncto* Article 62 paragraph (2) of the Law on Juvenile Criminal Justice System) imposed through the perspective of the criminal law, is truly implemented, it potentially results in many difficulties and troubles in the practice of the judiciary because the legislators of the Law on

Juvenile Criminal Justice System through these provisions have denied social realities that in the practice of criminal judiciary, any act performed by judges is not the only factor in the occurrence of any violation of the formal criminal procedure law, but there are also many factors, namely, among other things: the problem of unclear/obscure laws and regulations, the problem of insufficient facilities and infrastructure, the problem of the empirical conditions of Indonesian judiciary only having approximately 17 (seventeen) Juvenile Correctional Centers, the problem with the unfavorably natural/geographical conditions of Indonesia and the problem with the procedures for administrative cases at the courts, Public Prosecutor's Offices, Correctional Centers (society counselors) and social professionals.

Whereas the implementation of the obligation "to give the excerpt of a decision no later than 5 (five) days as from pronouncement of the decision" imposed through the perspective of the criminal law (the provision of Article 101 *juncto* Article 62 paragraph (2) of the Law on Juvenile Criminal Justice System) by denying the social realities

clearly violates the Principles of Guarantee, Protection and Legal Certainty of Just Laws for any citizen, in this matter for any Judge in performing his/her judicial duties, thus, it may be considered inconsistent with Article 28D paragraph (1) of the 1945 Constitution.

5. **Whereas the polarized thinking of the Legislators through the provisions of Article 96, 100 and 101 of the Law on Juvenile Criminal Justice System is inconsistent with the Constitutional Right of Judges as citizens and Parties exercising Judicial Power:**

(1) According to **Poltaris**: *"When the legislators discussed and formulated a law, all of them were of the opinion that it had been good and perfect. However, when enacted, such law directly faces thousands of various concrete problems which are unreachable and unthinkable at the time of the discussion and formulation".* If such problems are explained, they arise because, among other things, the formulation of such Law is often difficult to understand (elusive term), it has unclear meaning (unclear term), it has obscure and vague meaning (vague outline), it has ambiguous meanings (ambiguity), such Law is inconsistent with the constitution (unconstitutional), it violates or threatens the human rights of individuals, it is

contrary to common sense, and sometimes such Law is extremely formalistic, complicated, and not understandable, thus it cannot give certainty.

In line with the explanations above, in implementing and upholding the law and justice, justices always face real workloads, namely: **first**, the existing means of the criminal laws and regulations is not relatively adequate because it only regulates the general provisions and does not regulate the provisions required in the judicial process comprehensively. **Second,** any case has its own uniqueness which in the end must also be specially treated.

In line with the real workloads of judges as explained above, the polarized thinking of the legislators of the Law on Juvenile Criminal Justice System through the provisions of Article 96, Article 100, and Article 101 of the Law on Juvenile Criminal Justice System may be considered: contrary to common sense, not reflecting the principle of just and civilized humanity, exceeding the work capacity (beyond the work capability) of judges and/or violating the constitutional right of judges as citizens and parties exercising Judicial Power.

(2) The application of the mechanism of judges' accountability in upholding formal criminal law (procedural law) through a means of the criminal law has denied the constitutional right of judges as the parties exercising judicial power:

According to the national legal system applicable in the state of Indonesia, the judicial duties of Indonesian judges are based on the guidelines on the exercise of independent judicial power, namely to implement and uphold the law and to do and uphold justice. In performing their judicial duties, judges are required to do 3 (three) things: **first**, to implement and uphold the law (a Law) in accordance with the principle of legal certainty (*to uphold the law for the sake of law itself*). **Second**, to do and uphold justice based on *Pancasila* and in accordance with the principle of legal certainty of just laws (*to uphold the law for the sake of justice based on the belief in the one and only God, the unity of Indonesia, democracy guided by the inner wisdom of deliberations amongst representatives, and social Justice for all the people of Indonesia*). **Third**, to explore, follow, and comprehend the legal values and the sense of justice applied in the communities.

The sacred mission (*Mission sacree*) of the Indonesian judicial institutions is essentially not to uphold the law for the sake of law itself (*to uphold a Law*) as explained by Oliver Wendell Holmes, "*The supreme court is not a court of justice, it is a court of law*", but to uphold the law for the sake of justice for the individuals, communities, nation and state. The intended justice is divine. It is reflected in the opening of the decisions of Indonesian judges which starts with very religious utterances, namely: "**For the Sake of Justice under the One Almighty God**". This has juridical implications, namely that judges as the parties exercising Judicial Power are required to uphold the principle of "**equality before the law**" and the principle of "**equality before the justice**".

Whereas the Indonesian national legal system has determined expressly that the judicial activities in Indonesia are conducted "**For the Sake of Justice under the One Almighty God**", thus in a juridical, normative, academic, and religious manner, the principle of "**equality before the justice**" is higher than the principle of "**equality before the law**" constituting a product of western legal culture on the basis of codification or the Law.

In line with the explanations above, it is appropriate that Indonesian judges have the right to the guarantee, protection, special treatment and different service in performing the sacred mission of judicial institutions in Indonesia.

One of the forms of guarantee, protection, special treatment and different service for judges in performing the sacred mission of judicial institutions in Indonesia may be in the form of the Right of Judges to Immunity (judicial immunity). One of the logical consequences of the existence of such Right is that an error made by judges in applying the formal procedure law may be categorized as a violation of the Code of Ethics and the Code of Conduct of Judges rather than being in a criminal domain.

In addition, it also needs to be understood that the Right of Judges to Immunity (judicial immunity) in the context above does not automatically make judges as parties who cannot be supervised by any institution. Supervision over judges is very important in order to make sure that the principle of independence continues to be followed, and thus the fair judiciary can be achieved. However, it is necessary to underline that judges may exercise such supervision being restricted only to the ethical domain

and the behavioral domain. Such supervision is not restricted to the domain of examining and deciding upon a case because such domain is the private sphere owned by judges in which judges cannot be influenced by any party including by the Judicial Commission, the People's Legislative Assembly and the Supreme Court in order to objectively give opinions on and considerations for a case.

Based on the explanations above which are correlated with the principle of justice implemented "**For the Sake of Justice under the One Almighty God**", if there is any contradiction between the legal certainty (the Law) and the legal certainty for the sake of justice, judges are obligated to prioritize the legal certainty for the sake of justice. In concrete terms, in order to uphold the legal certainty of just laws, Judges may deviate from the principle of legal certainty, in this matter, the Law. Based on the explanations above, it can be concluded that the polarized thinking of Legislators through the provisions of Article 96, Article 100, and Article 101 of the Law on Juvenile Criminal Justice System may be considered in violation of the constitutional Right of judges because they are contrary to the Principles of Independence of the Judiciary and Independence of Judges.

6. Whereas in such judicial conditions, the criminalization of judges may be considered as an effort to restrict the Power of Judges to explore, follow and understand legal values and sense of justice applicable in the community as provided for in Article 24 paragraph (1) of the 1945 Constitution *juncto* Article 1 sub-article (1) and Article 5 paragraph (1) of Law Number 48 Year 2009 concerning Judicial Power. The provisions of criminal sanctions against judges basically have an impact upon the decreasing degree of independence of judges to perform their judicial duties, thus if it is seen from the context of the relationship among state institutions based on the system of checks and balances, decisions of the Legislators are contradictory to the concept of the distribution of power in the rule of law state of Indonesia as provided for in Article 1 paragraph (3) of the 1945 Constitution.

7. Whereas based on the democratic-constitutional perspective (the model of democracy which is also used in Indonesia following the amendment to the 1945 Constitution as provided for in Article 1 paragraph (2) and paragraph (3) of the 1945 Constitution which has combined the principles of democracy (rule of democracy) and the principle of monocracy/rule of law state, the logical consequence of this dimension is that democracy must be organized based on the law and the supreme law is the 1945 Constitution, while the formulation and

content of such law must be democratic. From this perspective, in order to implement constitutional democracy, the mechanism of supervision and balance among the branches of the state power is necessary. One branch of power is not allowed to gain “success” by sacrificing other branches of powers. Each branch of state power supervises and balances one another in accordance with their functions.

8. Whereas based on the perspective of the practice of implementation of the doctrine of a rule of law state, Britain until now is known as the most consistent state following the principle of supremacy of the parliament (in which it can be said that the power of its parliament is not limited and according to AV Dicey, the British parliament may take any action and may not take any action and no party may doubt the legitimacy of the action), but the criminal provisions in articles reviewed in the petition *a quo* are not included in the provisions of Laws made by its parliament (act of Parliament).

9. Whereas based on the explanations in paragraphs number 1 through number 8 above, it is clear that the provisions of Article 96, Article 100, and Article 101 of the Law on Juvenile Justice Law violate the Principles of Independence of the Judiciary and Independence of Judges in a rule of law state, and the Principle of Legal Certainty of Just Laws, and also they are discriminatory as regulated in the provisions of Article 1 paragraph (3), Article

24 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) of the 1945 Constitution which fully read as follows: *the State of Indonesia is a state based on law and judicial power shall be independent power to organize administration to uphold law and justice, Every person shall have the right to the recognition, guarantee, protection and legal certainty of just laws as well as equal treatment before the law, and every person shall the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment.*

10. Whereas based on all the arguments above, it is very appropriate for the Constitutional Court to declare that the provisions of Article 96, Article 100, and Article 101 of the Law on Juvenile Criminal Justice System are potentially qualified as articles violating the principle of “Independent Judicial Power (in the field of criminal law)”, in this matter, Independence of the Judiciary and Independence of Judges in their capacity as parties exercising judicial power to perform their duties, exercise their authority, and uphold the law and justice in a rule of law state which is not discriminatory. With the formulation of such Articles, the Articles *a quo* are unproportional and redundant and they are automatically inconsistent with Article 1 paragraph (3), Article 24 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) of the 1945 Constitution.

IV. CONCLUSIONS

1. Whereas the criminalization of a judge or court official in the provisions of Articles 96, 100, and 101 of the Juvenile Criminal Justice System Law is emphasized more on the emotional judgment (*the emotionally laden value judgment approach*) of the Legislators. Such emotional judgment does not have any clear purpose and it is not accompanied with the consideration of the balance/appropriateness between criminalization efforts and the purpose to be achieved. The policy made by the Legislators is oriented toward protection of the perpetrator (the child). The Legislators should have followed the ideal of balance, in which legal protection is given not only to the perpetrator (the child), but also to judges and other law enforcers (Investigators and Public Prosecutors) when performing their duties and exercising their authorities without the necessity of any intervention in the form of criminalization against any violation of the formal criminal law when they want to enforce the substantive criminal law.

2. Whereas the Politics of criminalization stipulating an act as a criminal act in the provisions of Article 96, Article 100, and Article 101 of the Juvenile Criminal Justice System Law is no longer oriented toward policies (policy-oriented approach) and values (value judgment approach). Such provisions do not

include any principles of criminalization or the purposes of criminalization/existence/functions of the criminal law, thus the formulation of such provisions does not reflect the principle of proportional justice for judges, and therefore, the formulation in such provisions is inconsistent with Article 28D paragraph (1) of the 1945 Constitution.

3. Whereas the effort of criminalization in the provisions of Article 96, Article 100, and Article 101 of the Juvenile Criminal Justice System Law is a form of overcriminalization because such Articles principally do not meet the conditions/criteria for criminalization because they are administrative in nature. The use of criminal law to criminalize a judge or court official constitutes the Legislators' digression/error because such criminalization is used carelessly without any clear purpose. The existence of such criminalization, to a greater extent, will result in negative impacts on the Juvenile Criminal Justice System.

4. Whereas the effort of criminalization in the provisions of Article 96, Article 100, and Article 101 of the Juvenile Criminal Justice System Law is a form of overreach of the criminal law (the crisis of overreach of the criminal law) because the application of criminal law in such provisions have overreached its authority. The criminal law should have been used to handle crimes/violations for which the perpetrators should be criminalized/punished. However, the provisions of Article 96,

Article 100, and Article 101 of the Juvenile Criminal Justice System Law have, in fact, also criminalized violations of the procedural law.

In the judicial practice, procedural violations are supervised by the Supreme Court and the Judicial Commission because such violations are categorized violations of the Code of Ethics and the Code of Conduct of Judges. The logical consequence of such violations is an Administrative Sanction.

5. Whereas criminalization of judges may be considered as an effort to restrict the power of judges in exploring, following and understanding the values of law and the existing sense of justice in the Community, as provided for Article 24 paragraph (1) of the 1945 Constitution *juncto* Article 1 sub-article (1) and Article 5 paragraph (1) of Law Number 48 Year 2009 concerning Judicial Power. Therefore, the criminal provisions for judges basically can have an impact on the decreased level of independence of judges in performing their judicial duties, thus if viewed from the context of relationships among state institutions based on the checks and balances system, such decision of the legislators is inconsistent with the concept of separation of powers in the rule of rule of law state of Indonesia as provided for in Article 1 paragraph (3) of the 1945 Constitution.

6. Whereas the Legislators should not have thought myopically (narrowly) when stipulating the provisions of criminalization for judges because judges are constitutionally obligated to be independently and impartial in the independent and impartial judicial system (fair trial). The legislators' revision of the procedural law and the substantive law of the Juvenile Criminal Justice System will improve the judicial function in providing legal protection for children rather than criminalizing judges.

7. Whereas the provisions of Article 96, Article 100, and Article 101 of the Juvenile Criminal Justice System Law are potentially qualified as articles violating the principle of "Independent Judicial Power (in the field of criminal law)", in this matter the Independence of Judges in the Rule of Law State of Indonesia which is not discriminatory in applying the Juvenile Criminal Justice System. With the formulation of such articles, the articles *a quo* are not proportional and excessive and they are automatically inconsistent with the provisions of Article 1 paragraph (3), Article 24 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) of the 1945 Constitution.

V. ***PETITUM***

Based on all arguments described above and exhibits enclosed, the Petitioners hereby request the Panel of Justices of the Constitutional Court to be willing to pass the following decision:

IN THE SUBSTANCE OF THE CASE

1. To grant the petition of the Petitioners in its entirety.

2. To declare that: Article 96, Article 100, and Article 101 of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System set forth in State Gazette of the Republic of Indonesia Year 2012 Number 153 and Supplement to the State Gazette of the Republic of Indonesia Number 5332, are inconsistent with the 1945 Constitution;

3. To declare that: Article 96, Article 100, and Article 101 of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System set forth in State Gazette of the Republic of Indonesia Year 2012 Number 153 and Supplement to the State Gazette of the Republic of Indonesia Number 5332, do not have any binding legal effect;

4. To order due promulgation of this decision in the Official Gazette of the Republic of Indonesia.

Or if the Panel of Justices of the Constitutional Court is of a different opinion, requesting for the decision to be passed by principles of what is fair and just (*ex aequo et bono*).

[2.2] Whereas to substantiate their arguments, the Petitioners presented the documentary/written evidence marked as exhibit P-1 through exhibit P-5, as follows:

1. Exhibit P-1 : Photocopy of Decision of Extraordinary National Conference of *IKAHI* Number IV/MUSNALUB-IKAHI dated April 25, 2012;
2. Exhibit P-2 : Photocopy of the Special Power of Attorney and the Identity of Principals and the Proxy;
3. Exhibit P-3 : Photocopy of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System;
4. Exhibit P-4 : Photocopy of the 1945 Constitution of the State of the Republic of Indonesia;
5. Exhibit P-5 : Photocopy of the Articles of Association/Bylaws of *IKAHI*

In addition, the Petitioner presented 4 (four) experts whose statements were heard at the hearing of the Court on January 9, 2013 and presented 2 (two) written statements of the experts in the name of **Dr. Aloysius Wisnubroto, S.H., M.Hum.,** and **Prof. Dr. Teguh Prasetyo, S.H.., Msi.,** at the hearing, that principally describe as follows:

1. Prof. Dr. Bagir Manan, S.H., MCL.

- Before the amendment, the Elucidation of Article 24 of the 1945 Constitution stated that: “Judicial power shall be independent from the government’s influence”. According to the expert, although, following the amendment, the Elucidation of Article 24 of the 1945 Constitution is not normatively applicable, the principle of “independence from the government’s influence” remains applicable because it constitutes a fundamental principle for every democratic rule of law state *(democratische rechtsstaat).* Such principle at least contains two matters: Firstly; “government is defined in a broad sense. It includes not only the executive power, but also the legislative power and other organs of the state. Secondly; the definition of “independent” is that: any form of interventions in the administration of judicial power or judicial process in a concrete case (case and controversy) is prohibited. Any stipulation, policy or act which will or may directly or indirectly influence the independent judicial power is also prohibited. The second category includes, among other things, the formulation of Laws or the existence of Laws containing the substance which may influence the independence of judicial power. The definition of influence also includes the judges’ concern or fear of accepting any consequence of their decisions.

- From various articles, Frank Cross notes at least five bases for independence of judicial power (and independence of judges).

First; *trias politica* (Montesquieu). Montesquieu wrote: "... there is no liberty, if the judiciary power be not separated from the legislative and executive. George Hamilton also expressed a similar utterance with a quite different formulation: "there is no liberty, if the power of judging be not separated from legislative and executive". Considering such expressions, *trias politica (*separation of powers*)* is particularly related to the guarantee and protection of public liberty. Moreover, the separation of powers as the method for limiting the powers is intended to prevent tyranny. Power is very tempting (greedy), Montesquieu said. Power which is too great will create tyranny. On the contrary, freedom which is too great will create anarchy. If it is so, “what is the connection between the separation of powers and the independent judicial power and the independence of judges? This is related to fairness and impartiality. Neutral judicial institutions and judges are necessary to guarantee that a legal dispute or a violation of the law may be settled fairly and impartially. Therefore, the judicial power of judiciary must be separated from the legislative and the executive or any influence from other powers. The judicial power must be separated and independent and the independence of judges must exist to guarantee neutrality, impartiality and fairness. Is the basis of the separation of powers *(trias politica)* relevant to Indonesia which is said to be not following the separation of powers? In the global development, the independent judicial power and the

independence of judges are obtained not only from the system of separation of powers. The aforementioned international institutions indicate the independence of judicial institutions also in the states which do not apply the system of separation of powers. Similarly, there is no relevance between the separation of powers and the civil law or common law. There are other bases for the independence of judicial power and the independence of judges (as described below). Second; the doctrine of rule of law state. It is common and acceptable – scientifically and practically – that the independent judicial power and the independence of judges are one of the elements of a rule of law state even though as a doctrine, a rule of law state and the independent judicial power and the independence of judges are two different doctrines arising from different backgrounds and reasons. The concept of the limitation of powers which becomes the main basis for the doctrine of rule of law state requires a neutral third party (the third neutral party) to settle any case or dispute between the power and the people (individuals). In addition to passing decisions based on the law (unless there is legal vacuum, unclear law or inconsistency with justice), the judicial power and judges must also pass decisions independently and free from any form of influence or pressures from other powers (forces) in order to guarantee objectivity and justice. Third; influence (pressures) of public opinions or the will of the majority.

- Judges must only pass decisions based on the law. As Supreme Court Justice Steven (United States) said: the decisions of judges must be based on the precedents (The United States follows the precedent system) instead of polling of public opinions. Judges must not only protect the people's interest (the majority), but also they must protect individuals and the minority. Public opinion shall never sacrifice the rights of individuals and/or the minority. Under certain circumstances, majority opinion is not identical to the truth and sense of justice. *vox populi vox dei* means not only the majority opinion. The voice of an oppressed person or minority whose rights are arbitrarily revoked or who are arbitrarily deprived of their rights is also God's voice (always demanding for truth and justice). Public opinion manipulated or intentionally built is not always the truth and justice, but it is a manipulation of the desires of groups having certain interests or certain pressure groups. The protection from denial of the rights of individuals or the minority in inappropriate and unfair manner can be provided, and the abuse of the majority can be prevented only if there are the independence of judicial power and the independence of judges. Fourth; avoiding the pressures from the plaintiff or prosecutor. It is likely that a plaintiff or prosecutor or a group of plaintiffs or prosecutors and especially the ruler have very strong pressures (political, economical, social, etc.) to influence or impose their

desires upon courts or judges. During the reign of the Soviet Union, there was an expression of *telephone justice* which means that a new judge would only decide upon a case after obtaining instructions from the communist party as the single ruling party. Independent judicial power and independent judges are necessary to guarantee fairness, impartiality, justice and due process of law. Fifth; legal constraints. Legal constraints (constraints of law) are like a double-edged sword. On the one hand, law is a means of control to prevent any arbitrary action or for the legal certainty. In this connection, judges must (are obligated to) pass decisions according to the law, namely the law which has existed before the case occurs (the principle of *nullum delictum*). On the other hand, the existing law can be restrictive if such law is arbitrary. Judges who should pass decisions in a correct and fair manner become wrong and unfair because they are forced to pass decisions according to the law which is substantively arbitrary and unfair. Can this happen? It is very likely, namely if the Legislators intentionally make an arbitrary Law including a Law which denies or reduces the independence of judicial power or the independence of judges. How to prevent it if there is an arbitrary Law or a Law which intentionally reduces the independence of judicial power and or the independence of judges? At least, two instruments may be used:

(1) A doctrine says that judges are not the mouth (funnel) of Laws (*bouche de la loi, spreekbuis van de wet,* the mouth of the laws*).* Judges have the right to refuse the application or to disregard an arbitrary or unfair Law or at least to discover the laws (interpretation, construction, etc.) to find correct and fair decisions.

(2) Judicial review institution

Judicial review enables courts or judges to get away from the chains of laws. Judges may disregard, declare invalid or nullify a Law for the reason that such Law is inconsistent with the Constitution.

- In addition to the bases noted by Frank Cross above, the tradition of respecting and upholding the independent judicial power and the independence of judges is also influenced by various factors, namely: tradition of democracy will grow and will be sound if it is defined not only as the form or type of power, but also as a social and cultural institution. In the tradition of democracy, respecting and guaranteeing the independence of judges constitute an inseparable part of upholding the law, but it does not mean that judges can do no wrong. They can make errors when conducting hearings. However, judges cannot bear the consequence (such as sanctions) of their decisions because it is a general consensus (an effort to guarantee the realization

of the independence of judicial power and the independence of judges). It means that the decisions of judges are final and cannot be challenged *(onschendbaarheid, inviolity)*. However, it does not mean that such decisions cannot be corrected or revised. Thus, it is the functions of legal remedies and the hierarchical structure of judicial institutions, and it is also the definition of supervision over the decisions of judges. Only in the authoritarian power system or under authoritarian rulers, judges may be punished or imposed with the consequences when their decisions are considered wrong, especially if they use different opinions on the definition of a principle of law, the different ways of interpretation, or the reason that judges are too legalistic, judges pay less attention to the sense of justice or public opinion. In fact, – anywhere in this world –different opinions, different principles which are followed, different ways of using legal reasoning may not become the reasons for correcting decisions, nullifying decisions, rejecting or accepting legal remedies. It must be declared that such reasons cannot be accepted (*ontvanklijkverklaard, non-admissibility),* because they are not the reasons for correcting the decisions of judges. The decisions of judges may corrected only if there are evidently errors in the legal facts being used, another person's errors, errors in the application of the principles of law, or errors in defining the law being applied which result in impairment or

injustice to the justice seekers. However, - once again – judges or the tribunal may not bear certain consequences.

- Supervision is often defined as power or authority to interfere or to intervene (*interference, interfeer*) in the scope of authorities or powers of other institutions or powers. The separation or distribution of powers are not merely the separation or distribution of functions, but also the separation or distribution of authorities or powers in the field of state administration which is called the state distribution of power *(staatmacht verdeling).* Each of them has an independent scope of power or scope of authority *(machten sfeer, bevoegdheid sfeer)* which not be intervened by any other powers. Existence of the authority of supervision does not mean that intervention is allowed. Supervision only functions to indicate that there is an error in policies or actions, but it is not authorized to take actions. Doing this would mean unifying the function of supervision and the function of action into a single function which may lead to arbitrariness *(willekeur),* This is prohibited in the organization system which is democratic and based on the law.

- As written by Frank Cross, the independence of judicial power and/or the independence of judges are not without limits. The independence of judicial power and the independence of judges are defined as the independence or the freedom in the judicial process comprising: 1) freedom from any pressure, intervention

and fear when examining and deciding upon cases, 2) no party may reject to implement the decisions of judges. The decisions of judges are laws which must be obeyed and implemented, 3) Judges cannot be sued or claimed for the reason that their decisions are wrong or impair any other party, and 4) Judges may not be imposed with an action (such as demotion, dismissal) because of their decisions.

- In this connection, please allow the expert to quote from the book written by Prof. Gerhard Robbes from Germany which is translated into English: *An Introduction to German Law. 2003,* pp. 27-28:

  "The Judges are subject to nothing other than the requirements of law and justice. This principle of independence of the judiciary is one of the central achievements of the rule of law (Rechtsstaat). The judge is independent in a double sense ... Firstly, nobody particularly not the government or the administrative apparatus, can dictate to the judge what the decision in the case should be. Secondly, the exercise of his judicial function can and may not have personal consequences for him.

- In this case of the petition being heard, the expert seriously requests for His Excellency the Chief Justice and Panel Members to pay attention to the second meaning, namely that judges may not at all bear a consequence such as a criminal

sanction in or when performing their judicial functions. The principle explained by Prof. Gerhard Robbers is applicable not only in Germany, but also in Indonesia whose constitution expressly *(expressis verbis)* states: "The State of Indonesia shall be a state based on the law" (the 1945 constitution, Article 1 paragraph 3).

- Although the Legislators may say that: “they are exercising the people’s sovereignty” and therefore the Law which is formulated has meet the requirements for democracy”, the exercise of the people’s sovereignty may not at all violate or may not be inconsistent with the other principles of the 1945 Constitution, namely the principle of rule of law state which, among other things, essentially guarantees the independent judicial power and the independence of judges. Democracy (people’s sovereignty) and rule of law state cannot work alone, but they work as an integrity, and thus they are called democratic rule of law state *(democratishe rechtsstaat).*

2. Prof. Dr. H. M. Laica Marzuki, S.H.

- Following the Third Amendment to the 1945 Constitution, judicial shall be exercised by a Supreme Court and a Constitutional Court, both carrying out the constitutional mission of the independent judicial power. The independent power, which is inherent in the autonomous power (*selbstandig*), means that it is

free from the influences of the Government's power and any power.

- The independent judicial power, in fact, substantively carries out the autonomy (*selbstandig*) in itself. The leaders of judicial power including the immediate superiors may not intervene in a case being heard by an inferior judge. A judge – during good behavior – is guaranteed to independently hear and decide upon a case according to his/her belief.

- Judges exercising the independent judicial power may not suffer from the syndrome of fear, worry or physical and psychological threats when carrying out the judicial mission to uphold law and justice.

- Judges shall have the right (and the obligation) to obtain the guarantee, protection, and legal certainty in carrying out the constitutional mission of judicial power as an independent power. Indonesia is a Rule of Law State which *in casu* guarantees judges to carry out the mission of judicial power as an independent power.

- The legislators may not set the rule of law (*wet, gesetz, droit*) which will threaten, frighten or criminalize judges when they hear and close a case based on their belief. The belief of judges considering (*ten aanzien van het recht*) a case, by law and

justice, may not be imprisoned in the syndrome of fear and doubt and the sanction of criminalization.

- However, several articles in Law Number 11 Year 2012 concerning Juvenile Criminal Justice System petitioned for judicial review in this case, contain the syndrome of fear and doubt and even the sanction of criminalization when hearing and deciding upon a case based on their belief;

- The examination of cases resulting in decisions is a series of process. The whole process is the product of the expression of free will. It may not be restricted by fear, anxiety, duress by threat because it will constrain the judicial administration for upholding law and justice. Three articles of Law Number 11 Year 2012 petitioned for judicial review are unconstitutional and violate the 1945 Constitution.

3. Prof. Dr. Romli Atmasasmita, S.H., LLM.

- The Juvenile Criminal Justice System is a Criminal Judicial Sub-System as the “umbrella-act”, so that all provisions of the Juvenile Criminal Justice System Law may not be inconsistent with the principles of general law set forth in the Criminal Judicial Sub-System as set forth in Law Number 8 Year 1981 concerning Criminal Procedure Law;

- The Juvenile Criminal Justice System positions a Child under 18 Years of age as a legal subject and an object of regulation of Law Number 11 Year 2012 the purpose of which is to position a child who has allegedly committed a criminal act not to be equally treated with an adult. The emphasis on the special regulation for a child who has allegedly committed a criminal act is on the aspect of legal treatment instead of the criminal aspect. The criminal aspect for a child found guilty of committing a criminal act has been regulated in the Indonesian Criminal Code, namely by imposing a primary criminal sanction which should be reduced by a third and a maximum criminal sanction of 15 years (Article 45 *juncto* Article 47 of the Indonesian Criminal Code). In addition to being subject to punishment, a judge may put such child in the education center for children under the supervision of the government (Article 46 of the Indonesian Criminal Code).

- The reasons for the existence of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System are firstly, the provisions of Law Number 3 Year 1997 concerning Juvenile Court have not been adequate, and secondly, the provisions of procedural law in Law Number 8 Year 1981 have not been fully adequate and have not considered the Rights of the Child as included in the Convention on the Rights of the Child ratified by Indonesia with Presidential Decree Number 36 Year 1990).

- The UN Convention on the Law of Treaties (UNCLT) Year 1969 has included the provisions which do not allow every ratifying state (state party) not to implement the provisions of the convention by reason of inconsistency with its national legal system. Indonesia has implemented the Convention on the Rights of the Child ratified under Presidential Decree Number 36 Year 1990, and has included it in Law Number 11 Year 2012 concerning Juvenile Criminal Justice System. In fact, the National Commission on Child Protection has been established to affirm the protection of the Rights of the Child so that it may be confirmed that Law Number 11 Year 2012 concerning Juvenile Criminal Justice System has been in line with the provisions of the Convention on the Rights of the Child which are only regulatory in nature. However, no provision of such convention obligates every State Party to impose a criminal sanction on law apparatuses who have not performed their obligations to protect a child who has committed a criminal act. The convention only imposes the obligations on each State party to draft the national Law in accordance with the purposes and objectives of, and also consistently with, the intended convention. In this context, the implementation of each international convention including the Convention on the Rights of the Child and other international treaties may not be inconsistent with or must be in line with the provisions of the

International Convention or International Treaty, namely, among other things, the Bangalore Principle of Judicial Conduct (Resolution of ECOSOC 2006/23 dated July 27, 2006).

- The history of the creation of the Bangalore principles for the Conduct of Apparatuses of Judicial Power began with the session of Supreme Court Chief Justices and senior judges of UN member states in April 2000 in Vienna during the occasion of the Tenth UN Congress on “The Prevention of Crime and the Treatment of Offenders”. Decisions of the intended congress are, firstly, “the principle of accountability demanded that the national judiciary should assume an active role in strengthening judicial integrity by effecting such systematic reforms as are within judiciary’s competence and capacity”; secondly, “it is recognized the urgent need for a universally acceptable statement of judicial standards which, consistent with the principle of judicial independence would be capable of being respected and ultimately enforced at the national level by the judiciary, without the intervention of either the executive or legislative branches of the government”. Subsequently, with such agreement, the congress participants confirmed that the organs of judicial power must take strategic measures to gain and maintain the respect of the people for them.

- Referring to the results of agreement which have been collectively developed by the Supreme Court Chief Justices

around the world and the senior judges above, it is clear that there is no desire at all to impose a punishment or a criminal sanction upon parties exercising judicial power including judges except for sanctions against any violation of the code of ethics during the performance of their duties and the exercise of their authorities. Judges may only be imposed with a criminal sanction if they are convincingly found guilty of committing a criminal act. Such joint agreement, in fact, obligates parties exercising judicial power to continue maintaining the integrity and to be freed from any intervention from either the executive or the legislative. Also referring to such agreement, I am of the opinion that the provisions threatening judges including investigators and public prosecutors with punishment in Law Number 11 Year 2012 have overreached the limits of tolerance and appropriateness constituting the international agreement on the duties, authorities, and obligations of a judge including those exercising judicial power. Indeed, the provisions of criminal sanctions in Law Number 11 Year 2012 concerning Juvenile Criminal Justice System have been inconsistent with the international standards for the conduct of Judges.

- Article 24 paragraph (1) the Fourth Amendment to the 1945 Constitution, in Chapter IX concerning Judicial Power, states that judicial power shall be independent power to organize judicial administration to uphold law and justice. Two main

sentences in such articles are that, the first sentence, *judicial power shall be independent power*; means that the judicative pillar may not be influenced or intervened by the pillars of other powers, either the executive power or the legislative power. The second sentence, *to organize judicial administration to uphold law and justice*, means that there is no influence or intervention of the pillars of other powers in the judicative power in order that judges may materialize law and justice without being afraid of any form of threats including criminal sanctions and moreover, Indonesian Judges pass decisions based on their belief in the One Almighty God.

- It may be said that the aforementioned Chapter IX Article 24 paragraph (1) of the 1945 Constitution is in line with the principle of "Independence of the Judiciary" as set forth in the UN Basic Principles on the Independence of the Judiciary adopted by UN General Assembly under Resolution Number 40/32 dated November 29, 1985. Principle 1 states that the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. Principle 2 states that:

  "*The Judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interferences, direct or indirect from any quarter or of any reason*". The second principle better confirms our belief that the

provisions of Article 96, Article 100, and Article 101 of Law Number 11 Year 2011 concerning Juvenile Criminal Justice System are clearly inconsistent with the universally recognized standards of the independence of judicial power. The sentence *"direct or indirect from any quarter or of any reason" confirms that the provisions of the Law a quo have met the categorical formulation of actions, restrictions, improper influence, inducements, pressures, threats or interventions in the aforementioned universal principle of the international judicial power.*

- The universal standards of the independent judicial power above have also been clearly set forth in the code of conduct of judges as stipulated in the Bangalore principles of judicial conduct (2007) and have been stipulated as the Code of Conduct of Judges in the system of judicial power in Indonesia by the Joint Resolution between the Chief Justice of the Supreme Court of the Republic of Indonesia and the Chief of the Judicial Commission Number 047/KMA/SKB/IV/2009 concerning the Code of Conduct of Judges as the concretization of the coming into effect of Law Number 22 Year 2004 as amended by Law Number 18 Year 2011 concerning Judicial Commission, whose duties and authority are to supervise the conduct of judges in the Indonesian Criminal Judicial System and the Indonesian Juvenile Criminal Justice System.

- The general legal principles which are applicable in either the system of civil law or the system of common law differentiate between any violation of the code of ethics and the code of conduct which contains obligations and any violation of the repressive criminal provisions in the form of criminal sanctions. The Indonesian Criminal Code has regulated the types of sanctions, namely punitive sanctions (*straaf*) and measures (*matregels*) and both types of sanctions are intended for any person who has violated the provisions of the Indonesian Criminal Code. The Indonesian Criminal Code does not impose sanctions for any violation of any obligation (obligations, in English; *plicht*, in Dutch) in the procedural process. The procedural process is included in the domain of administrative law, and thus, the appropriate sanction is an administrative sanction instead of a criminal sanction because criminalization is only applicable to acts considered disgraceful according to the community. Therefore, such acts are reasonably criminalized. Meanwhile, any violation of an obligation (*plicht*) is not, *mutatis mutandis*, a disgraceful act unless such act contains criminal elements such as bribery, embezzlement, or fraud or corruption.

- If it is categorized according to the gravity of an act, any act violating an obligation is considered as a minor violation and even in comparison, any act violating the criminal law is considered as a serious violation. Referring to this statement

and in the context of criminal sanctions as set forth in the Law *a quo*, the imposition of criminal sanctions for a violation of an obligation is extremely excessive and even it reflects the measure and policy of "overcriminalization" or "criminalization beyond the limit of fairness" and it is also an a legal policy with "overpenalization" nature. Both "overcriminalization" and "overpenalization" are inconsistent with the fundamental legal principles, the principle of proportionality, and the principle of subsidiarity, as well as the principle of "due process of law" and the principle of "fair and impartial trial" which are universally recognized.

- The imposition of criminal sanctions for any violation of an obligation stipulated by a Law may not be considered merely as "overcriminalization" or "overpenalization", but also it reflects the form of intervention or affects the integrity, credibility and capability of the independent judicial power. From the aspect of criminology, the provisions of sanctions against the parties exercising judicial power tend to constitute a process of stigmatization of a Judge's position and dignity in the judicial process in Indonesia, leading to the challenge to the dignity and position of judicial power which is independent and recognized in the 1945 Constitution.

- The purpose of judicial power which is free from any influence or intervention from other powers is for and for the sake of

objectivity of a Judge in discovering substantive truth and formal truth in examining and deciding upon a case. In the context of criminal sanctions in Law Number 11 Year 2012 concerning Juvenile Criminal Justice System, it can be said that the focus on the protection and maintenance of the rights of the child in the Juvenile Criminal Justice System through criminal sanctions as set forth in Article 96, Article 100 and Article 101; are not the appropriate legal solution because the purposes and objectives of the Juvenile Criminal Justice System Law Year 2012 are to strengthen the legal protection for every child who has legal issues.

- The accountability mechanism for the elements of Juvenile Criminal Justice System based on Law Number 11 Year 2012 becomes biased because the provisions of criminal sanctions set forth in such Law have characteristics which are diametrically opposed to the purposes of Law Number 11 Year 2012. Moreover, they are also inconsistent with the purposes of conventional criminalization, namely, firstly, retribution; secondly, prevention, and thirdly, the combination of retribution and prevention. Law Number 11 Year 2012, indeed, prioritizes recovery to the original condition instead of retribution (Article 1 sub-article 6) or the restorative justice which is significantly inconsistent with the retributive justice prioritizing a criminal sanction as the only solution in the criminal law.

- In order to achieve the purposes of the restorative justice, Law Number 11 Year 2012 concerning Juvenile Judicial System has regulated the provisions for diversion which is defined as “the settlement of juvenile cases from the process of criminal judiciary to the process of the out of criminal judiciary”, 5 (five) purposes of which contain the non-repressive characteristics, namely only prioritizing the approach for the child’s welfare (Article 6).

- Referring to the characteristics and mechanism of the juvenile criminal judicial process in Law Number 11 Year 2012 above, it is clear that there is a “*contradiction in terminis*” in the regulation of such Juvenile judicial process because on the one hand, Restorative Justice must be prioritized in treating a child facing the Juvenile Criminal Justice System for the child’s welfare (“non-repressive” in nature), while on the other hand, the Law imposes obligations on the elements of the Juvenile Criminal Justice System and Judges and also it imposes criminal sanctions which are in fact “repressive”, as they are unnecessary and excessive. The question is how a judge as the determining element in the Restorative Justice performs his/her obligations impartially without being worried and afraid of and without always feeling threatened by, repressive sanctions; while referring to the provisions of Article 8 paragraph (3) *juncto* Article 8 paragraph (1) *juncto* Article 9 and Article 10 paragraph

(2) of Law Number 11 Year 2012; it is clear that success in the diversion process depends not only to the elements of Judges or other law enforcers, but it also depends on other elements, namely, the research results of the correctional institution, family and community support, perpetrators and victims. In addition to such determining elements, factors categorized as criminal acts and recidivistic factors [Article 7 paragraph (2) and Article 9 paragraph (1) sub-paragraph a].

- Based on the explanations from number 1 up to number 16 above, it can be concluded that the existence of the provisions of Article 96, Article 100, and Article 101 of Law Number 11 Year 2012 is inconsistent with Article 24 paragraph (1) and Article 28G paragraph (1) of the 1945 Constitution. Article 24 paragraph (1) of the 1945 Constitution confirms that judicial power shall be independent power to organize judicial administration to uphold law and justice. However, in order to fulfill his/her duties and responsibilities in accordance with the 1945 Constitution, a Judge as a human being needs the protection from being threatened whether to do or not to do something, which constitutes the human rights (Article 28G paragraph (1) of the 1945 Constitution. The intended Human Rights in this provision must be defined as *"the human rights of a Judge to examine and decide upon a case impartially and freely from any intervention or influence or in any condition".*

4. Dr. Maruarar Siahaan, S.H.

- The Indonesian legal system has not clearly regulated the matters which have developed regarding the responsibility of judges if they, in performing their judicial duties, violate the law in the frame of constitutional concept. Although it is not written and as the implementation of the principle of equality before the law, no one rejects that a judge who receives a bribe from a party or in the Indonesian law, commits corruption to decide upon a case, shall face legal charges. In fact, the current practice indicates that with the existence of any serious violation in performing the judicial duties, the Honorary Council of Justices may take drastic actions of imposing serious sanctions, namely dismissal as a punishment for such violation. The practice which has clearly occurred in our legal life is that a judge found guilty of taking a bribe or committing corruption is heard and imposed with criminal sanctions. However, it never occurs that a judge is criminally responsible for an error which is minor and unintentionally committed in good faith when such judge performs his/her judicial functions. In fact, in such right, the constitutional principle demands such judge to be protected from such responsibility. In order to guarantee the independence of judges in performing their judicial authorities, as the constitutional principle, judges must be free from being worried about such legal process.

- Whereas the feelings of dissatisfaction and the loss of trust in the performance of judges constitutionally have created institutions, duties of which are, in fact, intended to carry out the external supervision. Law Number 22 Year 2004 as amended by Law Number 18 Year 2011 has explained Article 24B of the 1945 Constitution concerning the adoption of one judicial commission. Through a process of serious conflict between two constitutional principles, namely the independence of judges and justice, the amendment to the Law on Judicial Commission has regulated the supervision over judges which in fact, includes the investigation involving the interception of judges' telephone conversations. The supervision carried out to maintain the judges' honor, even though it is carried out in the domain of the code of ethics and the code of conduct, may in fact include a wide field which indicates any violation committed inside and outside of official services. Sanctions imposed because a violation is evidently committed are, according to the weight of its violation, mild sanction, medium sanction up to severe sanction.

- Whereas the Judicial Commission Law, the Supreme Court Law, and Laws of the 4 (four) jurisdictions do not regulate at all any system of a judge's personal civil and criminal responsibility for faults committed in performing his/her judicial duties, except for disciplinary responsibility. A Judge or a Supreme Court Justice

may be dishonorably dismissed during his/her term of office if such Judge or Supreme Court Justice:

a. is criminalized because he/she is found guilty of committing a criminal act based on a court decision having permanent legal force;

b. commits a disgraceful act;

c. fails to perform the obligations in performing his/her official duties for 3 (three) consecutive months;

d. violates the oath/pledge of office;

e. violates the code of ethics and/or the code of conduct of judges.

- All sanctions against any disciplinary violation in such Law can be seen as the forms of judges' accountability, but such Law does not contain at all articles or norms regulating such violation as a criminal act which is imposed with a criminal sanction upon judges through the process of criminal procedure law.

- Whereas viewed from the civil accountability which includes any compensation claim because of the decisions of judges violating the rights of one of the parties having a case, it seems clear – as it also occurs in many legal systems which provide legal remedies to examine or review the decisions of inferior judges,

legal remedies such as appeal, cassation, and review are considered as adequate instruments to maintain it. On the one hand, if the decisions passed by a judge are decisions made because such judge takes a bribe and commits corruption, the criminal responsibility as indicated in the practice may be used without any doubt. The Law on the Eradication of the Criminal Acts of Corruption and the Indonesian Criminal Code are equally applicable to such judge.

- The inclusion of Article 96, Article 100 and Article 101 of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System which prosecute Judges criminally because they fail to make diversion in juvenile cases, is the regulation which seems to be outside of the constitutional system and also outside the spectrum of the concept of the Independence of judges which positions the independence of judges as one of the constitutional principles which must be guaranteed. The unclear concept followed by the legislators by including articles which criminalize judges who fail to perform their duties within a stipulated period of time related to diversion, is a matter which can be less understood whether it is a form of accountability which means supervision, and how to see it from the aspect of constitutional norm of the universal practice followed by the world. Such articles demand compliance of judges with the procedural law and the timely dispute settlements which may be

seen from and achieved by the mechanism of accountability in the form of supervision in various effective and efficient forms.

- Whereas from the aspect of concept and the scope of guarantee of independence of judges, intended for giving space for impartial attitude of judges, one imposition with a criminal sanction upon the performance of a discretion which sometimes needs mature wisdom and data which is not obtained within a short time and which needs a deep thought to draw conclusions within a period of 1 (one) week. Besides, it is the thought and sanction outside of the system and the spectrum of the independence of judges as seen from its substance. It is in fact, inconsistent with the constitutional principle not to make any intervention which has direct and indirect influence, such as inducements, pressures, duress, threats, or retribution because of certain political or economical interests of any party, with rewards or promise of rewards such as the benefit of official position, economic benefit or other forms. The intended intervention includes intervention from the executive, the legislative and any party, even in the form of regulation in the Law. Although such provisions are instruments used to control judges, such regulation is inconsistent with the constitutional provisions intended to guarantee the independence of judges in performing their judicial duties. Lack of trust must be considered in the formulation of the provisions for supervision, but the

constitutional form cannot be overreached. Without reducing the purpose of such supervision in the control and supervision which is more consistent with the constitution, it must be confirmed that the thinking frame and the unconstitutional instruments must be avoided. The Law on judicial power, the Supreme Court Law and four Laws on four jurisdictions in fact regulate all sanctions against any disciplinary violation in such Law as the forms of disciplinary accountabilities of judges, but such Laws do not at all include articles and norms regulating such violation as a criminal act imposed with a criminal sanction upon judges. The Juvenile Criminal Justice System Law, by criminalizing a violation of judges' obligations through the process of criminal procedure law, deviates from the frame of constitutional concept of independence of judges which must be protected based on Article 24 paragraph (1) of the 1945 Constitution.

- The independence of judges for the purpose of obtaining impartiality in performing their judicial duties must be protected and guaranteed. The guarantee of immunity for judges is absolutely no longer applicable, but it becomes a consideration in regulating accountability proportionally.

- The regulations of the supervision and the imposition of sanctions of criminal responsibilities in the event of bribery and discipline have been relatively sufficient so that the problem is

the effective implementation which does not violate the corridor of the constitution;

- Article 96, Article 100 and Article 101, of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System are regulations which are outside of the frame of the constitutional concept and which are inconsistent with the 1945 Constitution.

5. Prof. Dr. Teguh Prasetyo, S.H., MSi.

- The Juvenile Criminal Justice System is –the Criminal Judicial Sub-System which is the primary Law, and thus all provisions of the Juvenile Criminal Justice System Law may not be inconsistent with the legal principles as set forth in the Criminal Judicial System as regulated in Law Number 8 Year 1981 concerning Criminal Procedure Law.

- The Juvenile Criminal Justice System treats a child having specific legal issues differently compared to an adult. Handling a child is focused more on such child's future which is a treatment instead of punishment.

- In its development, Law Number 3 Year 1997 concerning Juvenile Court is no longer adequate because it has not comprehensively given full legal protection for a child having legal issues as set forth in the Convention on the Rights of the

Child ratified with the Presidential Decree Number 36 Year 1990.

- The provisions for criminal sanctions against judges, investigators and public prosecutors as regulated in Law Number 11 Year 2012 concerning Juvenile Criminal Justice System, particularly Article 96, Article 100 and Article 101 are inconsistent with the provisions of Article 24 paragraph (1) of the Constitution of the State of the Republic of Indonesia stating that: *judicial power shall be independent power to organize judicial administration to uphold law and justice*, while paragraph (2) states that: *"Judicial power shall be exercised by a Supreme Court and its inferior courts in the jurisdiction of general courts, the religious affair courts, the military tribunal, the state administration courts, and by a Constitutional Court"*.

- The criminal sanctions set forth in Law Number 11 Year 2012, particularly the provisions of Article 96, Article 100 and Article 101 are overcriminalization and overpenalization constituting the forms of interventions in the independent judicial power.

- The imposition of criminal sanctions upon the enforcement of formal criminal law through the medium of criminal law has ignored the constitutional rights of judges acting as the parties exercising the independent judicial power because in performing their judicial duties, judges are demanded to do 3

(three) things: Firstly, to implement and enforce the law in line with the principle of legal certainty; secondly, to implement and uphold justice in line with the principle of legal certainty of just laws; thirdly, to explore, follow, and understand legal values and sense of justice existing in the community. Any violation of the formal criminal law is included in the domain of administrative law, and thus, the appropriate sanction is a administrative sanction instead of a criminal sanction.

- The international standards as set forth in the UN Basic Principles on the Independence of the Judiciary were adopted by the UN General Assembly with Resolution Number 40/32 dated November 29, 1985, principle I of which states: the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. According to the international standards, the imposition of criminal sanctions as regulated in the provisions of Article 96, Article 100 and Article 101 is inconsistent with the universally recognized standards for the independence of judicial power.

- Based on the explanations in number 1 up to number 7 above, it can be concluded that the provisions of Article 96, Article 100 and Article 101 of Law Number 11 Year 2012 are inconsistent with Article 24 paragraph (1) of the 1945 Constitution stating that: judicial power shall be independent power to organize judicial administration to uphold law and justice.

6. Dr. Aloysius Wisnubroto, S.H., M.Hum.

- The independent judicial power is principally an integral part of the existence of a rule of law state to achieve its purposes as set forth in the Preamble to the 1945 Constitution of the State of the Republic of Indonesia. The independent judicial power in organizing the judicial administration is required only to uphold law and justice based on the One Almighty God.

- The existence of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System (hereinafter referred to as the Juvenile Criminal Justice System Law) is a part of the Indonesian commitments as a state party to the Convention on the Rights of the Child which was ratified in 1990. The spirit contained in the Juvenile Criminal Justice System Law is the principle of legal protection for the child having consequences toward the obligation to give special protection for the child having legal issues. One of the purposes of special protection in the Juvenile Criminal Justice System Law is to prioritize the diversion approach in the process of case settlement of a child having legal issues and the very strict restriction of coercive remedies and sanctions in the form of deprivation of independence of a child having legal issues. The special protection in the juvenile judicial system prioritizing the approach of restorative justice is very important so that special protection

is regulated in a separate part in the Juvenile Criminal Justice System Law which obligates every court official to implement it. (namely: Article 7 paragraph (1), Article 19 paragraph (1), Article 33 paragraph (3), Article 34 paragraph (3), Article 35 paragraph (3), Article 37 paragraph (3), Article 38 paragraph (3), and Article 62 of the Juvenile Criminal Justice System Law). In fact, in order to enforce such articles in the part of the Juvenile Criminal Justice System Law regulating the criminal provisions, articles 96-101, the substance of which is to impose criminal sanctions upon any court official deliberately not performing not performing the obligations related to the special protection for the child in the process of case settlement involving children.

- In relation to the principle of independent judicial power as regulated in Article 24 paragraph (1) of the 1945 Constitution, the problem is not only about the existence of rules having the substance of special protection for the child in the juvenile judicial system and criminal sanctions as its enforceable instrument, but the more serious issue is the concept of criminalizing judges not implementing the provisions of articles related to the procedural law.

- In the judicial system in Indonesia, the independent judicial power in organizing the judicial administration must be exercised based on the provisions of the Law, but implementing such provisions of the Law is not identical to being absolutely bound

to the contents of articles in the Law being implemented. If it is related to the philosophical doctrine of the independence of judges, the concept of the independence of judges in Indonesia is closer to the doctrine of '*interessanjurisprudenz*', which is a 'hybrid' doctrine of the doctrine "*indeenjurisprudenz*" (legism) and '*freirechtslehre*- (free law theory). In the doctrine of *interessanjurisprudenz,* judges seek and discover justice within the limits of the rules as stipulated by implementing them creatively in each concrete case. It means that judges must be provided with freedom to interpret the provisions of the Law by discovering broad meanings and deepest essence in it in order to uphold the law justice which is the mandate of the 1945 Constitution.

- The constitutional foundation of the independent judicial power as regulated in Article 24 of the 1945 Constitution is confirmed in the Judicial Power Law, among other things, in Article 1 sub-article 1 of Law Number 48 Year 2009 stating that: "*Judicial Power shall be independent power to organize judicial administration to uphold law and justice based on Pancasila and the 1945 Constitution of the State of the Republic of Indonesia".* Furthermore, Article 5 paragraph (1) of Law Number 48 Year 2009 states that in order to exercise the judicial power, judges are obligated to explore, follow and comprehend legal values and sense of justice existing in the community. The spirit of rule

can be explored from the explanation of such judicial power, namely that judges as court officials are authorized to settle any case in a fair manner and must be provided with freedom room to discover the law. Such spirit of rule is not only limited to which is contained in the laws and regulation. If necessary, judges must explore the law existing in the community in order to achieve justice. The policy of criminal law formulated in Article 96, Article 100 and Article 101 of the Juvenile Criminal Justice System Law is inconsistent with the spirit in the elucidation of the definition of judicial power because it imposes criminal sanctions upon judges for not implementing certain articles in the Juvenile Criminal Justice System Law. In this matter, the independence of judges to discover the law fulfilling the sense of justice for the community will be narrowed or even restricted because of criminal sanctions against judges for not implementing an article related to the procedural law.

- It is in line with the development of human civilization affecting the history of thought, and thus to face problems arising in the modern community which enters the signs of the postmodernism “era” which is more complicated, and then the legal-positivistic law is considered obsolete. Currently, various models of new legal thoughts appear to criticize and offer solutions for the limitation of the modern law model which is legal-positivistic in nature, namely, among other things, the concept of progressive

law introduced by Prof. Dr. Satjipto Rahardjo, S.H. In the judicial perspective, the concept of progressive law is considered in accordance with the principle of the independence of judges in upholding the law fulfils the sense of justice for the community. In order to achieve substantial justice, a judge must work harder than implementing the rule of positive law, but such judge must be able to make a breakthrough as “a creator of law” to make decisions which fulfill the sense of justice. The existence of Article 96, Article 100 and Article 101 of the Juvenile Criminal Justice System Law, the contents of which criminalize judges not implementing the rule of positive law textually, is the concrete form of the narrow legal positivistic model, thus it is inconsistent with the spirit of progressive law. The diversion approach based on the restorative justice in the settlement of criminal cases; especially cases faced by the child having legal issues, is consistent with the spirit of progressive law. In fact, the diversion approach and restorative justice are very consistent with the method of legal practice requiring basic considerations which are holistic in nature as the characteristics of the progressive law. The problem is not about the obligations of judges to make diversion as regulated in Article 7 paragraph (1) of the Juvenile Criminal Justice System Law, but it focuses more on the criminal sanctions against judges not implementing articles of the rule of positive law which means that it enforces judges to implement the law mechanically. This mechanical

method of legal practice is inconsistent with the principle of the progressive law.

- Article 96 of the Juvenile Criminal Justice System Law enforces police force, public prosecutors and judges to implement Article 7 paragraph (1) of the Juvenile Criminal Justice System Law, namely making the effort of diversion in handling cases of a child who has legal issues. If the politics of law does not consider the aspect of social reality for the police force, public prosecutor's office and the judiciary, it will be counterproductive in the implementation of fast, simple and cost-effective as well as accurate and careful judicial administration. The effort of diversion to achieve restorative justice is conceptually very good for improving the quality of the settlement of criminal cases particularly related to a child having legal issues. However, the implementation of such concept needs the preconditions:

  a. Capacity of Human Resources of court officials; and

  b. The conflictual condition of the parties involved in the cases of a child having legal issues, which is greatly affected by socio-cultural factors.

  The enforcement of the implementation of Article 7 paragraph (1) *juncto* Article 96 of the Juvenile Criminal Justice System Law without including the preconditions required for implementing the concept of diversion and restorative justice will only result in the

method of legal practice which only prioritizes procedural formality. Such matter will not bring benefits at all and indeed, it will have counterproductive impacts because it will only lengthen the process of settlement of cases. Thus, it violates the rights of a person to obtain process of settlement of his/her cases in a fast, simple and cost-effective manner. One of the principles of the exercise of judicial power as stated in Article 2 paragraph (4) of Law Number 48 Year 2009 concerning Judicial Power is that: the judiciary shall be exercised in a simple, fast and cost-effective manner.

- According to the Expert, the imposition of the obligations to make diversion in the process of settlement of juvenile criminal cases upon judges using the instruments of criminalization or penalization is not appropriate, especially if it is related to the working capacity and competence factors of the law enforcement institutions. The best way is to prepare the human resources such as police forces, public prosecutors, and judges in order to have good knowledge, competence and skills to settle criminal cases in a qualified manner by using the diversion approach which refers to the principle of restorative justice. The decisions to develop and use the method for the settlement of cases as well as to decide and determine whether the conventional approach or the diversion approach will be used, are fully left to police forces, public prosecutors, and judges. The

progressive police forces, public prosecutors, and judges who have full capacity and comprehension about the benefits of diversion in settling criminal cases without imposing criminal sanctions or other sanctions, certainly will adopt the approach of diversion and restorative justice if they consider them as the best way to achieve substantive justice. The enforcement of the implementation of diversion and restorative justice, the meaning of which has been reduced when it only refers to the articles of the Juvenile Criminal Justice System Law, in fact, will restrict police forces, public prosecutors, and judges to act as the creators of Law in developing and implementing various legal breakthroughs in order to achieve qualified settlement of cases.

- The legal subjects criminalized in Article 96 of the Juvenile Criminal Justice System Law are police forces, public prosecutors, and judges in their capacity as court officials. What about advocates who are also law enforcers. Advocates having a role in the Juvenile Criminal Justice System as legal counselors for a child in conflict with the law or as attorneys for a child having legal issues, have a potential role in relation to the implementation of diversion in the process of juvenile cases' settlement. What if there is a possible case that an advocate intentionally influences his/her client to reject the diversion in the process of juvenile criminal cases' settlement? Although the provision of Article 96 of the Juvenile Criminal Justice System

Law is formulated logically that only police forces, public prosecutors, and judges have authority in the process of cases' settlement, the role of advocates in the criminal judicial process also cannot be ignored. It is clear that Article 96 of the Juvenile Criminal Justice System Law is discriminatory.

- A Law is a legislative product. Therefore, the substance of the rules in Article 96, Article 100, and Article 101 of the Juvenile Criminal Justice System Law which imposes criminal sanctions upon judges for not implementing the provisions of certain articles in the Juvenile Criminal Justice System Law, may be considered as an intervention from the legislative power in the judicial power. If Article 96, Article 100 and Article 101 of the Juvenile Criminal Justice System Law are still applicable, it is worried that criminalizing court officials, especially judges not implementing or apply the rule of the article related to the procedural law in the positive legal Law, will become the model of positive law to formulate the rules of positive criminal law in the future. Such concern has adequate reasons because the symptom of the model criminalizing judges implementing the wrong rules of the positive law once appeared in the Draft Law of the Supreme Court which made the parties exercising judicial power and thinkers on judicial power quite worried. It is clear that the existence of Article 96, Article 100, and Article 101 of the Juvenile Criminal Justice System Law is a serious threat to

the independent judicial power which is constitutionally affirmed by Article 24 paragraph (1) of the 1945 Constitution.

[2.3] Whereas with regard to the petition of the Petitioners, the Government presented its oral statement at the hearing on January 9, 2013 which was later completed with the written statement and conclusion received at the Registrar's Office of the Court on February 7, 2013 which principally describe as follows:

I. SUBSTANCE OF THE PETITIONERS' PETITION

1. Whereas the Petitioners are individual Indonesian citizens holding the position as judges who consider that their constitutional rights are impaired by the coming into effect of Article 96, Article 100, and Article 101 of the Juvenile Criminal Justice System Law which have reduced the degree of independence of judges in performing their judicial duties;

2. Whereas according to the Petitioners, the provisions of Article 96, Article 100 and Article 101 of the Juvenile Criminal Justice System Law constitute the form of criminalization against judges and other law enforcement apparatuses (investigators and public prosecutors). Such provisions do not include the principles of criminalization and the purposes of criminalization, the existence or the functions of criminal law, and thus the formulation in such provisions does not reflect the principle of justice as provided for in the provisions of Article 6 paragraph (1)

sub-paragraph g of Law Number 12 Year 2011 concerning Formulation of Laws and Regulations;

3. Whereas according to the Petitioners, the effort of criminalization in the provisions of Article 96, Article 100, and Article 101 of the Juvenile Criminal Justice System Law is the form which overreaches the limits of the criminal law because the application of criminal law in such provisions has overreached the limits of its authority, is not proportional, excessive and it is as an effort to restrict the power of judges in exploring, following and understanding the legal values and the sense of justice existing in the community, so that they are inconsistent with the provisions of Article 1 paragraph (3), Article 24 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) of the 1945 Constitution.

II. LEGAL STANDING OF THE PETITIONERS

The provisions of Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 state that the petitioners are the parties considering that their constitutional rights and/or authorities are impaired by the coming into effect of the Law, namely:

a. individual Indonesian citizens;

b. customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of Republic of Indonesia as regulated in Law;

c. public or private legal entities; or

d. state institutions;

Such provisions above are confirmed by its elucidation that “constitutional rights” are the rights regulated in the 1945 Constitution of the State of the Republic of Indonesia.

Therefore, in order that a person or a party can be accepted as a Petitioner having legal standing in a petition for judicial review of a Law against the 1945 Constitution of the State of the Republic of Indonesia, such person or party shall first explain and substantiate:

a. His/her qualification in the petition *a quo* as referred to in Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011;

b. His/her constitutional rights and/or authorities in the intended qualification which are considered to have been impaired by the coming into effect of the Law being reviewed;

c. The impairment of constitutional rights and/or authorities of the Petitioners due to the coming into effect of the Law being petitioned for review.

Furthermore, following its Decision Number 006/PUU-III/2005 and Decision Number 11/PUU-V/2007 as well as subsequent decisions, the Constitutional Court has provided the cumulative interpretation and definition of the impairment of constitutional rights and/or authorities due to the coming into effect of a law and based on Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011, which must meet 5 (five) requirements, namely:

a. the existence of constitutional rights of the Petitioners granted by the 1945 Constitution of the State of the Republic of Indonesia;

b. whereas the Petitioners consider that such constitutional rights have been impaired by the Law being reviewed;

c. whereas such constitutional impairment of the Petitioners must be specific (special) and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;

d. there is a causal relationship (*causal verband*) between the relevant impairment and the coming into effect of the Law being

petitioned for review;

e. there is a possibility that with the granting of the petition, such constitutional impairment as argued will not or will no longer occur;

With regard to the aforementioned matters, according to the Government, it is necessary to question whether the interest of the Petitioners has been appropriate as the parties considering that their constitutional rights and/or authorities are impaired by Article 156a of the Indonesian Criminal Code *juncto* Article 4 of Prevention of Religious Abuse and/or Defamation (*PNPS*) Number 1 Year 1965 and whether the intended constitutional impairment of the Petitioners is specific (special) and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring, and also whether there is a causal relationship (*causal verband*) between the impairment and the coming into effect of the Law being petitioned for review.

Hence, the Petitioners in the petition for judicial review for a Law against the 1945 Constitution shall first explain and substantiate:

1) their position as the Petitioners as referred to in Article 51 paragraph (1) of the Constitutional Court Law;

2) the impairment of constitutional rights and/or authorities granted by the 1945 Constitution due to the coming into effect of the Law being petitioned for review.

With regard to legal standing of the Petitioners, the Government can give the following explanations:

1. Whereas the Petitioners holding the position as judges only have legal standing to the extent of the provisions regulating the Petitioners' rights and authorities as judges. Meanwhile, the articles being petitioned for review are not only related to judges, but also they are related to investigators and public prosecutors (Article 96) and court officials (Article 101).

2. Whereas according to the Government, the provisions of the 1945 Constitution which serve as the touchstone by the Petitioners are not appropriate, the elucidation of which is as follows:

   a. Article 1 paragraph (3) of the 1945 Constitution states, "*the State of Indonesia is a rule of law state".* In relation to the definition of "a rule of law state", the Constitutional Court has given an interpretation in Decision Number 69/PUU-X/2012 stating that *the principle in a rule of law state is that the state and citizens shall be subject to the law in performing their duties and functions. In the event of violations of law, the law must be enforced through the*

legal mechanism as provided for in a democratic manner (due process of law). Therefore, the Government is of the opinion that this article does not regulate the human rights of citizens, and thus such article is not related to the constitutional rights of the Petitioner in the petition *a quo*.

b. Article 24 paragraph (1) of the 1945 Constitution states "*Judicial power shall be independent power to organize judicial administration to uphold law and justice".* The provision of this article regulates the independence of judicial power in deciding upon cases which may not be influenced by any party. Therefore, the Government is of the opinion that the provisions in the Juvenile Criminal Justice System Law do not at all restrict or reduce the independence of judges in deciding upon cases based on the definition as provided for in Article 24 paragraph (1) of the 1945 Constitution.

c. Article 28I paragraph (2) of the 1945 Constitution states, *"Every person shall have the rights to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment".* The Government is of the opinion that the Juvenile Criminal Justice System Law does not at all contain discriminatory provisions because

it does not give different treatments, among other things, based on ethics, religions and races.

Based on the aforementioned matters, the Government is of the opinion that the Petitioners in this petition do not suffer the impairment of constitutionality, thus they **do not meet the qualifications** as the parties having legal standing as referred to in the provision of Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 year 2011 and based on the previous decisions of the Constitutional Court.

Therefore, according to the Government, it is appropriate for the Chief Justice/Panel of Justices of the Constitutional Court to prudently **declare that the petition of the Petitioners cannot be accepted** (*niet ontvankelijk verklaard*).

However, the Government fully leaves it to the Chief Justice/Panel of Justices of the Constitutional Court to consider and assess whether the Petitioners have legal standing or not.

III. THE GOVERNMENT'S EXPLANATION OF THE SUBSTANCE BEING PETITIONED BY THE PETITIONERS

Before giving its explanation of the substance being petitioned for review by the Petitioners, the Government shall first convey the following matters:

1. Children are an inseparable part of the survival of human beings and the continuity of a nation and state. Article 28B of the 1945 Constitution expressly states that "*every child shall have the right to survive, grow and develop and shall have the right to be protected against violence and discrimination"*. Therefore, the best interest of the child is reasonably understood as the best interest of the survival of human beings and is required to be follow up by making Government policies which are intended to protect children, particularly children having legal issues.

2. The Juvenile Criminal Justice System Law regulates all processes of the settlement of cases of the child having legal issues starting from the investigation level up to the counseling level after serving the criminal sanction.

   One of the special regulations with respect to the process of settlement of cases of the child having legal issues is through the diversion process. The diversion is intended to achieve reconciliation between the victim and the child, to settle the case of such child out of the court, to prevent such child from being deprived of his/her independence, to encourage public participation, and to teach such child about responsibilities.

   The Diversion Process is applied from the levels of investigation, prosecution, up to examination on the case of the child at the court. The Diversion Process is made by deliberations involving

the child and his/her parents/guardian, the victim and/or his/her parents/guardian and other relevant parties to reach fair settlement together by focusing on recovery instead of retribution (restorative justice). The diversion is made if a criminal act committed is imposed with the criminal sanction of maximum imprisonment of 7 (seven) years and it is not a recurrence of a criminal act.

In order to perform the diversion process, the Government is obligated to organize education and training for law enforcers and the relevant parties in an integrated manner for at least 120 (one hundred and twenty) hours. Therefore, the diversion may be only made by the law enforcement apparatuses (investigators for children, public prosecutors for children, judges for children, appellate judges for children and cassation judges for children) which have already obtained education, training and certificates.

In addition to such requirements, the Government is obligated to provide facilities, infrastructure and human resources in implementing the Juvenile Criminal Justice System Law. In order to fulfill such requirements and provision of facilities, infrastructure and human resources, the Juvenile Criminal Justice System Law is valid for a period of 2 (two) years as from the enactment day. Therefore, it is expected that when the Juvenile Criminal Justice System Law comes into effect, the law

enforcement apparatuses may perform the diversion process in a good and professional manner.

With respect to the Petitioners' assumption that the provisions of Article 96, Article 100, and Article 101 of the Juvenile Criminal Justice System Law are inconsistent with the provisions of Article 1 paragraph (3), Article 24 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) of the 1945 Constitution, and therefore, the Government may give the following explanation:

1. With respect to the assumption of the Petitioners that the provisions of Article 96 of the Juvenile Criminal Justice System Law violate the principles of independence of the judiciary and the independence of judges so that they are inconsistent with Article 1 paragraph (3) and Article 24 paragraph (1) of the 1945 Constitution, the Government may give the following explanation:

   a. Whereas the provision of article 96 of the Juvenile Criminal Justice System Law refers to the provisions of Article 7 paragraph (1) of the Juvenile Criminal Justice System Law stating that: *at the levels of investigation, prosecution, and examination on Juvenile cases at the district court,* ***Diversion must be made****.*

      It is clear that the provision *a quo* only obligates "the effort of diversion" through deliberations involving the

child and his/her parents/guardian, the victim and/or his/her parents/guardian, the public counselors, and professional social workers and the diversion is made when there is an agreement between the parties to make it. Therefore, a judge deliberately not making the effort of diversion is imposed with criminal sanctions by the Juvenile Criminal Justice System Law. However, if a judge has made the effort of diversion, while the parties do not reach an agreement of the case's settlement, such judge is not criminalized because he/she does not meet the elements of criminal acts as referred to in the provision of Article 96 of the Law on Juvenile Judicial System.

Furthermore, the Government may explain that the obligation to make the effort of diversion has been principally performed since the investigation level and the prosecution level, and thus, if at the investigation level or the prosecution level, an agreement on the diversion has been reached, the case is closed. Therefore, such judge has a relatively light obligation to make the diversion.

b. Whereas the implementation of diversion is not at all related to and/or does not violate the principles of independence of the judiciary and independence of judges. The definitions of independence of judges and

independence of the judiciary may be seen in the Judicial Power Law, namely:

1) Judicial Power shall be independent power to organize judicial administration to uphold law and justice based on *Pancasila* and the 1945 Constitution of the State of the Republic of Indonesia, for the purpose of organizing a rule of law state of the Republic of Indonesia.
2) In performing their duties and functions, judges and constitutional justices are obligated to maintain independence of the judiciary
3) Any other party from outside the judicial power is prohibited to intervene in the judicial affairs, except in matters referred to in the 1945 Constitution..

Furthermore, the Constitutional Court in its decisions has emphasized that "*independence of judges and independence of the judiciary are materialized into the independence of judges either as individuals or as institutions in order that they are free from outside influences in the form of interventions having direct influences, namely inducement, pressure, duress, threat or retribution because of certain political or economic interests from the government and ruling political power, certain groups, with rewards or promise of rewards in the*

form of holding a position, economic benefits, or other forms, and that independence of judges is closely related to the impartial attitude of judges in the examination or the decision-making" (vide Decision of the Constitutional Court 005/PUU-IV/2006)

Based on the explanations, according to the Government, it is clear that no provision in the Law *a quo* has a direct influence such as inducement, pressure, duress, threat or retribution because of certain political or economic interests which may influence judges to pass their decisions. In fact, with the existence of diversion, judges may explore and understand the legal values and the sense of justice existing in the community.

Therefore, the Government is of the opinion that the Petitioners' concern with the provision of Article 96 of the Juvenile Criminal Justice System Law being considered capable of influencing the independence of judges and discriminatory, is groundless and not true.

2. With regard to the provision of Article 100 of the Juvenile Criminal Justice System Law, the Government may give the following explanations:

Whereas the provision *a quo* are intended to impose sanctions upon judges deliberately extending the detention period or

deliberately continuing the detention of such child after his/her detention period expires.

The Government is of the opinion that the judges' concern that such child is not released from the detention even though his/her detention period has expired, is groundless because many parties, namely, among others, the parents/guardian, advocates, detention centre officials, and such child will make the effort to remind them about the time limit, unless the judges continue (deliberately) to detain such child.

3. With regard to the provision of Article 101 of the Juvenile Criminal Justice System Law, the Government explains that the provision of Article 101 of the Juvenile Criminal Justice System Law *juncto* Article 62 of the Juvenile Criminal Justice System Law is intended for court officials instead of judges. The court officials are obligated to give the excerpt of decisions on the day the decision is pronounced to such child or his/her advocates or other legal assistance providers, public counselors, and public prosecutors. It is intended to guarantee the existence of legal certainty because in the practice, *extract vonnis* (the excerpt of decisions) are often not given.

Therefore, the Government is of the opinion that the assumption that the provision of Article 101 of the Juvenile Criminal Justice

System Law *juncto* Article 62 of the Juvenile Criminal Justice System Law is intended for judges is groundless.

4. with regard to the criminal provisions (as criminal policy, in this matter, criminalizing an act) in Article 96, Article 100, and Article 101 of the Juvenile Criminal Justice System Law, the Government may give the following explanation:

   a. In Decision Number 34/PUU-VIII/2010 in the Petition for Judicial Review of Law Number 36 Year 2009 dated October 18, 2011, the Constitutional Court states that: *without the existence of criminal provisions, such prohibitions or obligations will not have any legal effect at all because such rules cannot be enforced by exercising the state power. Prohibitions only mean appeals* (*vide* decision of the Constitutional Court Number 34/PUU-VIII/2010 page 118). Therefore, the Government is of the opinion that the provisions of Article 96, Article 100, and Article 101 of the Juvenile Criminal Justice System Law are intended for enforcing the provisions of Article 7 paragraph (1), Article 35 paragraph (3), Article 37 paragraph (3), Article 38 paragraph (3), and Article 62 of the Juvenile Criminal Justice System Law and are not intended to intervene judges.

b. Whereas criminalization of an act which is expressly stated in the formulation of offence also serves as general prevention (*general prevalence*) in order that any person does not commit a crime or psychological pressures because the imposition of criminal sanctions is clear.

c. Jan Remmelink in his book titled Criminal Law states that the criminal provisions are basically the *ultimum remedium*, but since the administrative sanctions are often not obeyed/implemented well, the imposition of criminal sanctions is necessary. The criminal sanctions are imposed in order that law enforcement apparatuses will not evade from the implementation of the obligations which have been determined.

d. Whereas in a Law, criminal sanctions are often imposed upon certain officials and sometimes such criminal sanctions are made more severe. In Article 52 of the Indonesian Criminal Code, criminal sanctions against officials who commit any criminal act are automatically made more severe at a third of every criminal sanction against criminal acts. Article 52 of the Indonesian Criminal Code states that: *"If an official by committing a punishable act violates a special official duty or by committing a punishable act employs the power,*

opportunity or means conferred upon him by his office, the punishment may be enhanced with one third.". There are many examples of Laws outside of the Indonesian Criminal Code that officials imposed with criminal sanctions for not performing their duties and responsibilities, namely, Law Number 30 Year 2002 concerning the Commission for the Eradication of Criminal Acts of Corruption, Law Number 12 Year 2006 concerning the Citizenship of the Republic of Indonesia, Law Number 8 Year 20120 concerning the Prevention and Eradication of Criminal Acts of Money-Laundering.

e. Whereas Law Number 12 Year 2011 concerning Formulation of Laws and Regulations stipulates that "If a criminal provision is applicable to any person, the subject of the criminal provision is formulated by the phrase *any person*". The intention of such provision is that any person basically has an equal position for any act criminalized. This applies to any person regardless of certain position or profession.

f. Whereas the provisions of Article 96, Article 100, and Article 101 of the Juvenile Criminal Justice System Law start with the phrase "deliberately". However, it is not easy to prove the deliberateness of the perpetrator in the judicial process and even to determine the *dolus molus* or

the motive of the perpetrator. Therefore, an act which must be proved in such deliberateness is the motive (*dolus molus*) which means that perpetrator knows and intends (*weten and willen*) to commit a crime. Therefore, the provisions of Article 96, Article 100, and Article 101 of the Juvenile Criminal Justice System Law shall be carefully applied.

The Petitioners consider that the Legislators have used the labeling perspective on the actions taken by investigators, public prosecutors, judges, court officials in the Juvenile Criminal Justice System Law. The Labeling theory is the criminology theory rather than the theory in the criminal law introduced initially by Frank Tannenbaum (1938). The main key of this theory is that a person becomes evil because of social reaction, not because he/she commits any unlawful act. With his concept on dramatization of evil, Tannenbaum states that *"... the process of tagging, defining, identifying, segregating, describing, and emphasizing any individual out for special treatment becomes a way of stimulating, suggesting and evoking the very traits that are complained of. A person becomes the thing they are described as being".* The theory is principally intended for implementation of the criminal law which causes a person to be stigmatized, so

that in the end, the whole labeling process really makes such person become a criminal.

This theory is later developed by Edwin M. Lemert who differentiates between primary deviance and secondary deviance. Primary deviance is the deviation which occurs because of various causes, namely either biological, sociological, or psychological causes, while secondary deviance is the deviation which occurs more intensively as the reaction of the perpetrator toward the social reaction arising from the existence of primary deviance.

Theory which is included in the school of conflict theory is intended for law enforcement apparatuses who tend to act discriminatorily toward marginal groups so that the state can maintain the *status quo*. This theory essentially positions the instrument of social control to protect its power by taking any violent action against groups considered dangerous to its position.

Based on the explanation above, it is impossible for judges as a part of the judicative power to be included in the marginal group or the group without power as described by the labeling theorists. Therefore, it is clear that the Petitioners have used the wrong theory in presenting arguments regarding the perspective used by

the legislators of the Juvenile Criminal Justice System Law.

IV. THE GOVERNMENT'S CONCLUSION REGARDING THE HEARING AT THE CONSTITUTIONAL COURT

Whereas at the hearing in the Constitutional Court on January 9, 2013, the Petitioners presented the experts, namely, among others, Prof. Bagir Manan, Prof. Laica Marzuki, Prof. Romli Atmasasmita, and Dr. Maruarar Siahaan, based on whose statements it may be concluded in performing their functions, duties and exercising authorities, judges are independent, which means that judicial power is the independent power to organize judicial administration to uphold law and justice.

With regard to such experts' statements, the Government can basically understand the concept of judicial power which is independent and free from any party's intervention as provided for in Article 24 paragraph (1) and paragraph (2) of the 1945 Constitution.

According to the Government, the definition of the provisions of Article 24 paragraph (1) and paragraph (2) of the 1945 Constitution is the materialization of the decisions of judges who are free and independent or who may not be influenced by any party. The Government is of the opinion that no existing provision in the Juvenile Criminal Justice System Law is intended to influence or threaten judges when they pass their decisions. The Law *a quo* only obligates judges to make the effort of diversion, but if the effort of diversion is not successful, the juvenile

criminal judicial process is still continued and becomes the absolute authority of judges for passing the decisions.

Whereas the implementation of diversion is not at all related to and/or it does not violate the principles of independence of the judiciary and independence of judges. In fact, with the existence of diversion, judges can explore and understand the legal values and the sense of justice existing in the community.

V. *PETITUM*

Based on the explanations and argumentations above, the Government requests the Chief Justice/Panel of Justices of the Constitutional Court examining and deciding upon the petition for judicial review (constitutional review) of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System against the 1945 Constitution of the State of the Republic of Indonesia to pass the following decision:

1. To declare that the Petitioners do not have legal standing;

2. To reject the Petitioners' petition for review (void) in its entirety or at least to declare that the Petitioners' petition for review cannot be accepted (*niet ontvankelijk verklaard*);

3. To accept the statement of the Government in its entirety;

4. To declare Article 96, Article 100, and Article 101 of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System not inconsistent with Article 1 paragraph (3), Article 24 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia;

[2.4] Whereas with regard to the petition of the Petitioners, the People's Legislative Assembly of the Republic of Indonesia presented its oral statement at the hearing on January 9, 2013 and presented its written statement received at the Registrar's Office of the Court on February 5, 2013 which principally describe as follows:

A. THE PROVISIONS OF THE JUVENILE CRIMINAL JUSTICE SYSTEM LAW BEING PETITIONED FOR JUDICIAL REVIEW AGAINST THE 1945 CONSTITUTION OF THE STATE OF THE REPUBLIC OF INDONESIA

The Petitioners in the petition *a quo* filed the petition for judicial review of Article 96, Article 100 and Article 101 of the Juvenile Criminal Justice System Law which read as follows:

- **Article 96:**

  Any Investigator, Public Prosecutor, and Judge deliberately not performing his/her obligations as referred to in Article 7 Paragraph (1) shall be subject to a maximum criminal sanction

of imprisonment of 2 (two) years) or a maximum pecuniary sanction of Rp.200,000,000.00 (two hundred million rupiah).

- **Article 100:**

  Any Judge deliberately not performing his/her obligations as referred to in Article 35 paragraph (3), Article 37 paragraph (3), and Article 38 paragraph (3) shall be subject to a maximum criminal sanction of imprisonment of 2 (two) years.

- **Article 101:**

  Any court official deliberately not performing his/her obligations as referred to in Article 62 shall be subject to a maximum criminal sanction of imprisonment of 2 (two) years.

B. THE PETITIONERS CONSIDER THAT THEIR CONSTITUTIONAL RIGHTS AND/OR AUTHORITIES HAVE BEEN IMPAIRED BY THE COMING INTO EFFECT OF ARTICLE 96, ARTICLE 100 AND ARTICLE 101 OF THE JUVENILE CRIMINAL JUSTICE SYSTEM LAW

The Petitioners in the petition *a quo*, state that their constitutional rights have been impaired and violated by the coming into effect of **Article 96, Article 100, Article 101 of the Juvenile Criminal Justice System Law** which are principally as follows:

1. The Petitioners are of the opinion that the provisions of Article 96, Article 100 and Article 101 of the Juvenile Criminal Justice

System Law have reduced the degree of independence of judges in performing their judicial duties because the criminal sanctions in the provisions of Articles *a quo* have allowed for to an interpretation that any violation of the juvenile formal criminal law (procedural law) is a criminal act and must be imposed with the criminal sanctions which make judges, who conduct hearings, feel doubtful and afraid, and thus, they are inconsistent with Article 3 paragraph (1) and Article 24 paragraph (1) of the 1945 Constitution.

2. Whereas the Petitioners are of the opinion that the application of the obligation of diversion imposed through the perspective of criminal law in the formulation of the provision of Article 96 of the Juvenile Criminal Justice System Law clearly violates the principle of independence of judges which is also usually accompanied with the constitutional rights of judges to professional immunity (judicial immunity), and thus, it is considered inconsistent with Article 3 paragraph (1) and Article 24 paragraph (1) of the 1945 Constitution.

3. Implications of the politics of criminalization in Articles *a quo* of the Juvenile Criminal Justice System Law violate the principles of guarantee, protection, and legal certainty of just laws for any citizen, in this matter any Judge in performing his/her judicial duties, and thus, they are inconsistent with 28D paragraph (1) of the 1945 Constitution.

4. Whereas any action taken by the legislators to criminalize judges to account for any act and/or fault they have not committed through the provision of Article 100 of the Juvenile Criminal Justice System Law is principally an act which may be categorized as discriminatory, and thus, it may be considered inconsistent with the provision of Article 28I paragraph (2) of the 1945 Constitution.

5. The Petitioners are of the opinion that the imposition of the obligation stating "the copy of the decision must be given no longer than 5 (five) days as from the pronouncement of the decision" in the formulation of the provision of Article 101 *juncto* Article 62 paragraph (2) of the Juvenile Criminal Justice System Law) through the perspective of criminal law without considering the existing social realities clearly violates the principles of guarantee, protection and legal certainty of just laws for any citizen, in this matter any judge in performing his/her judicial duties, and thus, it may be considered inconsistent with Article 28D paragraph (1) of the 1945 Constitution.

C. THE STATEMENT OF THE PEOPLE'S LEGISLATIVE ASSEMBLY OF THE REPUBLIC OF INDONESIA

I. Legal Standing

With regard to the arguments of the Petitioners as described in the petition *a quo*, the People's Legislative Assembly in giving its opinion first explains legal standing of the Petitioners.

The Petitioners as the parties must meet the qualifications as regulated in the provision of Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court (hereinafter referred to as the Constitutional Court Law), stating that *"The Petitioners are the parties considering that their constitutional rights and/or authorities are impaired by the coming into effect of the Law, namely:*

a. individual Indonesian citizens;

b. customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of Republic of Indonesia as regulated in Law;

c. public or private legal entities; or

d. state institutions."

The constitutional rights and/or authorities referred to in the provisions of Article 51 paragraph (1) are affirmed by the elucidation thereof that **"constitutional rights" are the rights regulated in the 1945 Constitution of the State of the Republic of Indonesia."** The elucidation of the provisions

of Article 51 paragraph (1) affirms that only the rights expressly regulated in the 1945 Constitution of the State of the Republic of Indonesia constitute the "constitutional rights".

Therefore, according to the Constitutional Court Law, in order that a person or a party can be accepted as a Petitioner having legal standing in the petition for judicial review of a Law against the 1945 Constitution, such person or party shall first explain and substantiate:

a. His/her qualifications as a Petitioner in the petition *a quo* as referred to in Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court;

b. His/her constitutional rights and/or authorities as referred to in the **"Elucidation of Article 51 paragraph (1)"** which are considered to have been impaired by the coming into effect of the Law.

With regard to the parameters of constitutional impairment, the Constitutional Court has provided the interpretation and definition of the constitutional impairment due to the coming into effect of a law which must meet 5 (five) requirements (vide Decision Number 006/PUU-III/2005 and Number 011/PUU-V/2007), namely:

a. the existence of constitutional rights of the Petitioners granted by the 1945 Constitution of the State of the Republic of Indonesia;

b. whereas the Petitioners consider that their constitutional rights and/or authorities have been impaired by a Law being reviewed;

c. whereas the intended impairment of constitutional rights and/or authorities of the Petitioners must be specific (special) and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;

d. there is a causal relationship (*causal verband*) between the relevant impairment and the coming into effect of the Law being petitioned for review;

e. there is a possibility that with the granting of the petition, such impairment of constitutional rights and/or authorities as argued will not or will no longer occur;

If the Petitioners do not fulfill such five requirements in the case of judicial review of the Law *a quo*, the Petitioners do not have the qualification for legal standing as the Petitioners.

With regard to legal standing of the Petitioners, the People's Legislative Assembly fully leaves it to the Chief Justice/Panel of Justices of the Constitutional Court to consider and assess whether the Petitioners have legal standing or not as regulated in the provision of Article 51 paragraph (1) of Law concerning the Constitutional Court and based on Decision of the Constitutional Court Number 006/PUU-III/2005 and Decision Number 011/PUU-V/2007.

II. Judicial Review of the Juvenile Criminal Justice System Law

With regard to the Petitioners' opinions in the petition *a quo*, the People's Legislative Assembly gives its explanation as follows:

1. Whereas Indonesian children play very important roles and strategy for the future of Indonesian journey because children are an inseparable part of the continuity of a nation and state. Therefore, Article 28B paragraph (2) of the 1945 Constitution expressly states *"the state guarantees the rights of every child to survive, grow and develop and to be protected against violence and discrimination".*

2. Whereas in order to guarantee that every child is entitled to survive, grow, and develop and is entitled to be protected against violence and discrimination as mandated in the constitution, the state needs to have strategic efforts to provide child protection. One of such strategic efforts is to formulate laws and regulations for the purpose of protecting children.

3. Whereas children need to be protected from the negative impacts of the rapid development, the flow of globalization in the field of communication and information, the scientific and technological development, and the changes of lifestyle and way of life of some parents who bring basic social changes in the community life which greatly influence the morals and behavior of children who often have legal issues.

4. Whereas the Juvenile Criminal Justice System Law is

formulated in order to realize the judiciary which really guarantees the protection of the best interest of children who have legal issues. The handling of children, who have legal issues, in the Juvenile Criminal Justice System Law, is based on the roles and duties of the community, the government, and other state institutions having the obligations and responsibilities to improve the children's welfare and provide the special protection for children having legal issues.

5. Whereas one most basic substance in the Juvenile Criminal Justice System Law is the express regulation of restorative justice and diversion intended for protecting children and keeping them away from the judicial process, and thus such children having legal issues can be protected from stigmatization, and it is expected that the children can return to normal social environment. The express regulation of such restorative justice and diversion is reflected in Article 5 paragraph (1), Article 7 paragraph (1) *juncto* Article 96 of the Juvenile Criminal Justice System Law regulating the following matters:

   a. The Juvenile Criminal Justice System must prioritize the approach of restorative justice, namely an effort to settle a case of criminal acts by involving the perpetrator, the victim, the family of the perpetrator/victim, and other relevant parties to achieve fair settlement together by

focusing on recovery rather than retribution.

b. The diversion must be made at the levels of investigation, prosecution, and examination on the juvenile cases at the district court, namely that the settlement of Juvenile cases is transferred from the process of criminal justice to the process outside of criminal justice.

c. The criminal sanctions are imposed upon investigators, public prosecutors, and judges deliberately not performing the obligation to make the effort of diversion at the levels of investigation, prosecution, and examination on the juvenile cases at the district court

6. Whereas restorative justice constitutes a diversion process, namely that all parties involved in a certain criminal act deal with the problem together and create an obligation to make anything better by involving the victim, the child, and the community to find any solution for recovery, reconciliation, reassurance, instead of retribution.

7. Considering the special character and trait of a child and for the purpose of protecting the child, Article 5 paragraph (1) *juncto* Article 7 paragraph (1) *juncto* Article 96 of the Juvenile Criminal Justice System Law have regulated that law enforcers, in handling the case of a child having legal issues, must first prioritize the process of out-of-court settlement before they

perform the judicial process, namely by the diversion based on the approach of restorative justice.

8. Whereas considering that every child who has legal issues to be first settled by diversion based on the restorative justice as explained above has the right to the process of the out- of-court settlement, such matter is not at all related to the independence of Judges in performing their judicial functions because such diversion is made before conducting the judicial process, or in other words, outside the court process. If the diversion process is successful in reaching an agreement or if the results of diversion are not implemented, based on the provisions of Article 13 of the Juvenile Criminal Justice System Law, the judicial process of such child may be continued into the judicial process in which judges have independence to perform their judicial functions.

9. Whereas in order to guarantee the legal protection, the legal certainty, and the law enforcement for the implementation of the provision on the rights of a child having legal issues to be first settled by the diversion based on restorative justice as regulated in Article 5 paragraph (1) and Article 7 paragraph (1) of the Juvenile Criminal Justice System Law, Article 96 of the Juvenile Criminal Justice System Law has expressly regulated the imposition of criminal sanctions on investigators, public prosecutors, and judges deliberately not performing their

obligation to reach settlement by making the effort of diversion at the levels of investigation, prosecution, and examination of juvenile cases at the district court.

10. Whereas the law enforcers (including judges) deliberately not performing their obligation to prioritize the criminal case settlement of a child by diversion based on restorative justice, will result in the impairment of the legal interest and the constitutional rights of such child as guaranteed by Article 28B paragraph (2) of the 1945 Constitution *juncto* Article 5 paragraph (1) and Article 7 paragraph (1) of the Juvenile Criminal Justice System Law. In addition, the provisions on criminal sanctions against law enforcers as regulated in Article 96 of the Law *a quo*. The process of settlement of a criminal case of a child through diversion based on restorative justice is an effort to implement one of the substance and important purposes desired to be achieved in the Juvenile Criminal Justice System. Such process is intended for protect children and keeping them away from the judicial process so that the children having legal issues can be protected from stigmatization, and it is expected that the children can return to normal social environment. Therefore, the People's Legislative Assembly is of the opinion that the provisions of Article 96 of the Law *a quo* have legal ratio which is sufficiently well grounded.

11. The Formulating Team approved the criminal sanctions in the

minutes of meeting dated June 8, 2012, the excerpt of which is as follows “

“*We have formulated it, Sir, if you read Article 96, Article 97, Article 98, they state that a criminal sanction of maximum imprisonment of 2 years is imposed upon any official deliberately not performing or not releasing the child by law even though the period has expired. In fact, we also comply with the agreement to formulate the article imposing sanctions upon any court official who does not give the excerpt of a decision within 5 days. Such court official is also subject to 2 years. This is intended in order that there will be no more reasons to postpone the execution of the court decisions or not to prevent the court decisions from being executed.”*

“If Article 34, Alhamdulillah (All praise is due to Allah), applies sanctions, Article 35 paragraph (3) also applies sanctions. However, Article 37, Article 38 do not apply sanctions, as there are only the words issued by law. So, I read Article 34, indeed, 3 remains and even articles 33, 34, 35 apply sanctions, but when I read Article 37, it does not apply sanctions. Article 37 does not apply sanctions because it is related to children detained by Judges at the cassation level. So, I think, such article must also apply sanctions”.

“The Working committee has also passed Article 98, oh there

was an addition. Article 98, any judges deliberately not performing as referred to in Article 35 Paragraph (3), Article 37 Paragraph (3) and Article 38 Paragraph (3) shall be subject to a criminal sanction of maximum imprisonment of 2 years. Do we agree on this "?

(The Meeting agrees on it)"

12. Whereas the formulation of norms of the provision of Article 101 of the Juvenile Criminal Justice System Law does not state that judges are imposed with criminal sanctions because they do not perform the obligation to give the excerpt and copy of decisions. However, it states that court officials deliberately not performing the obligation to give the excerpt and copy of decisions are imposed with criminal sanctions. Therefore, the People's Legislative Assembly is of the opinion that the provision of Article 101 of the Law *a quo* and its formulation of norms are not directly related to the constitutional impairment of the Petitioners having the profession as judges.

13. Whereas based on the explanations above, the People's Legislative Assembly is of the opinion that the provisions of Article 96, Article 100 and Article 101 of the Juvenile Criminal Justice System Law are not inconsistent with Article 3 paragraph (1), Article 24 paragraph (1), and Article 28D paragraph (1) of the 1945 Constitution.

Therefore, the People's Legislative Assembly requests for the Chief Justice/Panel of Justices of the Constitutional Court to be willing to pass the decision with the following injunctions:

1. To declare that the statement of People's Legislative Assembly is accepted in its entirety;

2. To declare the provisions of Article 96, Article 100 and Article 101 of the Juvenile Criminal Justice System Law not inconsistent with Article 3 paragraph (1), Article 24 paragraph (1), and Article 28D paragraph (1) of the 1945 Constitution.

3. To declare that the provisions of Article 96, Article 100, and Article 101 of the Juvenile Criminal Justice System Law still have binding legal effect.

[2.5] Whereas with regard to the Petition of the Petitioners, the Relevant Party, namely Indonesian Child Protection Commission (*KPAI*) presented a written statement received at the Registrar's Office of the Court on January 16, 2013 which principally states as follows:

STATEMENT OF THE INDONESIAN CHILD PROTECTION COMMISSION (KPAI), AS THE RELEVANT PARTY IN THE PETITION FOR JUDICIAL REVIEW OF ARTICLE 96, ARTICLE 100, AND ARTICLE 101 OF LAW NUMBER 11 YEAR 2012 CONCERNING JUVENILE CRIMINAL JUSTICE SYSTEM AT THE CONSTITUTIONAL COURT UNDER REGISTRATION NUMBER 110/PUU-X/2012.

I. Child Protection Context in the establishment of norms of Article 96, Article 100 and Article 101 of Law Number 11 Year 2012.

1. Law Number 11/2012 reforms the principle of law and the progressive development of child protection guided by the constitutional spirit of Article 28B paragraph (2) of the 1945 Constitution.

Law Number 11 Year 2012 concerning Juvenile Criminal Justice System (hereinafter referred to as "**Law Number 11/2012**") is the substitute for Law Number 3 Year 1997 to reform the legal norms of juvenile court to become the juvenile criminal justice system. The introduction of Law Number 11/2012 has resulted in many improvements and legal reform in the juvenile criminal justice system, including among other things, the approval of diversion, the change in the criminalization system, and the imposition of sanctions or criminalization against law enforcers not performing the obligation of diversion (Article 96), Judges deliberately not releasing a child whose detention period has expired by law (Article 100), and court officials not giving the excerpt of decisions as required (Article 101).

Therefore, the existence of Article 96, Article 100 and Article 101 of Law Number 11/2012 is intended to improve the effectiveness of law enforcement and to provide special protection for children more optimally. It is relevant to and based on the mandate and constitutional guidance of Article 28B paragraph (2) of the 1945 Constitution.

(a) The obligation of diversion is useful to prevent the deprivation of liberty of children and the negative impacts of judicial process

Diversion is the progress of Law Number 11/2012 as the progress of constitutional reform with the existence of Article 28B paragraph (2) of the 1945 Constitution which in the end, leads to better and more optimum protection for children. Diversion is a concrete form of the constitutional progress of child protection.

If we analyze the spirit of Law Number 11/2012, the reason for diversion is to *"protect children against the deprivation of liberty"* [*vide* Article 6 paragraph (1) sub-paragraph c of Law Number 11/2012].

The establishment of norms of the obligation to order diversion in Law Number 11/2012 is in line with and complies with the demand of Article 28I paragraph (4) of the 1945 Constitution stating that the protection, promotion, upholding and fulfillment of human rights shall be the responsibility of the state, particularly the government.

In addition, such obligation of diversion is in line with and complies with the demand of Article 28I paragraph (4) of the 1945 Constitution guaranteeing that every child shall have the right to survive, grow and develop and shall have the right to be protected against violence and discrimination as guaranteed by Article 28B paragraph (2) of the 1945 Constitution.

(b) Detention of a child beyond the time limit constitutes deprivation of liberty.

With regard to a child who is detained at every level of examination, if the detention period has expired, while a decision has not been made, such child **must** be released by law [*vide* Article 35 paragraph (3), Article 37 paragraph (3), Article 38 paragraph (3) of Law Number 11/2012]. This

obligation is imperative in nature, but if judges do not perform it, it will certainly result in the deprivation of liberty of children which illegal and without legality.

Deprivation of liberty of children is illegal or without legality since Law Number 11/2012 orders to release such child by law, and thus, **it is appropriate, objective and fair if the act of deprivation of liberty of children illegally or without legality is qualified as a criminal act imposed with criminal sanctions.**

Deprivation of liberty of children absolutely cannot be performed unless it is made legally and with legality. This constitutional right is guaranteed by Article 28I paragraph (1) of the 1945 Constitution.

With regard to the juridico-constitutional elucidation, if Article 28I paragraph (1) of the 1945 Constitution follows the principle of legality **("…the right not to be prosecuted under retroactive laws")** by referring to the doctrine of the principle of legality which includes *lex scripta, lex certa, no retroactive* elements and prohibition from using construction and analogy, the principle of legality

constitutes the constitutional right (and the Human Rights) as well as the constitutional right '…**which may not be reduced under any circumstances**. That is the content of Article 28I paragraph (1) of the 1945 Constitution.

(c) With no excerpt of decision, deprivation of liberty occurs.

The report of the Indonesian Child Protection Commission (*KPAI*) in the 1st Human Rights Session gives factual information that many children still do not obtain the excerpt of decisions on the cases, namely the decisions of Judges which have been passed [*KPAI*, the Report of the 1st Human Rights Session, December 12, 2011]. As a result, according to the report of *KPAI* in the 1st Human Rights Session, the Defendant/Convict cannot be released even though his/her detention period or his/her criminal sanction period has expired (it is for a convict whose detention period is same with or equal to his/her sanction). In fact, the order to give the excerpt of decisions has been clear in the criminal procedural law as contained in Article 226 paragraph (1) of the Criminal

Procedure Code. Based on the foregoing, 2 (two) matters are explained as follows:

(1) Not giving the excerpt of decisions results in illegal deprivation of liberty of children being still committed, thus violating the constitutional rights and the human rights.

(2) The giving of the excerpt of decisions is not effective only based on the order in Article 226 of the Criminal Procedure Code because there is no sanction against such action, and thus, it indeed results in and facilitates the occurrence of illegal deprivation of liberty of children.

Even if it is considered that the giving excerpt of the decisions of Judges is a matter of criminal procedural law being violated which may be imposed with sanction of the code of ethics, in reality, such imperative order of the criminal procedural law cannot be followed.

The most basic reason of such criminal procedural law is that not giving such excerpt of decisions makes a child, who should have been released

because his /her criminal sanction period has expired, unable to be released.

If a child faces such reality because the excerpt of decisions is not given, it causes such child to be deprived of his/her liberty by, groundless or illegal imprisonment. Besides violating the Human Rights and the constitutional rights of the child to the implementation of the principle of legality, illegal deprivation of liberty of children is a crime which must be criminalized (*vide* Article 28I paragraph (1) of the 1945 Constitution).

Deprivation of liberty of children as the constitutional right and Human Rights absolutely may not be performed legally and with legality. This is a constitutional right guaranteed by Article 28I paragraph (1) of the 1945 Constitution.

The juridico-constitutional elucidation is that Article 28I paragraph (1) of the 1945 Constitution follows the principle of legality **("…the right not to be prosecuted under retroactive laws")** by referring to the doctrine of the principle of legality which include *lex scripta, lex certa, no retroactive* elements and the prohibition from using

construction and analogy, the principle of legality constitutes the constitutional right (and the Human Rights) as well as the constitutional right "…**which may not be reduced under any circumstances**. That is the content of Article 28I paragraph (1) of the 1945 Constitution.

The implications will be more serious if such excerpt of decisions or *extract vonnis* has not been/is not given while the court has passed a pure acquittal decision on a defendant or it decides that the criminal sanction period is equal to the detention period, but authorities of the detention center are not willing to release such defendant without *extract vonnis*, thus an unimaginable irony of violation of the Human Rights occurs.

Deprivation of liberty factually occurs. Illegal deprivation of liberty is a crime. In fact, children may be deprived of their liberty if the obligatory requirements are fulfilled, namely:

(a) it shall be in conformity with the law;

(b) it shall be as the last resort and

(c) it shall be for the shortest possible period of time.

2. The reasons why the protection for children is necessary

Law Number 11/2012 has been passed to protect the constitutional rights of the child in Article 28B paragraph (2) of the 1945 Constitution. It is set forth in the philosophical foundation of Law Number 11/2012 in order to give special protection for children having legal issues [*vide* Consideration section of "considering sub-paragraph c" and considering sub-article 1".

Therefore, it is appropriate, valid and fair for Law Number 11/2012 which is the positive law being more progressive than Law Number 3 Year 1997 (amended) to be passed to guarantee the constitutional right of the child [Article 28B paragraph (2) of the 1945 Constitution], the right of the child as the Human Rights to the principle of legality [Article 28I paragraph (1) of the 1945 Constitution in order to prevent illegal deprivation of liberty of children. These are the rights which may not be reduced under any circumstances (non derogable rights) as stated in Article 28I paragraph (1) of the 1945 Constitution.

In addition to the juridico–constitutional reasons, there are several sociological reasons why the protection for children is necessary. The following is the rationality why the state must provide protection for children [Peter Newel, **"Taking Children Seriously – A Proposal for Children's Rights Commissioner"**, Calouste Gulbenkian Foundation, London, p.18].

1) The cost of making recovery due to the failure to protect children is extremely high. It is extremely higher than the cost incurred if children obtain the protection.

2) Children are affected by direct and long-term impacts of the action or inaction of the Government or other groups.

3) Children always experience separation or disparity in the provision of public service.

4) Children do not have the voting right and the power of lobbying to influence the government's policy agenda.

5) Children, in many cases, cannot obtain protection and fulfillment of their rights.

6) Children have a higher risk of exploitation and abuse.

II. The problem focus on the review of the establishment of norms of Article 96 of Law Number 11/2012.

The problem focus of the Petitioners with respect to Article 96 of Law Number 11/2012 is whether the obligation of diversion along with its criminal sanctions is inconsistent with the 1945 Constitution. Therefore, the answer to it is that the obligation of diversion along with criminal sanctions in Article 96 of Law Number 11/2012 must be reviewed.

If the Petitioners give their reasons and argue that Article 96 of Law Number 11/2012 is unconstitutional, in our opinion, it is inappropriate because it will expand the focus of its judicial review into several justifications in a juridico-constitutional manner, namely:

(a) Diversion is the development of law in Law Number 11/2012 constituting a consequence of constitutional reform because of the existence of Article 28B paragraph (2) of the 1945 Constitution.

(b) Diversion is included in the philosophical context and in accordance with the spirit of Law Number 11/2012, which is, among other things, intended to *"protect Children*

against the deprivation of liberty" [*vide* Article 6 paragraph (1) sub-paragraph c of Law Number 11/2012].

(c) Diversion in the form of reform form of juvenile judicial law will better guarantee the rights of the child, especially against deprivation of liberty, if it is in accordance with and in compliance with the spirit of Article 28I paragraph (4) of the 1945 Constitution stating that the protection, advancement, enforcement and fulfillment of human rights shall be the responsibility of the state, particularly the government.

III. The Problem Focus on judicial review of Article 100 and Article 101 of Law Number 11/2012.

If we follow the way of thinking of the Petitioners in the case of judicial review of Law Number 11/2012 *a quo* questioning the reasons or criteria for the establishment of norms of Article 100 and Article 101 of Law Number 11/2012, the answer to it is simple, namely that: **the criteria and reasons for criminalizing acts in Article 100 and Article 101 of Law Number 11/2012 are related to the existence of deprivation of liberty of children illegally and without legality.**

It is very clear and obvious that any act resulting in the occurrence of deprivation of liberty of children is a crime. In a concrete case, is an act of still detaining a child who should

have been released (whose detention period has expired) – because of another person's act—a disgraceful act or not?

Does the detention of a child – due to another person's deed - although his/her detention period has expired constitute a disgraceful act or not?

Does a child whose criminal sanction period has expired (in accordance with the judge's verdict) have to be in prison or a correctional institution for the deed of an official or another person not giving excerpt of verdict (*extract vonnis*)?

1. What is a criminal act?

Formulating or defining a criminal act is the most important milestone in addressing the issue of the substance of the petition for substantive review *a quo,* particularly **of** Article 100 and Article 101 of Law Number 11/2012.

Theoretically based on the legal science, the issue of criminal liability begins with the doctrine of criminal act. Roscoe Pound states that, "*the fundamental conception in legal liability was the conception of an act*". [Roscoe Pound, "***An Introduction to Philosophy of Law****"*, New Brunswick: Transaction Publisher, 1922, in Chairul Huda, "**Kesalahan dan Pertanggungjawaban Pidana**

(Tinjauan Kritis terhadap Teori Pemisahan Tindak Pidana dan Pertanggungjawaban Pidana) [*Fault and Criminal Liability (A Critical Review of the Theory of Separation between Criminal Act and Criminal Liability)*]", Summary of Doctoral Program of the Faculty of Law of Indonesia University, 2004, p. 6].

Determination or formulation of an act as a criminal act generally contains a prohibition of an act, namely the conduct and its consequences, whether it is to do something (commission) or not to do something (omission).

Vos stated that "*it is a human behavior imposed with a criminal sanction by the laws and regulations; thus it is a human behavior generally prohibited and subject to a criminal sanction*" [Prof. Mr. lit. A.Z. Abidin and Prof.Dr. jur. Andi Hamzah, "**Pengantar Dalam Hukum Pidana Indonesia [*Introduction into Indonesian Criminal Law*]**", Jakarta: Yarsif Watampone, 2010, p. 117].

Theoretically according to the monistic science teachings, a criminal act includes physical as well as mental elements. A criminal act includes:

(a) objective element (an act of doing something or not doing something with prohibited consequences) and;

(b) subjective element (fault of the perpetrator).

A criminal act of course bears a prohibited act along with its consequences. A criminal act only bears an *actus reus*, while *means rea* constitutes a determining factor of criminal liability. [Chairul Huda, "**Kesalahan dan Pertanggungjawaban Pidana (Tinjauan Kritis terhadap Teori Pemisahan Tindak Pidana dan Pertanggungjawaban Pidana) [*Fault and Criminal Liability (A Critical Review of the Theory of Separation between Criminal Act and Criminal Liability)*]**", Summary of Doctoral Program of the Faculty of Law of Indonesia University, 2004, p. 7].

How do we formulate a criminal act?

A criminal act or an offense in a Law starts with the subject (*normadressaat*) or the perpetrator of the formulated offense. The formulation of an offense contains the "core part" (*bestanddelen*) of an offense. Each offense (criminal article) has a different "core part", namely the prohibited act. For example, the "core acts" in Article 338 the Indonesian Criminal Code (offense of

murder) is (a) deliberateness and (b) taking the life of another person.

In short, the “core part” of an offense is the prohibited or unlawful act. According to Van Bemmelen, a legal principle which applies is that a deed can be blamed to the perpetrator and committed in an unlawful manner.

In the petition for judicial review of this Law 11/2012, the issues are:

(1) Whether it is illegal deprivation of liberty?

(2) Whether the illegal deprivation of a child’s liberty is an offense?

The answer to such questions will differentiate between the act as a criminal act or an autonomous offense. Thus, the answer can differentiate and separate it clearly from the duties of a judge related to the principle of independence of judges.

2. Does the act of illegal Deprivation of a child’s Freedom constitute a crime?

To answer such question, a parable of offense of kidnapping can be used. Does kidnapping (taking a person from another person’s legal control)

constitute an offense? Is kidnapping a crime? Physically, the “core act” of kidnapping is deprivation of liberty.

Article 328 *junco* Article 330 paragraph (1) of the Indonesian Criminal Code indeed criminalized kidnapping of children. Similarly, Article 83 Law Number 23 Year 2002 concerning Child Protection explicitly criminalizes child kidnapping. Relevant to kidnapping, even Article 79 of Law Number 23 Year 2002 criminalizes child adoption not in accordance with the laws and regulations.

In sum, deprivation of liberty can only be done when it is legal or on the basis of legality. On the contrary, deprivation of a child’s liberty cannot be done without any legal basis or without legality. Therefore, in the event of any omission leading to the occurrence of deprivation of a child’s liberty, the act is similar to kidnapping. It is appropriate, objective and just to criminalize deprivation of liberty illegally or without legality as a crime.

3. Conditions for Deprivation of a Child’s Freedom

Juridico-constitutionally, Article 28A through Article 28J of the 1945 Constitution constitute constitutional rights as human rights (HR). In the spirit and norm of the constitution, every person is free from any obstacles in exercising freedom, of course in accordance with the laws and regulations. Conversely, the constitution guarantees that no person will be deprived of his/her liberty.

Instead of deprived liberty such as an arbitrary arrest, detention or imprisonment, beyond that protection from violence against children has in fact been guaranteed in Article 28B paragraph (2) of the 1945 Constitution. By referring to the constitution, especially Article 28B paragraph (2) of the 1945 Constitution which explicitly guarantees constitutional rights of children, then juridico-constitutionally, Article 28B paragraph (2) of the 1945 Constitution is intended for protecting and **preventing arbitrary deprivation of liberty, be it an arrest, detention or imprisonment. Arbitrary deprivation of liberty, even for a very short time, injures human rights/children's rights.**

Based on Article 28B paragraph (2) of the 1945 Constitution, it is clear that the constitution guarantees that deprivation of children's liberty will no longer occur unless in accordance with the law.

Such constitutional rights, if compared to the norms of Law explicitly limiting and providing conditions for deprived liberty. Since freedom is a human right, deprivation of liberty constitutes a human right violation (also a constitutional right violation) if conducted arbitrarily.

Article 66 paragraph (4) the Human Right Law as well as Article 16 paragraph (3) of the Child Protection Law require that deprivation of liberty may ONLY be performed if:

(a) "it is in accordance with the prevailing law" and

(b) "it can only be performed as the ultimate remedy".

If referring to Article 66 paragraph (4) of the Human Right Law and Article 16 paragraph (3) of the Child Protection Law, these 2 (two) requirements are the reference point for observing

whether deprivation of liberty is performed arbitrarily or not, whether deprivation of liberty is performed legally or illegally. The answer is clear, namely that deprivation of liberty cannot be performed illegally and without legality. Such deprivation of liberty is a crime.

Moreover, the legal issue of deprived liberty constitutes a universal legal issue and follows the universal legal principle that deprivation of liberty may only be performed under definite conditions.

As a part of civilized nations already ratifying the UN's Convention on the Rights of the Child and since it has been followed and ratified by most of UN member states, it is a universally-accepted international law.

Based on Article 37B Convention on the Right of the Child (CRC), the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time, and these are even limited to exceptional cases only, if referring to the United Nations Rules

for the Protection of Juveniles Deprived of their Liberty.

If compared, Article 37B of CRC contains 2 (two) similar substantive norms regarding the conditions of deprivation of liberty, namely:

(a) conformity with the law;
(b) the last resort.

Going further than both laws, CRC adds the third condition, namely the shortest possible time.

Prohibition of deprivation of liberty which is illegal or not in conformity with the law is based on the conditions in the Human Right Law, the Child Protection Law and various international instruments on the right of the child such as CRC. However, it is also in conformity with the provisions of other human rights instruments.

Indonesia ratified the Convention Against Torture with Law Number 5 Year 1998 concerning Ratification of the Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment (on September 28, 1998).

4. Legal Deprivation of Liberty of a Child Violates the Principle of Legality as a constitutional right in Article 28I paragraph (1) of the 1945 Constitution.

With respect to a criminal act or an offence, the principle of legality applies. Thus, the principle of legality also applies in the legal issue of deprivation of liberty. In sum, deprivation of liberty may only be performed with the principle of legality. Without legality, deprivation of liberty cannot be performed, especially deprivation of liberty against children in the evolving capacities which are vulnerable and which need special protection in accordance with the constitutional rights in Article 28B paragraph (2) of the 1945 Constitution.

With reference to the teaching of the principle of legality consisting of the elements of *lex scripta, lex certa, non-retroactive*, and the prohibition from using construction including analogy, then juridico-constitutionally, Article 28I paragraph (1) of the 1945 Constitution adhering to the principle of legality ("...***the right not to be prosecuted under retroactive laws***"). Thus, the principle of legality is

a constitutional right (and a human right) as well as a constitutional right "...***which cannot be reduced under any circumstances***". This is the text of Article 28I paragraph (1) of the 1945 Constitution.

Therefore, deprivation of liberty of children cannot be performed without any formal legality with respect to the arrest, detention, criminalization or imprisonment. Thus, if an act of doing something (commission) or an act of not doing something (omission) depriving children of their liberty is prohibited or disgraceful.

In criminal law, an act cannot be criminalized unless based on the power of the existing provisions of criminal laws [Komariah Emong Sapardjaja, S.H. "***Ajaran Sifat Melawan-Hukum Materiel Dalam Hukum Pidana Indonesia*** **[The Doctrine of the Nature of Being Against Substantive Law in Indonesian Criminal Law]**", Alumni, Bandung, 2002, p. 5.].

The adage of "*nullum delictum noela poena pravia sine lege poenali*" means that the Law stipulates and limits the acts and the criminal sanctions to be imposed on the perpetrators.

Hamel (1927) and Noyon-Langemeyer state that *straf baar feit* is the behavior of people formulated in Law which is unlawful and which should be criminalized with fault. [Martiman Prodjohamidjojo, "**Memahami Dasar- Dasar Hukum Pidana Indonesia 2 [Understanding the Bases of Indonesian Criminal Law 2]**", Jakarta: Pradnya Paramita, 1996, p. 15].

5. Criminalization based on Article 96, Article 100 and Article 101 of Law Number 11/2012 is beyond the context of Independence of the Judiciary and Independence of Judges.

With the explicit explanation that criminalization of omission leading to illegal deprivation of liberty of children. Juridico-constitutionally, by referring to Article 28B paragraph (2) and Article 28I paragraph (1) of the 1945 Constitution, at has been appropriate, objective and just to have legal norms criminalizing judges' acts leading to deprivation of liberty of children [*vide* Article 100 of Law Number 11/2012].

The existence of the obligation to make a diversion and the threat of criminal sanction based on Article

96 of Law Number 11/2012 do not constitute an intervention in the independence of judges. On the contrary, they ensure restorative justice for justice seekers.

Isn't it the obligation of judges to delve into the sense of justice of the community? However, the petitioners for substantive review *a quo* has an incorrect understanding of diversion in Law Number 11/2012 for considering diversion as a judicial process which has been going on and which is within the power of judges to hear. Meanwhile, the diversion obligation exists before the hearing is held. Therefore, the diversion obligation does not at all perturb independence of judges and independence of the judiciary.

The consideration of the petitioners in the case *a quo* that Article 100 and Article 101 of Law Number 11/2012 threaten the independence of judges, in fact, groundless because:

(a) The obligation to protect the constitutional rights and human rights is the responsibility of the state, especially the government. The use of the aforementioned phrase

responsibility of the state in Article 28I paragraph (4) of the 1945 Constitution, in the separation of power, is based on *trias politica*, and therefore, the responsibility to protect human rights is included in the responsibility of the judicative in addition to the responsibility the executive and the legislative, of course.

Therefore, juridico-constitutionally, the guarantee and protection of constitutional rights and human rights from illegal deprivation of liberty is the legal responsibility of the state, so that it is legal to make optimum efforts, including criminalization of such illegal deprivation.

(b) Liberty may only be deprived in accordance with the law or performed legally and based on legality. Conversely, liberty cannot be deprived if the mandatory conditions (in accordance with the law) are not met.

This is in conformity with the constitutional spirit which guarantees every person's freedom, including for legal certainty of just

laws. Without any legitimate legal basis, deprivation of liberty is illegal, and therefore, it is against the constitutional right to legal certainty of just laws guaranteed in Article 28D paragraph (1) of the 1945 Constitution.

(c) Liberty can only be deprived on condition that it is in accordance with the law, which has an explicit meaning that deprivation of liberty demands the mandatory requirement of existence of legality in the deprivation of liberty. Article 28I paragraph (1) of the 1945 Constitution adheres to the principle of legality by acknowledging the existence of prohibition of prosecution based on retroactive laws which constitutes the right which cannot be reduced under any circumstances (non-derogable right). Recognition of the constitutional rights based on the principle of legality version of Article 28I paragraph (1) of the 1945 Constitution is also in conformity with the principle of legality in the Indonesian Criminal Code universally recognized as a general legal principle

(d) Illegal deprivation of liberty against children is juridico-constitutionally inconsistent with Article 28I paragraph (1), Article 28D paragraph (4), and also Article 28B paragraph (2) of the 1945 Constitution. Therefore, it is appropriate, objective and just for Article 100 and Article 101 of Law Number 11/2012 to impose criminal sanctions in the event of illegal deprivation of liberty. Isn't illegal deprivation of liberty, as the core act of an offense such as kidnapping or hostage taking, a criminal act?

Therefore, as a neutral criminal act which already has the justification and formal legality as an offense, there is no reason for any person to use his/her position and authority to be immune to the threat of criminal law; if there has been an act, there will be integrally a liability

Please allow the Indonesian Child Protection Commission (KPAI) to once again quote the opinion of Roscoe Pound

stating that, "*the fundamental conception in legal liability was the conception of an act*".[Roscoe Pound, "***An Introduction to Philosophy of Law***", New Brunswick: Transaction Publisher, 1922, in Chairul Huda, "**Kesalahan dan Pertanggungjawaban Pidana (Tinjauan Kritis terhadap Teori Pemisahan Tindak Pidana dan Pertanggungjawaban Pidana) [*Fault and Criminal Liability (A Critical Review of the Theory of Separation between Criminal Act and Criminal Liability)*]**", Summary of Doctoral Program of the Faculty of Law of Indonesia University, 2004, p. 6].

It can also be asserted that the **"*actus reus* constitutes a neutral term, thus it is inappropriate to relate it with unneutral issues",** in Chairul Huda, "**Kesalahan and Pertanggungjawaban Pidana (Tinjauan Kritis terhadap Teori Pemisahan Tindak Pidana dan Pertanggungjawaban Pidana) [*Fault and Criminal Liability (A Critical Review of the Theory of Separation*

***between Criminal Act and Criminal Liability)*]**", Summary of Doctoral Program of the Faculty of Law of Indonesia University, 2004, p. 8].

The existence of a syndrome of fear of absoluteness of professional immunity is an unneutral element, and therefore, liability cannot be set aside. Doesn't Article 27 paragraph (1) of the 1945 Constitution recognize equal position in law or the so-called the principle of *equality before the law* in legal theories? Doesn't Article 28I paragraph (1) adhere to the principle of legality, which serves as the basis for justification of prohibition of illegal deprivation of liberty.

(e) Illegal deprivation of liberty is a crime or a criminal act (*straft*), so that it is not correlated with professional immunity (judicial impunity). In addition to being indisputable with the principle of equality before the law and the guarantee of the constitutional right to equal position in law in Article 27 paragraph (1) of the 1945

Constitution, both in theory and practice, the reason of professional immunity of judges cannot be used to reject the existence of the core act of an offense of deprivation of liberty. The reason of professional immunity is not relevant to the discharge from a legal prosecution of a criminal act related to a profession, like a number of cases involving judges committing a certain act related to their position or profession.

In the 1945 Constitution, Indonesia is recognized as a rule of law state (*rechtstaat*) rather than a power state (*machtstaat*), in which the state's power is not unlimited. Similarly, judicial power and the judge's profession are not unlimited absolutely in the name of professional immunity.

(f) It is indeed incorrect to understand the provisions of Article 96, Article 100 and Article 101 of Law Number 11/2012 as a threat which creates the syndrome of fear because, in fact, Article 96, Article 100 and Article 101 of Law Number 11/2012

constitute legal guide useful in maintaining the nobleness of the judge's profession. No syndrome of fear must be displayed by the Petitioners because the judge's profession is substantially a noble profession, serving as "God's representative" on earth which adjudicates based on the heading of "For the Sake of Justice Under the One Almighty God".

It has been the destiny of the judge's profession serving as the guardian of justice and "God's representative: on earth to maintain the nobleness of the profession and to be free from any pressure other than the law and justice. As the guardian of law and justice, judges do not need to heed any pressure, intervention, much less the syndrome of fear which are not necessarily real, true and rational.

Based on the aforementioned reasons, the existence of Article 96, Article 100 and Article 101 of Law Number 11/2012 has juridico-constitutional, sociological and normative justifications. Therefore, it is not

related and irrelevant to disprove criminalization in Article 96, Article 100 and Article 101 of Law Number 11/2012 for any reason in the name of independence of judges and using professional immunity.

6. The politics of child protection of arbitrary deprivation of liberty and deprivation of liberty as the ultimate remedy.

If we analyze the substance of the norms of Law Number 11/2012 in a systematic and in-depth manner, its consideration section refers (among other things) to Article 28B paragraph (2) of the 1945 Constitution, being intended to provide special protection of children vis a vis the law. (*vide* the “considering” section paragraph c of Law Number 11/2012). For that purpose, Law Number 11/2012 integrates diversion (Article 6 through Article 15), sets a child’s higher criminal age at 12 years (Article 1 sub-article 3) following KPAI’s petition for substantive review of Law Number 3 Year 1997 producing Decision of the Constitutional Court Number 1/PUU-VIII/2010.

Moreover, Law Number 11/2012 also constitutes deconstruction of the criminal sanction of imprisonment being no longer serving as the main and leading criminal sanction (*vide* Article 71 of Law Number 11/2012).

The punishment system in Law Number 11/2012 has been under reconstruction which deconstruct the belief in the criminal sanction of imprisonment. If Article 71 of Law Number 11/2012 is analyzed, the Juvenile Criminal Justice System builds the criminal sanction of imprisonment no longer as the only main criminal sanction, by providing admonition, criminal sanction of social work training, criminal sanction of supervision [Article 71 paragraph (1) of Law Number 11/2012].

The punishment system in Article 71 paragraph (1) sub-paragraph a, sub-paragraph b, sub-paragraph c, sub-paragraph d and sub-paragraph e of Law Number 11/2012 has limitedly provided for the types of main criminal sanctions, namely: (a) criminal sanction of admonition, (b) conditional criminal sanctions, namely: (1) guidance outside the institution, (2) public service, or (3) supervision. (c) work training, (d) guidance within the institution

(e) imprisonment. The types of main criminal sanctions in sub-paragraph a, sub-paragraph b, sub-paragraph c and sub-paragraph d are deconstruction which separate the priority of the criminal sanction of imprisonment as the main criminal sanction.

However, according to KPAI, substantively and technically, the criminal sanctions of admonition, guidance outside the institution, public service, work training and guidance within the institution should not be qualified as main criminal sanctions but rather, as Actions (*maatregelen*).

Therefore, it is deconstruction of the belief in guidance through the criminal sanction of imprisonment against children (as a form of deprivation of liberty of children). With such legal idea, deprivation of liberty of children must be prevented and performed under strict conditions.

Therefore, it has been appropriate, objective and just as a criminalization policy, that criminalization is made as a norm for any omission causing children in conflict with the law to be kept in detention or criminalization. This becomes the

basis why such acts are criminalized with Article 100 and Article 101 of Law Number 11/2012.

In fact, children placed in a correctional institution or a juvenile detention center experience destruction of their rights. The overcapacities of children constitutes denial the rights of the child in his/her detention or imprisonment.

In 2008, from the sources of 29 Correctional Centers, 6,505 children were in conflict with the law and brought to court, and 4,622 cases (71.05%), of juvenile criminal acts were punished with criminal sanctions of imprisonment. In 2009, the number of children having legal issues increased to 6,704, and 4,748 children (70.82%) among them were punished with criminal sanctions of imprisonment. Approximately 84.2% of children were placed in prisons for adults due to overcapacity of juvenile prison [Ministry of Social Affairs, "***Pedoman Operasional Program Kesejahteraan Sosial Anak*** [Guidelines on the Social Welfare Program for Children]", 2011, p. 3].

Behind the reality of overcapacity, the child's right to health has been ignored in juvenile prisons

which are crowded and which have bad sanitation not meeting environmental health standards. Article 44 paragraph (3) of the Child Protection Law grants the right to health including curative, promotive and preventive aspects including physical standards (rooms, bedding) and environmental sanitation (clean water, bathrooms, water closets, waste disposal, food sanitation) [Ministry of Health, "***Pedoman Pelayanan Kesehatan Anak di LAPAS/Rutan*** [**Guidelines on Child's Health Service in Correctional Institutions**]", 2009, pp. 13-14].

The overcapacity of juvenile prisons has led to consequent effects of decompetency and defunctionality of juvenile prison or Juvenile Correctional Institution as a place where children are guided in the correctional institutions improve themselves.

Based on such reasons, either juridico-constitutionally or sociologically and factually, deprivation of liberty of children which is illegal or without legality, constitutes a crime which, according to criminal law expert van

Bemmelen, is qualified as a disgraceful act which should be imposed with criminal sanctions. Therefore, Article 96, Article 100 and Article 101 of Law Number 11/2012 has not only juridico-constitutional justifications but also sociological and factual justifications.

Based on the reasons described above, KPAI as the Related Party requests for the panel of Constitutional Court Justices hearing the petition *a quo* to pass the decision with the following injunctions:

(1) To reject the Petitioners' petition in its entirety or to declare that the Petitioners' petition cannot be accepted.

(2) To accept the statement of KPAI as the related party.

(3) To declare Article 96, Article 100 and Article 101 of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System not inconsistent with Article 1 paragraph (3), Article 24 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) of the 1945 Constitution.

[2.6] Whereas the Petitioners and the Government have submitted their written statements received at the Registrar's Office of the Court on January 14, 2013 and on February 7, 2013 and which principally state that they are consistent with their opinions;

[2.7] Whereas to shorten the description in this decision, all which took place in the hearings shall be sufficiently indicated in the minutes of the hearing which constitutes an integral and inseparable part of this decision;

3. LEGAL CONSIDERATIONS

[3.1] Whereas the substance of the Petitioners' petition is constitutionality review of Article 96, Article 100 and Article 101 of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System (State Gazette of the Republic of Indonesia Year 2012 Number 153, Supplement to State Gazette of the Republic of Indonesia Number 5332, hereinafter referred to as Law d 11/2012) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.2] Whereas prior to considering the substance of the petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider the Court's authority to hear the petition *a quo* and the Petitioners' legal standing;

Authorities of the Court

[3.3] Whereas based on Article 24C paragraph (1) of the 1945 Constitution, Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year

2003 concerning the Constitutional Court as amended with Law Number 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, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereinafter referred to as the Constitutional Court Law), Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076) the Court shall have authority to hear at the first and final levels, the decision of which shall be final, to review Laws against the 1945 Constitution;

[3.4] Whereas the Petitioners' petition is to review Article 96, Article 100 and Article 101 of Law 11/2012 against the 1945 Constitution, which is one of the authorities of the Court, so that the Court has authority to hear the petition *a quo*;

Legal Standing of the Petitioner

[3.5] Whereas based on Article 51 paragraph (1) of the Constitutional Court Law along with its Elucidation, the parties eligible to file a petition for review of Laws against the 1945 Constitution shall be those considering that their constitutional rights and/or authority granted by the 1945 Constitution are impaired by the coming into effect of a Law, namely:

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

b. customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of Republic of Indonesia as regulated in Law;

c. public or private legal entities; or

d. state institutions;

Therefore, in the judicial review of a Law against the 1945 Constitution, the Petitioners must first explain and substantiate:

a. their standing as Petitioners as intended in Article 51 paragraph (1) of the Constitutional Court Law;

b. the impairment of constitutional rights and/or authority granted by the 1945 Constitution due to the coming into effect of the Law petitioned for review;

[3.6] Whereas following its Decision Number 006/PUU-III/2005, dated May 31, 2005 and Decision Number 11/PUU-V/2007, dated September 20, 2007, as well as subsequent decisions, the Court has the standpoint that the impairment of constitutional rights and/or authority as intended in Article 51 paragraph (1) of the Constitutional Court Law must fulfill five requirements, namely:

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

b. the Petitioners consider that such constitutional rights and/or authority are impaired by the Petitioners by the coming into effect of the reviewed Law;

c. such impairment of constitutional right and/or authority shall be specific and actual or at least potential in nature which, based on logical reasoning, can be assured of occurring;

d. there is a causal relationship (*causal verband*) between the intended impairment and the coming into effect of the reviewed Law;

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

[3.7] Whereas the Petitioners, as individual Indonesian citizens, argue that Article 96, Article 100 and Article 101 of Law 11/2012 impairs the Petitioners' constitutional rights provided for in Article 1 paragraph (3), Article 24 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2) of the 1945 Constitution, which state as follows:

Article 1 paragraph (3):

(3) The state of Indonesia is a rule of law state.

Article 24 paragraph (1):

(1) Judicial power shall be an independent power to organize judicial administration to uphold law and justice.

Article 28D paragraph (1):

(1) Every person shall have the right to the recognition, guarantee, protection, and legal certainty of just laws as well as equal treatment before the law;

Article 28I paragraph (2):

(2) Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment.

With the following principal reasons:

1. Whereas criminalization of a judge, a judicial official in the provisions of Article 96, Article 100 and Article 101 of Law 11/2012 is emphasized more on the emotionally laden value judgment approach) of the legislators. This emotional judgment does not have any clear purpose and is not accompanied with the consideration of the balance/appropriateness between criminalization efforts and the purpose to be achieved. The policy made by the legislators is oriented more toward protection of the perpetrator (the child). The legislators should have adhered to the ideal of balance, in which legal protection is given not only to the perpetrator (the child), but also to judges and other law enforcers (Investigators and Public Prosecutors) when performing their duties and exercising their authority, without any intervention in the form of criminalization against any violation of the formal criminal law when they want to enforce the criminal law.

2. Whereas the politics of criminalization stipulating an act as a criminal act in the provisions of Article 96, Article 100 and Article 101 of Law 11/2012 is no longer oriented toward policies (policy-oriented approach) and values (value judgment approach). Such provisions do not contain any principles of criminalization or the purpose of criminalization/existence/function of the criminal law, so that the formulation in such provisions does not reflect the principle of proportional justice for judges, and therefore, the formulation in such provisions is inconsistent with Article 28D paragraph (1) of the 1945 Constitution.

3. Whereas the efforts of criminalization in the provisions of Article 96, Article 100 and Article 101 of Law 11/2012 is a form of overcriminalization because such articles, in principle, do not meet the conditions/criteria for criminalization since they are more administrative in nature. The use of the criminal law in criminalizing judges is the legislators' digression/error since such criminalization has been used carelessly without any clear purpose. In a wider framework, the existence of criminalization will have negative impacts on the Juvenile Criminal Justice System.

4. Whereas criminalization in the provisions of Article 96, Article 100 and Article 101 of Law 11/2012 constitutes the crisis of overreach of the criminal law because the use of the criminal law in such provisions has gone beyond their limit of authority. The criminal law should have been used to handle crimes/violations which in fact should be

criminalized/imposed on the perpetrators. However, the provisions of Article 96, Article 100 and Article 101 of Law 11/2012 have, in fact, also criminalized violations of the procedure of the procedural law.

In the judicial practice, procedural violations are supervised by the Supreme Court and the Judicial Commission because such violations are categorized as violations of the Code of Ethics and the Code of Conduct of Judges. The logical consequence of such violations is administrative sanction.

5. Whereas criminalization of judges can be seen as an effort to limit the power of judges in exploring, following and understanding the values of law and the living sense of justice within the community, as provided for in Article 24 paragraph (1) of the 1945 Constitution *juncto* Article 1 sub-article (1) and Article 5 paragraph (1) of Law Number 48 Year 2009 concerning Judicial Power. Therefore, criminal provisions for judges basically can have an impact on the reduced level of independence of judges in performing their judicial duties, so that when viewed from the context of relationships among state institutions under the checks and balances system, such decision of the legislators is inconsistent with the concept of separation of power in a rule of law state of Indonesia, as provided for in Article 1 paragraph (3) of the 1945 Constitution.

6. Whereas the legislators should not have had myopic (narrow) thinking when stipulating the provisions of criminalization for judges because judges are constitutionally obligated to be independent and impartial in

a free and impartial judicial system (*fair trial*). The legislators' revision of the procedural law and the substantive law of the Juvenile Criminal Justice System will improve the judicial function in providing legal protection for children rather than criminalizing judges.

7. Whereas the provisions of Article 96, Article 100 and Article 101 of Law 11/2012 constitute articles potentially qualified to be in violation of the principle of "Independent judicial power (in the field of criminal law)", in this case the independent of judges in the rule of law state of Indonesia which is not discriminatory in implementing the Juvenile Criminal Justice System. With such formulation, the articles *a quo* are not proportional and they are automatically inconsistent with the provisions of Article 1 paragraph (3), Article 24 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) of the 1945 Constitution.

[3.8] Whereas the Petitioners as part of law enforcers in the Juvenile Criminal Justice System which includes investigators, public prosecutors, and judges as special officials of Juvenile Criminal Justice System constitute an integral part of the system whose parts cannot be separated from one another. As an integral system, judges, in implementing the Juvenile Criminal Justice System, are closely related to the investigators and public prosecutors in juvenile criminal cases having similar obligations in relation to the realization of justice for children, especially in terms of diversion;

[3.9] Whereas based on Article 51 paragraph (1) of the Constitutional Court Law and the Court's decisions on legal standing as well as related to the impairment suffered by the Petitioners, in the Court's opinion:

- The Petitioners have constitutional rights granted by the 1945 Constitution, particularly Article 28D paragraph (1), and Article 28I paragraph (2) and the Petitioners consider that such constitutional rights are impaired by the coming into effect of the Law petitioned for review;
- The petitioners' constitutional impairment is specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
- There is a causal relationship between the intended impairment and the coming into effect of the law petitioned for review, and it is likely that with the granting of the petition, the constitutional impairment argued will not or will no longer occur;

Based on such considerations, the Court is of the opinion that the Petitioner have legal standing to file the petition *a quo*;

[3.10] Whereas since the Court has authority to hear the petition *a quo* and the Petitioners have legal standing to file the petition *a quo*, the Court shall subsequently consider the substance of the petition;

Substance of the Petition

Opinion of the Court

[3.11] Whereas the substance of the Petitioners' petition is constitutionality review of Article 96, Article 100 and Article 101 of Law 11/2012 which are, according to the Petitioners, inconsistent with Article 1 paragraph (3), Article 24 paragraph (1), Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution. The aforementioned articles petitioned for constitutional review principally constitute provisions imposing criminal sanctions on the legal subjects in the implementation of the Juvenile Criminal Justice System not performing their obligations, namely (i) investigators, public prosecutors, and judges deliberately not seeking diversion at the levels of investigation, prosecution and examination of cases; (ii) judges, namely judges at the first level, appellate judges, judges at the cassation appeal level, deliberately not providing the decision and not releasing children from detention in the event that the detention extension period has expired; and (iii) court officials deliberately not giving the excerpt of decision to the parties or not giving copies of decision to the parties within the period of 5 (five) days;

[3.12] Whereas after carefully examining the Petitioners' petition, the statement of the Government, the statement of the People's Legislative Assembly, the statement of the Related Party, namely the Indonesian Child Protection Commission, the statements of experts of the Petitioners and written evidence/documents presented by the Petitioners as included in the Facts of the Case section, the Court shall consider as follows:

[3.13] Whereas before further considering the substance of the petition *a quo,* the Court needs to first describe the child and his/her constitutional rights as well as the nature of the Juvenile Criminal Justice System, as follows:

1. Children are the next generation in the survival of human beings, including the survival of the nation and state of Indonesia. Based on such strategic position, Article 28B paragraph (2) of the 1945 Constitution states that there is protection of constitutional rights fully stating that "*Every child shall have the right to survive, grow and develop and shall have the right to be protected from violence and discrimination*";

2. According to the name, a child is not a small human, but he/she is a human being still in the process of growth/development. The child, therefore, still really need other people, especially the parents and the community, to guard his/her growth and development to become a mature human being ready to be personally responsible for his/her rights and obligations in the traffic of association in the community, the nation and the state;

3. The child has not been mentally mature to be responsible as a human being because he/she is still in the process of growth/development, requiring the appropriate view when a child breaches/violates the law, by which it is expected to have appropriate attitude and treatment as well according to the background of the formulation of Law 11/2012, so that the child may have healthy and reasonable growth/development so

that the child must obtain protection from the negative impacts of the rapid development, the wave of globalization in the field of communication and information, advancements in science and technology, as well as changes in the lifestyle of some parents which have brought fundamental social changes in the life of the community which greatly influence the values and behavior of the child [*vide* General Elucidation in the second paragraph]. The child must obtain protection from such matters since he/she has extremely weak resistance to the influencing factors, so that he/she is at great risk of easily breaching and violating the law;

4. In accordance with the background of the formulation of the Law *a quo,* the Juvenile Criminal Justice System in Article 1 sub-article 1 of Law 11/2012 is defined as *"...the entire process of case settlement of cases of children faced with the law, starting from the investigation phase up to the guidance phase after serving a criminal sanction*". Although the formulation of such definition only mentions the existence of the phases of investigation and guidance after serving the criminal sanction, it actually contains the phases, namely the investigation phase, the prosecution phase, the examination phase and court decision. Therefore, from the perspective of the process, the Juvenile Criminal Justice System involves many legal subjects as an integral system with interrelated elements (the juvenile justice system), such as the investigators and public prosecutors also serving as special officials in the process of juvenile criminal justice system;

5. In relation to the formulation of definition the implementation of which involves many special officials for the Juvenile Criminal Justice System in the General Elucidation fifth paragraph states that, "*This law uses the name of the Juvenile Criminal Justice System not to be interpreted as a judicial body as regulated in Article 24 paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia stating that judicial power shall be exercised by a Supreme Court and its inferior courts, in the jurisdictions of general courts, the religious affair courts, the military tribunal, the state administration courts, and by a Constitutional Court. However, this Law constitutes a part of the court of general jurisdiction*";

6. Based on the strategic position as well as the vulnerability of the child to the influence of external factors as well as the nature of the Juvenile Criminal Justice System as described above, the Juvenile Criminal Justice System, although constituting a judicial system, includes 2 (two) substantive matters distinguishing it from the administration of justice in general as intended in Article 24 paragraph (2) of the 1945 Constitution the substantive process of which includes examination and passing of decision. The two substantive and fundamental matters of the judicial system in general or, in other words, what make the Juvenile Criminal Justice System special, are as follows:

   a. Providing special protection for children facing legal issues [*vide* General Elucidation in the fourth paragraph];

b. Provision of restorative justice and diversion to avoid and keep the child away from the judicial process, but finding solutions to improve, reconcile and providing a peaceful heart not being based on retaliation [*vide* General Elucidation seventh paragraph];

The aforementioned two matters are intended for the welfare of the child as the next generation in the continuity of the life of the community, the nation and the state in the future;

[3.14] Whereas based on the description, the issue is whether provisions threatening judges and court officials with criminal sanctions as special officials in the administration of the Juvenile Criminal Justice System in Article 96, Article 100 and Article 101 of Law 11/2012 are inconsistent with the 1945 Constitution, and also what the case is for other special officials in those articles, namely investigators and public prosecutors in the Juvenile Criminal Justice System;

[3.15] Whereas in accordance with the formulation of definition of the Juvenile Criminal Justice System in Article 1 sub-article 1 of Law 11/2012, then the Juvenile Criminal Justice System constitutes a case settlement process which involves investigators, public prosecutors and judges as special officials of the Juvenile Criminal Justice System constituting an integral system whose elements cannot be separated from one another. As an integral system, judges in the administration of the Juvenile Criminal Justice System are closely related to the investigation conducted by the investigators

and prosecution by the public prosecutors in the child's criminal cases. Judges as the executors of judicial power obtain the constitutional guarantee in Article 24 paragraph (1) of the 1945 Constitution in administering justice, stating that "*Judicial power shall be an independent power to organize judicial administration to uphold law and justice*". The intended independence obligates judges to implement it in performing their functions without the influence of anything of anyone, including the influence of the leadership of the courts where they hear cases, as well as judges or leadership of higher courts. Judges must be objective and impartial in examining and adjudicating cases;

[3.16] Whereas independent judicial power, in addition to obligating judges to exercise it as described above, prohibits every influencing extra-judicial power or moreover, the intervention in the court as the executing institution and among the judges as the executors of judicial power. Such characteristic of judicial power, in addition to constituting a constitutional provision, also constitutes the consequence of the option of democratic state idea based on the law [*vide* Paragraph IV of the Preamble to the 1945 Constitution and Article 1 the 1945 Constitution];

[3.17] Whereas the constitutional provision considered above obligates the legislators to formulate it normatively in a Law in order to provide legal guarantee for the administration of justice for the purpose of enforcing the law and justice. The Juvenile Criminal Justice System, in its position as a special court within the court of general jurisdiction with special officials as the administrators, namely, among others, judges, court officials, investigators

and public prosecutors as considered above, constitutes a criminal justice system intended for enforcing the law and justice for children facing legal issues. Since it is the child who is faced in the judicial process with the position and conditions as described above, then the more prioritized purpose is justice rather than the law. With such legislation policy option, the obligation of diversion phase implementation is stipulated for the purpose of restorative justice;

[3.18] Whereas Article 96, Article 100 and Article 101 of Law 11/2012 providing for criminal sanctions against special officials in the administration of the Juvenile Criminal Justice System, namely judges, court officials, investigators and public prosecutors, according to the Court, not only formulate constitutional provisions on the independence of judicial power and independence of the relevant special officials (judges, public prosecutors and investigators of juvenile cases), namely providing legal guarantee for the independent administration of justice, but moreover, they have criminalized administrative violations in the implementation of the Juvenile Criminal Justice System which of course has negative impacts on the special officials implementing the Juvenile Criminal Justice System. Such negative impacts are psychological impacts which are unnecessary in the form of fear and anxiety in performing their duties of hearing a case. This creates legal uncertainty and injustice, thus they are inconsistent with Article 28D paragraph (1) of the 1945 Constitution and counterproductive to the purpose of implementation of the Juvenile Criminal Justice System with its effective and efficient diversion for the purpose of restorative justice;

[3.19] Whereas based on all the considerations above, the arguments in the Petitioners' petition in the constitutionality review of Article 96, Article 100 and Article 101 of Law 11/2012 against the 1945 Constitution have legal grounds;

4. CONCLUSION

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

[4.1] The Court has authority to hear the petition *a quo;*

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

[4.3] The substance of the Petitioners' petition is evidenced and has legal grounds;

Based on the 1945 Constitution of the State of the Republic of Indonesia, Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 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, Supplement to the State Gazette of the Republic of Indonesia Number 5226) and Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076);

5. INJUNCTIONS OF DECISION

Passing the Decision,

To declare:

1. To grant the Petitioners' petition in its entirety;

   1.1. Article 96, Article 100 and Article 101 of Law Number 11 Year 2012 concerning Juvenile Criminal Justice System (State Gazette of the Republic of Indonesia Year 2012 Number 153, Supplement to State Gazette of the Republic of Indonesia Number 5332) inconsistent the 1945 Constitution of the State of the Republic of Indonesia;

   1.2. That Article 96, Article 100 and Article 101of Law Number 11Year 2012 concerning Juvenile Criminal Justice System (State Gazette of the Republic of Indonesia Year 2012 Number 153, Supplement to State Gazette of the Republic of Indonesia Number 5332) have no binding legal effect;

2. To order the promulgation of this decision properly in the Official Gazette of the Republic of Indonesia;

Hence this decision was made in the Consultative Meeting of Justices by nine Constitutional Court Justices, namely Moh. Mahfud MD as Chairperson and concurrent Member, Achmad Sodiki, Anwar Usman, Muhammad Alim, Maria Farida Indrati, Hamdan Zoelva, Harjono, M. Akil Mochtar, and Ahmad Fadlil Sumadi, respectively as members on **Tuesday, the twenty-sixth of March,**

two thousand and thirteen, and was pronounced in the Plenary Session of the Constitutional Court open to the public on **Thursday, the twenty-eighth of March, two thousand and thirteen,** with the pronouncement being completed at **14.55 West Indonesia Time**, by eight Constitutional Court Justices, namely Moh. Mahfud MD as Chairperson and concurrent Member, Achmad Sodiki, Anwar Usman, Muhammad Alim, Maria Farida Indrati, Hamdan Zoelva, M. Akil Mochtar, and Ahmad Fadlil Sumadi, respectively as Members, assisted by Achmad Edi Subiyanto as the Substitute Registrar, in the presence of the Petitioners/their attorneys, the Government or its representative, and the People's Legislative Assembly or its representatives.

CHIEF JUSTICE,

Sgd.

Moh. Mahfud MD.

JUSTICES

Sgd.	**Sgd.**
Achmad Sodiki	**Anwar Usman**
Sgd.	**Sgd.**
Muhammad Alim	**Maria Farida Indrati**

Sgd.	**Sgd.**
Hamdan Zoelva	**M. Akil Mochtar**

Sgd.

Ahmad Fadlil Sumadi

SUBSTITUTE REGISTRAR

Sgd.

Achmad Edi Subiyanto