EXCERPT FROM DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Decision Number 1/PUU-VIII/2010 regarding Review of Law Number 3 Year 1997 concerning Juvenile Court under the 1945 Constitution of the State of the Republic of Indonesia

DECISION

Number 1/PUU-VIII/2010

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing, and deciding upon constitutional cases at the first and final levels, has passed a decision in the case of petition for Judicial Review of Law Number 3 Year 1997 regarding Juvenile Court under the 1945 Constitution of the State of the Republic of Indonesia, filled by:

[1.2] 1. **Komisi Perlindungan Anak Indonesia/the Indonesian Child Protection Commission**, based at Jalan Teuku Umar Number 10-12 Menteng, Central Jakarta, represented by:

Name : **Drs. Hadi Supeno, M.Si**

Occupation : Head of the Indonesian Child Protection Commission;

Referred to as ---------- **Petitioner I**;

2. **Yayasan Pusat Kajian dan Perlindungan Anak Medan/Medan Child Protection and Study Centre Foundation,** based at Jalan Abdul Hakim Number 5A, Pasar Satu Setia Budi, Tanjung Sari Sub-District, Medan Selayang District, Medan City, represented by:

Name : **Ahmad Sopian, S.H., M.A**

Occupation : Head of Medan Child Protection and Study Center Foundation;

Referred to as ---------- **Petitioner II;**

By virtue of Special Power of Attorney Number 412 KPAI/XII/2009 dated November 23, 2009 and November 25, 2009 granting authority to: 1. Muhammad Joni, S.H., M.H; 2. Indrawan, S.H., M.H; 3. Despi Yanti, S.H; 4. Ade Irfan Pulungan, S.H; 5. Ariffani Abdullah, S.H; 6. Azmiati Zuliah, S.H.

All of whom being advocates of the "Litigation Team for the Eradication of Child Criminalization of the Indonesian Child Protection Commission" based at Jalan Teuku Umar Number 10-12 Menteng, Jakarta, acting for and on behalf of the Authorizer, both individually and jointly;

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

[1.3] Having read the petition of the Petitioners;

Having heard the statements of the Petitioners;

Having read the written statement of the Government;

Having read the written statement of the People's Legislative Assembly (DPR);

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

Having examined written evidence submitted by the Petitioners;

Having read the written conclusion of the Petitioners;

2. FACTS OF THE CASE

And so on

3. LEGAL CONSIDERATIONS

[3.1] Whereas the substance of the Petitioners' petition is to review the constitutionality of Article 1 sub-article 2 point b, Article 4 paragraph (1), Article 5 paragraph (1), Article 22, Article 23 paragraph (2) sub-paragraph a, Article 31 paragraph (1) Law Number 3 Year 1997 regarding Juvenile Court (State Gazette of the Republic of Indonesia Year 1997 Number 3, Supplement to the State Gazette of the Republic of Indonesia Number 3668, hereinafter referred to as the Juvenile Court Law) under Article 28B paragraph (2), Article 28D paragraph (1), and Article 28I paragraph (1) of 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:

a. authority of the Court to examine, hear, and decide upon the petition *a quo*;

b. legal standing of the Petitioners;

With respect to the aforementioned two matters, the Court is of the opinion as follows;

Authority of the Court

[3.3] Whereas according to Article 24C paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the Constitutional Court Law) *juncto* Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 regarding Judicial Authority (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 has authority to hear at the first and final levels, the decision of which shall be final in nature, to review Laws under the 1945 Constitution;

[3.4] Whereas the Petitioners' petition is intended for judicial review of the norms in Article 1 paragraph 2 point b, Article 4 paragraph (1), Article 5 paragraph (1), Article 22, Article 23 paragraph (2), Article 31 paragraph (1) of Law Number 3 Year 1997 concerning Juvenile Court under Article 28B paragraph (2), Article 28D paragraph (1), and Article 28I paragraph (1) of the

1945 Constitution, and therefore, the Court has authority to examine, hear, and decide upon the petition *a quo*;

Legal Standing of the Petitioners

[3.5] Whereas based on Article 51 paragraph (1) of the Constitutional Court Law, the parties which can file a petition for Judicial Review of a Law under the 1945 Constitution shall be those considering that their constitutional rights and/or authority have been impaired by the coming into effect of a Law petitioned for judicial review, namely as follows:

a. individual Indonesian citizens, including groups of people having a common interest;
b. customary law community group insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the Republic of Indonesia as regulated in Law;
c. public or private legal entities; or
d. state institutions;

[3.6] Whereas the Petitioners consist of two legal entities, namely the Indonesian Child Protection Commission (KPAI) as Petitioner I and Centre Study and Medan Child Protection and Study Center Foundation (YPKPAM) as Petitioner II believing that their constitutional rights have been impaired or at least potentially impaired by the coming into effect of several articles in the Juvenile Court Law;

[3.7] Whereas Petitioner I is a legal entity established based on the mandate of Article 74 of Law Number 33 Year 2002 regarding Child Protection *juncto* Decree of the President of the Republic of Indonesia Number 77 Year 2003. Based on Article 76 of Law Number 23 Year 2002, Petitioner I has tasks to perform socialization, complaint filing, review, monitoring, evaluation, and supervision related to child protection and providing considerations to the President in the issue of child protection (*vide* evidence P-1A), while Petitioner II is a private legal entity which, based on Article 3 paragraph 1 of its Memorandum of Association, has the objective to "give protection towards children and women as well as every person or institution who violate the rights of child"; (*vide* Evidence P-3A);

[3.8] Whereas the Petitioners have missions to conduct public interest advocacy concerning the interest of children, thus based on Decision Number 002/PUU-I/2003 regarding Judicial Review of the Oil and Gas Law which has granted the legal standing of the Petitioners as Non-Government Organization (NGO), because they are proven to have public interest advocacy in the petition filed;

[3.9] Considering also that following the Court's Decision Number 006/PUU-III/ 2005 dated May 31, 2005 and Decision Number 11/PUU-V/2007 dated September 20, 2007 as well as the subsequent Decisions, the Court is of the opinion that impairment of constitutional rights and/or authority intended in Article 51 paragraph (1) of the Constitutional Court Law must meet five requirements, namely:

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

b. the Petitioners believe that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;

c. the impairment of such constitutional rights and/or authority 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/or authority of the Petitioners and the law petitioned for review;

e. it is likely that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will no longer occur;

[3.10] Whereas the Petitioners believe that their right is impaired by the coming into effect of the articles in the law *a quo* considered to have the potential to impair the interest and mission of the Petitioners as legal entities with child protection as their goal. Meanwhile, based on the practices faced by the Petitioners, the existence of the articles *a quo* has caused or at least potentially causes constitutional right impairment towards their child protection activities in Indonesia;

[3.11] Whereas from this point of view, the Petitioners have causal relationship (*causal verband*) and potential impairment of their constitutional rights as guaranteed in Article 1 paragraph 2 sub-paragraph b, Article 4 paragraph (1), Article 5 paragraph (1) Article 22, Article 23 paragraph (2) sub-paragraph a, Article 31 paragraph (1) of Law Number 3 Year 1997 regarding Juvenile Court under Article 28B paragraph (2), Article 28D paragraph (1), and Article 28I paragraph (1) of the 1945 Constitution;

[3.12] Whereas even though the Petitioners do not suffer any direct impairment factually, actually and specifically due to the coming into effect of the articles *a quo*, the existence of Evidence P-1A and Evidence P-3A has indicated that the Petitioners are public and private legal entities having the mission at least to provide protection and advocacy on child protection;

[3.13] Whereas based on the principles of public interest and justice, legal standing of the Petitioners having public interest advocacy can be qualified as parties which should be considered in this case;

[3.14] Whereas based on the aforementioned considerations, according to the Court, the Petitioners, *prima facie* , have legal standing to file a petition for judicial review of the articles on the Juvenile Court Law, and therefore, the substance of the Petitioners' petition is very relevant and must be considered carefully and accurately in the substance of the petition;

Substance of the Petition

[3.15] Whereas the Petitioners have legal standing, and thus the substance of the petition, namely regarding constitutionality of the articles petitioned for review, must be considered and given legal and just evaluation;

[3.16] Whereas the Petitioners argue that the articles in the Juvenile Court Law petitioned for review are inconsistent with the 1945 Constitution or at least conditionally unconstitutional, namely;

1. Article 1 sub-article 2 point b to the extent of the phrase "...*or according to other regulations of law existing and applicable in the relevant community*."
2. Article 4 paragraph (1) to the extent of phrase "...*at a minimum age of 8 (eight) years*..."
3. Article 5 paragraph (1) to the extent of phrase "...*before reaching the age of 8 (eight) years*..."
4. Article 22 to the extent of phrase "...*criminal or..."*
5. Article 23 paragraph (2) sub-paragraph a to the extent of phrase "...*criminal sanction of imprisonment..."*
6. Article 31 paragraph (1) to the extent of phrase "...*in Juvenile Correctional Institution..."*

The Petitioners argued that three of the six articles petitioned by the Petitioners are unconstitutional or inconsistent with the 1945 Constitution, while the other phrases contained in the other three articles are petitioned by the

Petitioners to be interpreted as conditionally unconstitutional, if the juvenile investigation process has guaranteed the protection of the rights of children by taking account of children's rights to obtain priority of non-criminal actions

Meanwhile, the three articles petitioned to be declared unconstitutional and inconsistent with the 1945 Constitution are related to the following legal issues:

1. **Definition of Delinquent Child**. The Petitioners stated that the definition of Delinquent Child contained in Article 1 sub-article 2 point b of the Juvenile Court Law to the extent of the phrase, "...*or according to other regulations of law existing and applicable in the relevant community*", has contradicted the principle of criminal law legality in Indonesia. This is because the standards of social norms existing in society cannot be taken as the benchmark to guarantee the legal certainty for children. Consequently, child criminalization practices will easily occur because of ambiguity between the definition of "criminal act" and "juvenile delinquency". The Petitioners consider that the inclusion of the phrase *a quo* in the definition of Delinquent Child to be a form of violation of the rights of children guaranteed by the 1945 Constitution;

2. **Criminal Sanction of Imprisonment for Delinquent Child**. The Petitioners stated that the alternative to impose a criminal sanction of imprisonment for delinquent child in Article 23 paragraph (2) sub-paragraph a in the phrase "*criminal sanction of imprisonment*" is

inconsistent with the constitution because it violates the rights of children. This is due to the fact that a delinquent child are not supposedly imposed with a criminal sanction of imprisonment, but education or enforcement action which are educative and rehabilitative in nature. In this respect, a delinquent child can still be imposed with detention, fine, and criminal supervision which are more educative compared to "*criminal sanction of imprisonment*" which tends to have negative effects to the children themselves;

3. **Delinquent Child in Juvenile Correctional Institution**. The Petitioners stated that the placement of a delinquent child in the Juvenile Correctional Institution as children of the state as contained in Article 31 paragraph (1) of Juvenile Court Law is inconsistent with the constitution. Placement of delinquent children in a Juvenile Correctional Institution is wrong or incorrect because the principle of activities which can be provided to delinquent children handed over to the state includes "education, guidance, and work training activities" *(vide* Article 24 paragraph (1) of the Juvenile Court Law) where such activities are not appropriate to be given to children;

In addition to the three articles petitioned to be declared unconstitutional, the Petitioners have also requested the Court to grant conditionally unconstitutional interpretation to the other three articles under the following legal issues:

1. **Juvenile Age Limit.** The Petitioners stated that the age of children who can be brought into a juvenile court hearing as provided for in Article 4 paragraph (1) of the Juvenile Court Law is too low. This is because criminal age limit for children in Indonesia is considered lower than the criminal age limit of children in other countries. The low age limit will hinder the progressive nature of children's education fulfillment as well as threatening children's rights to grow and develop. In reality, the judicial process in Indonesia still applies the adults' judicial process which is far from protecting the rights of children;

The Petitioners also state that the age limit of children for investigation as provided for in Article 5 paragraph (1) of the Juvenile Court Law to be conducted is also too low for the reason that conflicting children tend to experience violence in such investigation. This is based on reality and practices in the examination process where children often experience violence, such as joint detention with adults, environmental problem caused by over capacity of prisons in Indonesia up to other various detention and guidance problems;

Therefore, specifically for the two articles related to juvenile age limit, namely a minimum age of 8 years [Article 4 paragraph (1) and Article 5 paragraph (1)], the Petitioners requested the Court to declare them conditionally unconstitutional and that they can only apply constitutionally if the juvenile investigation process has guaranteed the protection of the rights of children;

2. **Criminal Sanction or Action**. The Petitioners stated that the alternatives to impose punishment for Delinquent Children provided for in Article 22 of the Juvenile Court Law, namely Action or Criminal Sanction, “Action” punishment must be prioritized. This is because criminal punishment will have more negative impacts compared to action punishment. This is based on reality and facts that prison has various and extremely complex problems, starting from joint detention with adults, over capacity, inadequate facility and infrastructure, which overall will hinder children’s rights to grow and develop according to their age;

Therefore, the Petitioners requested the Court to declare the phrase “…criminal sanction or…” in Article 22 of the Juvenile Court Law conditionally unconstitutional and shall only apply when the action is prioritized instead of criminal sanction for the sake of care for the rights of children;

The aforementioned articles are inconsistent with the articles in the 1945 Constitution, namely;

a. Article 28B paragraph (2) of the 1945 Constitution

”Every child shall have the right to live, to grow, and to develop and shall have the right to protection from violence and discrimination”.

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

”Every person shall have the right to the recognition, guarantee, protection, and certainty before the law and equal treatment before the law”.

c. Article 28I paragraph (1) of the1945 Constitution

"*The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances".*

[3.17] Whereas to support their arguments, the Petitioners have presented written evidence marked as Evidence P-1 through Evidence P-52;

[3.18] Whereas in addition to written evidence, the Petitioners have also presented 5 (five) experts, namely **Dr. Surastini, S.H., M.H.; Fentiny Nugroho, M.A., Ph.D**, **Prof. Bismar Siregar, and Hj. Aisyah Amini**, who gave their statements in court on April 7, 2010 and on May 11, 2010 and **Adi Fahrudin** on October 26, 2010 whose statements have been included in the Case Position description, which principally state as follows:

1. Dr. Surastini, S.H., M.H.,

- Whereas Article 1 sub-article 2 point b of the Juvenile Court Law is an unwritten law in the form of customary law or custom so that it can be interpreted to expand the probability of a child to be indicted to criminal sanctions, thus inconsistent with the principle of "*nullum delictum nulla poena sine praevia lege poenali"* in criminal law;
- Whereas Article 4 paragraph (1) of the Juvenile Court Law, the minimum age limit of 8 (eight) years is considered too low to be

asked for criminal liability because children at the age of 8 years still badly need protection;

- Whereas Article 5 paragraph (1) of the Juvenile Court Law which allows for investigation of children under the age of 8 years without being brought to hearings will have a psychologically negative impact on the children;
- Whereas Article 22 and Article 23 of the Juvenile Court Law regarding imposition of criminal sanctions and criminal sanctions of imprisonment against children are inappropriate because they do not help children improve in the future;
- Whereas Article 31 paragraph (1) of the Juvenile Court Law regarding the imposition of criminal sanctions or actions which equally placed in a Juvenile Correctional Institution constitutes an unfair treatment;

2. **Fentiny Nugroho, M.A., Ph.D**

- Whereas children at the age of 8 to 18 years are very vulnerable to be imposed with criminal sanctions because it is at this age that children grow and develop maximally;
- Whereas juvenile judiciary should be in accordance the perspective of child protection which emphasizes the interest, survival, and growth of children and also respect of children's opinion;

3. Prof. Bismar Siregar

- Whereas parents are more liable to assume the responsibility for the actions of children at the age of 8 years rather than the children themselves;
- Whereas children still need love and education from their environment;
- Whereas if children are wrong, then it is their parents who have wrong in educating their children;

4. Hj. Aisyah Amini

- Whereas children at the age of 8 years who are involved in juvenile court hearings will lose their rights to obtain education;
- Whereas in Islamic law, children who have not reached their mental accomplishment (*akil baligh*) cannot be asked for liability so that they cannot be imposed with legal burden (*taklif*);

5. Adi Fahrudin

- Whereas juvenile imprisonment practiced all this time is not effective in the social correction and rehabilitation of children because it can cause trauma;
- Whereas community service order is more appropriate with children's development level and can be made a substitute alternative to criminal sanction of imprisonment for children;
- Whereas the other option is to rehabilitate children in social rehabilitation units under the Ministry of Social Affairs by providing

social workers and infrastructure;

- Whereas to perform the aforementioned options, it is necessary to synchronize the existing regulations;
- Whereas viewed from the children's psychosocial aspect, it shall not be until reaching the age of 13 (thirteen) years the children may be subject to legal liability because they have known their rights and obligations;
- Whereas it shall not until reaching the age of 13 years that children may be imposed with legal liability;

[3.19] Whereas the Government has given its written statement dated March 30, 2010 and have presented an expert, namely Dr. Mudzakkir, S.H., M.H., whose statements have been heard on March 2, 2010 and have been included in the Case Position part, which principally explain as follows:

- Whereas the legal norm in the phrase "...***or according to other regulations of law existing and applicable in the relevant community***" (Article 1 sub-article 2 point b of the Juvenile Court Law) is a legal norm which is common and appropriate with heterogeneous society and criminal legal system in Indonesia;
- Whereas even though the United Nations Committee on the Rights of the Child recommends the minimum age limit for juvenile legal liability at 12 years, such age limit cannot be made as the basis for interpreting the constitutionality of age floor in Article 4 paragraph (1) and Article 5 paragraph (1) of the Juvenile Court Law;

- Whereas the option to impose criminal sanction of imprisonment on children is based on judicial discretion, while the differentiation in treatment and punishment is of course based on physical, mental, and social growth and development of a child;

Opinion of the Court

[3.20] Whereas legal issues which must be evaluated by the Court are:

1. Whether the minimum age floor of 8 (eight) years is too low that it can violate children's constitutional rights and inconsistent with the 1945 Constitution?
2. Whether the coming into effect of other existing and applicable regulations in society are inconsistent with the principle of criminal law legality and inconsistent with the 1945 Constitution?
3. Whether the clause that a Delinquent Child can be imposed with criminal sanction of imprisonment violates the constitutional rights of children and thus inconsistent with the 1945 Constitution?

[3.21] Whereas basically, the juvenile justice system is a judiciary system aimed to grant protection and appropriateness between children's interest and public order in a fair and balanced manner. The juvenile justice system is directed towards special justice implementation for children committing criminal acts by considering children's social, mental, and moral protection more than the mere sentencing concept;

[3.22] Whereas the penalty approach aimed at by the juvenile justice system is more of children's mental and moral rehabilitation process rather than the application of sanctions *an sich*;

[3.23] Whereas the balance of the juvenile justice system has three philosophical principles which must be implemented together, namely: community protection, development competency and accountability. This balance philosophy must also be implemented carefully in addition considering the best interest of children;

[3.24] Whereas the Court is of the opinion that the existence of the Juvenile Court Law should be aimed at providing the best protection for children in order to guarantee their rights to life, rights to survival, and rights to develop. The existence of the Juvenile Court Law specifically aimed at the best interest of children is a form of affirmative action for children;

[3.25] Whereas after carefully examining the laws and regulations regarding the Juvenile Court, the Court is of the opinion that the substance or material of the Law *a quo* must be corrected, such as Article 23 paragraph (2) sub-paragraph a of the Law which states, "*Primary criminal sanctions which can be imposed against Delinquent Children are: a. criminal sanction of imprisonment; b. detention; c. fine; or d. criminal supervision".* The systematization of the formulation is supposed to prioritize criminal supervision and put criminal sanction of imprisonment last according to legal ratio described in paragraph **[3.22]** and paragraph **[3.23]** above;

[3.26] Whereas out of the six articles petitioned for review, the Petitioners request for three articles in the Juvenile Court Law to be decided to be inconsistent with the 1945 Constitution and thus they must be revoked and declared without any binding legal effect. The three articles are Article 1 sub-article 2 point b, Article 23 paragraph (2) sub-paragraph a, Article 31 paragraph (1) of the Juvenile Court Law;

[3.27] Whereas in addition to the three articles petitioned requested to be revoked and declared unconstitutional, the Petitioners also requested the Court to pass a decision of conditional unconstitutionality. Conditional unconstitutionality decision means that an article is declared inconsistent with the 1945 Constitution in a conditionally unconstitutional manner, unless understood in a certain way. In this respect, the three articles petitioned to be declared conditionally unconstitutional are Article 4 paragraph (1), Article 5 paragraph (1), and Article 22 of the Juvenile Court Law;

[3.28] Whereas the Petitioners requested the Court to revoke the phrase, "...*or according to other regulations of law existing and applicable in the relevant community*." in Article 1 sub-article 2 point b of the Juvenile Court Law. The Petitioners argued that the existence of such phrase have posed a greater criminal burden and is succinct in defining "Delinquent Child". This is because the phrase *a quo* has resulted in relative meanings depending on culture and scope of society. The Petitioners stated that the existence of the clause in Article 1 sub-article 2 point b of the Juvenile Court Law is inconsistent with the principle of

criminal law legality and has caused legal uncertainty for children due to lack of clear standards or measures regarding the definition of Delinquent Child according to extremely various and continuously developing social standards;

Whereas the Court has heard the Government's expert, namely Dr. Mudzakkir, S.H., M.H., who stated that the existence of clause in Article 1 sub-article 2 point b of the Juvenile Court Law regarding the definition of Delinquent Child as a child committing a criminal act and other forbidden acts based on other regulations applicable in society, is a common legal norm and is appropriate to the heterogeneous nature of Indonesian society and criminal legal system in Indonesia. This proves that the Law *a quo* has accommodated heterogeneity possessed by Indonesian society;

Whereas regarding the legal statement of the Petitioners' expert, Dr. Surastini, S.H., M.H., who stated that Article 1 sub-article 2 point b of the Juvenile Court Law is an unwritten law in the form of customary law or custom and therefore it can be interpreted to expand the probability of a child to be indicted to criminal sanctions, thus inconsistent with the principle of "*nullum delictum nulla poena sine praevia lege poenali*" in criminal law, the Court is of the opinion that the legal statement is not accurate based on law because the regulation *a quo* is a (criminal) legal norm meant not only for children *an sich* but also for all justice seekers in accordance with the principle of legality [*vide* Article 1 paragraph (1) of the Criminal Code];

Whereas the Court is of the opinion that legal norms in Indonesia cannot be classified solely for positive legal norms written in laws. In addition to the legal

norms regulated and written by the State, other legal norms in essence rooted and culturally applicable among Indonesian society also apply. The legal norms existing in society sociologically and historically are more acknowledged by Indonesian society with various cultures they possess;

Whereas the Court acknowledges the existence of other legal norms existing and binding within Indonesian society, namely religious law norms, customary law norms, and law of decency norms all of which cannot be included in the positive law in Indonesia;

Whereas the legal reasons in the substance of the petition are the relativity and unclear standards with respect to the coming into effect of the article *a quo* which in the end can be proven by legal process in court. The interpretation that a child can be categorized as a “Delinquent Child” in not a process without procedure and which can be justified through a judicial process by every person. The “Delinquent Child” categorization is a justification which can be made through a judicial process the standards of which shall be weighed and proven before the law, and thus the Petitioners’ argument regarding the violation of principle of legality in criminal law is incorrect and does not have any legal basis;

[3.29] Whereas to the extent of the legal issue regarding the phrase, “...*at a minimum age of 8 (eight) years*...”, in Article 4 paragraph (1) of the Juvenile Court Law which , the law must be declared conditionally unconstitutional and can only be applied if the process of juvenile investigation, detention, prosecution, hearing, and imposition of criminal sanctions in a Juvenile Correctional Institution

have guaranteed the protection of the rights of children and the of phrase, "...*before reaching the age of 8 (eight) years*...", in Article 5 paragraph (1) of the Juvenile Court Law to be declared inconsistent with Article 28B paragraph (2), Article 28D paragraph (1) of the 1945 Constitution and conditionally unconstitutional, thus only applicable if juvenile investigation process has guaranteed protection of the rights of child;

Whereas the Petitioners argue that the age floor of children which can be brought to court is too low, thus it does not fulfill the sense of justice and violates children's constitutional rights. The Petitioners compared the age floor of Indonesian juvenile criminal liability to the age floor applicable in several countries and the recommendation from United Nations (UN) Committee on the Rights of the Child, thus concluding that the age of 12 years is the minimum age floor for juvenile criminal liability which has become the international customary law. Besides, the Petitioners also argue that in Article 113 paragraph (1) of the Criminal Code Draft Law, it has been designed that those who have not reached age floor of 12 years cannot be asked for liability for any criminal act he/she has committed;

Whereas the Petitioners argue that the phrase "...*before reaching the age of 8 (eight) years*..." is too low since towards the children at that age *"pro justisia"* legal process can be conducted by the Investigator. The Petitioners state that in reality investigators do not give different treatment towards children under the age of 8 years in the investigation process. The Petitioners have also referred to legal facts of violation of the rights of children such as violence and

uncomfortable condition in the investigation process for the sake of "*pro justisia*" interest;

Whereas the Petitioners argued about several problems that occurred in juvenile the investigation and hearing process in Indonesia. The investigation and hearing process for children at the age of 8 years according to the Petitioners have impaired children's constitutional rights and thus it cannot guarantee the protection and fair legal certainty as well as equal treatment before the law;

Whereas the Petitioners' expert, Fentiny Nugroho, M.A., Ph.D, stated that children at the age of 8 to 18 years are very vulnerable to the imposition of criminal sanctions because at this age, children grow and develop maximally. In line with the statement, the Petitioners' expert, Dr. Surastini, S.H., M.H, stated that the minimum age floor of 8 (eight) years is considered too low for children to be asked for criminal liability because children at the age of 8 years are still badly need protection. Another expert of the Petitioners, Prof. Bismar Siregar, stated that children at the age of 8 years cannot be asked to be responsible for crime and that their parents are more responsible for the children's acts. From the perspective of Islamic law, the Petitioners' expert, Hj. Aisyah Amini, stated that children who have not experienced *akil baligh* or have not reached mental accomplishment cannot be asked for criminal liability. Another expert of the Petitioners, Adi Fahrudin, stated that from children psychosocial study, it shall not be until reaching the age of 13 years that children can imposed with legal liability because the children have recognized their rights and obligations;

Whereas on the contrary, the Government's expert, Dr. Mudzakkir, S.H., M.H. stated that even though the UN Committee on the Rights of the Child has recommended the minimum age floor for juvenile legal liability, namely 12 years, such age floor cannot be made as the basis for interpreting the constitutionality of age floor in Article 4 paragraph (1) and Article 5 paragraph (1) of the Juvenile Court Law;

Whereas from the two legal views both from the Petitioners' experts and the Government's expert, the Court is of the opinion that the age floor has resulted in various interpretations and controversy of thoughts so that the Law needs an age floor which is compatible and in line with the legal liability level of children based on children's constitutional rights. The Court finds out the difference in the minimum age floor for children to be brought in the process of investigation, hearing, and imposition of criminal sanctions. Article 4 paragraph (1) of the Juvenile Court Law states that the age floor of Delinquent Child who can be brought to the Juvenile Court shall be the minimum age of 8 (eight) years. Furthermore, Article 5 paragraph (1) of the Juvenile Court Law states that in the event that a child has not reached the age of 8 (eight) years, investigation may be conducted; while Article 26 paragraph (3) and paragraph (4) of the Juvenile Court Law state that a Delinquent Child under the age of 12 years committing a criminal act subject to a death sentence or life sentence shall be imposed with a criminal sanction on as regulated in Article 24 paragraph (1) of the Juvenile Court Law. The legal provisions concerning the age floor in the process of investigation,

hearing, and the imposition of criminal sanctions constitute the type and substance of (criminal) law liability, all of which should be consistent with the legal principles set forth in Article 5 sub-article c of Law Number 10 Year 2004 regarding Formulation of Laws and Regulations;

Whereas the Court is of the opinion that the age floor of 8 (eight) years for children can be brought to court and for those under 8 (eight) years to be investigated by the Investigator is, factually correct, relatively low. The Elucidation of the Law *a quo* determines the age floor of 8 (eight) years because sociologically, psychologically, and pedagogically, children are considered to have had a sense of responsibility. Even though the Juvenile Court Law also applies principle of presumption of innocence, according to the Court, the legal fact shows the existence of several problems in the process of investigation, detention, and hearing which impair children's constitutional rights guaranteed in the 1945 Constitution. Therefore, the Court needs to establish an age floor to protect children's constitutional rights, especially protection rights and development rights. The Court is of the opinion that based on international convention, recommendation from the UN Committee on the Rights of the Child, and other international legal instruments, age floor of 12 years old can be made as a comparison to establish the minimum age floor for children in legal liability. Even so, the Court is of the opinion that international legal instruments and UN recommendation cannot be made as the touchstone *an sich* in evaluating constitutionality of age floor for children's legal liability;

Whereas the establishment of the minimum age of 12 (twelve) years as the legal liability age floor for children has been accepted in several countries' practice and recommended by the UN Committee on the Rights of the Child in the General Comment on February 10, 2007. The age floor of 12 (twelve) years has been in accordance with the provisions on criminal sanctions which can be imposed on children in Article 26 paragraph (3) and paragraph (4) of the Juvenile Court Law. The age floor has also been determined by considering that children at that age relatively had stable emotional, mental, and intellectual intelligence and in accordance with child psychology and the culture of Indonesian people, and thus they can be legally responsible since they have been aware of their rights and obligations. Besides, the age floor has been determined in line with the spirit of the revised Criminal Code which sets higher age floor to avoid violations of children's constitutional rights as argued by the Petitioners and which is equal to the Juvenile Adjudication Draft Law which also sets the age floor of 12 (twelve) years. Based on the legal views above, the Court is of the opinion that the determined age floor of 12 (twelve) years can guarantee children's rights to grow and develop, and it can also give protection guaranteed in Article 28B paragraph (2) of the 1945 Constitution. Therefore, the phrase "at a minimum age of 8 (eight) years" in Article 4 paragraph (1) of the Juvenile Court Law and the phrase "before reaching the age of 8 (eight) years" in Article 5 paragraph (1) of the Juvenile Court Law is conditionally unconstitutional, which makes it unconstitutional unless interpreted that they

have reached the age of 12 (twelve) years as the minimum age floor for criminal liability;

Whereas with the change in the minimum age for children's legal liability into the age of 12 (twelve) years, the Court is of the opinion that such change brings legal implication for the minimum age floor for Delinquent Children as regulated in Article 1 paragraph (1) of the Juvenile Court Law stating that "*A child is a person who in the case of Delinquent Child* ***has reached the age of 8 (eight) years*** *but has not reached the age of 18 (eighteen) years old and has not been married*". Therefore, the Court is of the opinion that even though the Article *a quo* is not petitioned for review by the Petitioners, the Article *a quo* is the spirit or soul of the Juvenile Court Law, especially Article 4 paragraph (1) and Article 5 paragraph (1) of the Juvenile Court Law, and thus the minimum age floor must also be adapted so that it will be inconsistent with the 1945 Constitution, namely being changed into the age of 12 (twelve) years.

Whereas in essence, according to the Court, the deletion of the phrase, "*at a minimum age of 8 (eight) years*" and Article 5 paragraph (1) of the Juvenile Court Law to the extent of the phrase *"...before reaching the age of 8 (eight) years..."* in the Juvenile Court Law will affect not only Article 4 paragraph (1) of the Juvenile Court Law but will also, *mutatis mutandis,* affect the existence of the phrases *a quo* in other articles. According to the Court's consideration, other articles which will be affected are Article 1 sub-paragraph 1 on General Requirements part namely, "*A child is a person who in a case of Delinquent Child*

has reached the age of 8 (eight) years *but has not reached the age of 18 (eighteen) years and has not been married",* and the elucidation of the Law *a quo* insofar as related to the age floor of 8 years;

Whereas even though the articles petitioned for review are solely Article 4 paragraph (1) of the Juvenile Court Law to the extent of the phrase, *"...at a minimum age of 8 (eight) years..."* and Article 5 paragraph (1) of the Juvenile Court Law to the extent of the phrase,*"...has not reached 8 (eight) years...",* the Court, according to its constitutional authority, will not allow any norms in Law which are inconsistent and not line with the mandate of constitutional protection constructed by the Court. Therefore, the norms of other articles in this Law, namely Article 1 sub-paragraph 1 and the elucidation of the Juvenile Court Law insofar as they include the phrase referred to in Article 4 paragraph (1) and Article 5 paragraph (1) of the Juvenile Court Law must be declared conditionally unconstitutional as considered above;

Whereas in the constitutional case relating to constitutionality review of a Law, the term of "*ultra petita*" decision (decision exceeding the Petitioners' petition) is actually not recognized, but since Law is an integrated system, where the declaration of any of its articles not having any binding legal binding effect will affect other articles which are not petitioned for review, the declaration of conditionally not having any binding legal binding effect with respect to Article 4 paragraph (1) and Article 5 paragraph (1) of the Law *a quo* is also applicable to Article 1 sub-paragraph 1 as well as to the elucidation of the Juvenile Court Law to the extent of the phrase, "...*has reached the age of 8 (eight) years ..."* which is

unavoidable, even though they are not petitioned for review by the Petitioners;

Whereas as the Interpreter of Constitution, the Court can provide an interpretation in deleting the phrase "...*has reached the age of 8 (eight) years ..."* in Article 1 sub-paragraph 1, **the** phrase "...*at a minimum age of 8 (eight) years ..."* in Article 4 paragraph (1) and the phrase *"...has not reach the age of 8 (eight) years ..."* in Article 5 paragraph (1) of the Juvenile Court Law so that hereinafter the can only be implemented if interpreted according to the minimum age floor determined by the Court, namely the age of 12 (twelve) years;

[3.30] Whereas the Petitioners request the Court to declare Article 22 of the Juvenile Court Law to the extent of the phrase "...*criminal sanction or...*" conditionally unconstitutional and inconsistent with the provisions of Article 28B paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution in order to guarantee the obtainment of the rights of children where the Law must prioritize the imposition of actions rather than criminal sanctions;

Whereas the Petitioners argue that Article 22 of the Juvenile Court Law regarding the imposition of criminal sanctions will have a trauma impact on the children because the ex-prisoner status will affect the children's mental development process both directly and indirectly considering that the status will still attach to the children after they are released from the Juvenile Correctional Institution;

Whereas the Article *a quo* does not emphasize the priority to impose actions instead of criminal sanctions against children so that it does not guarantee the protection and legal certainty for the sake of children's growth and

development;

Whereas the Petitioners expert (Dr. Surastini, S.H., M.H) stated that Article 22 of the Juvenile Court Law regarding criminal sanction imposition on children is not appropriate because it does not help children improve in the future;

Whereas on the contrary, the statement of the Government's expert, namely Dr. Mudzakkir, S.H., M.H; emphasizes that the imposition of criminal sanctions on children constitutes the judicial discretion domain which is also based on the children's physical, mental, and social growth and development in implementing different laws;

Whereas from legal views of the two experts above, the Court can accept the statement of the Government's expert that the imposition of criminal sanctions and the option to impose criminal sanctions to children constitute the judicial discretion domain in deciding upon every case. This is because every lawsuit and case has their own considerations and different legal actions and therefore, the Petitioners' reason is inappropriate according to law and must be set aside;

[3.31] Whereas the Petitioners also requested the Court to revoke the phrase *"a. criminal sanction of imprisonment"*, in Article 23 paragraph (2) sub-paragraph a of the Juvenile Court Law for the reason that the criminal sanction of imprisonment for children will violate the rights of children such as the rights to education, rights to a sense of security/freedom from fear, rights to eat, freedom from violence, rights to gather with one's family, and rights to just law. The

Petitioners argue that the criminal sanction of imprisonment in Indonesia has its own problems which have made them ineffective in giving education on the awareness of the criminal act committed by a child;

Whereas the Petitioners' expert stated that the existence of the article *a quo* regarding the imposition of criminal sanctions and criminal sanction of imprisonment for children are inappropriate options and do not helping children improve in the future;

Whereas the Court can accept the statement of the Government's expert, Dr. Mudzakkir, S.H., M.H., explaining that the option to impose criminal sanction of imprisonment to children is part of judicial discretion, while different treatment and criminal sanction are of course based on children's physical, mental, and social growth and development;

From the legal view above, the Court is of the opinion that Article 23 paragraph (2) sub-paragraph a of the Juvenile Court Law has provided a number of criminal sanction alternatives for Delinquent Children other than criminal sanction of imprisonment namely detention, fine or criminal supervision. In this case, the criminal sanction of imprisonment is not the only criminal option for children and thus it is not absolutely impairing children's constitutional rights. The existence of the criminal sanction of imprisonment clause is a form of action the final decision of which will be entrusted to the judges based on considerations of the weight of a criminal act, children's personal capacity, and so on. It is certainly done by considering a number of principles balanced between the best interest of child and social structure order of the society;

Whereas insofar it is concerned with the legal issue in the form of cases of violence suffered by children in the prison, the actions occurring systematically are due to the coming into effect of the norm in Article 23 paragraph (2) sub-paragraph a of the Juvenile Court Law. The Court is of the opinion that the impairment of rights suffered by children in the prison is not caused by the coming into effect of the norm *a quo*, but because of unconstitutional implementation of the norm. The norm does not absolutely cause impairment of rights of all children living in the Juvenile Correctional Institution and therefore, Article 23 paragraph (2) sub-paragraph a of the Juvenile Court Law is constitutional;

[3.32] Whereas the Petitioners argue that the phrase, "...*in the Juvenile Correctional Institution...",* in Article 31 paragraph (1) of the Juvenile Court Law for the reason that the placement of Delinquent Children decided upon sentenced by the Judges in the Juvenile Correctional Institution constitutes "**incorrect placement**" or "**false imprisonment**". The Petitioners argue that Delinquent Children are not supposed to be put in the Juvenile Correctional Institution and to follow the education, guidance, and work training as referred to in Article 24 paragraph (1) sub-paragraph b of the Juvenile Court Law;

On the contrary, with respect to the Petitioners' argument, the Government has given its statement in principle stating that provisions regarding the existence of the Juvenile Correctional Institution as a consequence of criminal acts committed by children causing them to be placed in a correctional institution which is different from adults' correctional institutions, the Government

states that the Juvenile Correctional Institution has been established in order to protect children from improper behavior; compared to the situation if the children are outside the Correctional Institution;

Besides, the Government has also admitted the problems such as law violations suffered by children when they are in the Juvenile Correctional Institution. This problems have been due to both limitations in facility and infrastructure and the level of professionalism of correctional institution officers in performing their tasks which have not been optimum. In this case, the Government also admits to have put in efforts to improve the handling and guidance of children in the Juvenile Correctional Institution;

Whereas the Court is of the opinion that the provision in Article 31 paragraph (1) is a confirmation of the existence of Juvenile Correctional Institutions and the requirement for law enforcement officers not to place Delinquent Children found guilty in an adult Correctional Institution. The existence of the article *a quo* has strengthened the existence of the Juvenile Correctional Institution as a place for education, guidance, and work training for Delinquent Children condemned to serve criminal sanctions in the Juvenile Correctional Institution;

Whereas in principle, problems argued by the Petitioners regarding Juvenile Correctional Institution have been arising from incorrect application of law by law enforcement officers rather than the existence of norms inconsistent with the 1945 Constitution. Therefore, the Petitioners' argument is inappropriate and does not have any legal basis;

[3.31] Whereas based on the series of the Court's opinions above in their mutual relationship, the Petitioners cannot prove the arguments of their petition, and therefore, the phrases petitioned by the Petitioners included in Article 1 paragraph 2 sub-paragraph b, Article 22, Article 23 paragraph (2) sub-paragraph a, Article 31 paragraph (1) of Law Number 3 Year 1997 regarding Juvenile Court are not evidenced according to law, while the Petitioners' arguments regarding Article 4 paragraph (1) and Article 5 paragraph (1) of the Juvenile Court Law have legal basis;

4. CONCLUSION

Based on the whole process of evaluation of the facts and laws as described above, the Court concludes as follows:

[4.1] The Court has authority to examine, hear, and decide upon the case *a quo*;

[4.2] The Petitioners have legal standing to act as petitioners in the case *a quo*;

[4.3] The Petitioners' arguments in partly evidenced by law.

Based on the 1945 Constitution of the State of the Republic of Indonesia and in view of Article 56 paragraph (2) and paragraph (3) as well as Article 57 paragraph (1) and paragraph (3) of Law Number 24 Year 2003 regarding to the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia

Number 4316).

5. ORDERS

Passing the decision,

- Granting the Petitioners' petition partly;
- Declaring the phrase,*"... 8 (eight)years ...,"* in Article 1 sub-paragraph 1, Article 4 paragraph (1), and Article 5 paragraph (1) of Law Number 3 Year 1997 regarding Juvenile Court (State Gazette of the Republic of Indonesia Year 1997 Number 3, Supplement to the State Gazette of the Republic of Indonesia Number 3668) and its elucidation particularly related to the phrase *"...8 (eight) years ..."* inconsistent with the 1945 Constitution of the Unitary State of Indonesia and therefore declaring it conditionally unconstitutional, meaning unconstitutional unless interpreted to be "*...12 (twelve) years ...";*
- Declaring the phrase,*"... 8 (eight) years ...,"* in Article 1 sub-paragraph 1, Article 4 paragraph (1), and Article 5 paragraph (1) of Law Number 3 Year 1997 regarding Juvenile Court (State Gazette of the Republic of Indonesia Year 1997 Number 3, Supplement to the State Gazette Number 3668), including the elucidation of the Law particularly related to the phrase *"... 8 (eight) years ..."* are conditionally unconstitutional, which means unconstitutional, unless interpreted to be *"...12 (twelve) years...";*
- Rejecting the remaining parts of the Petitioner's petition;

- Ordering publication of this Decision properly in the Official Gazette of the State of the Republic of Indonesia.

In witness whereof, this decision was passed in the Consultative Meeting of Justices by nine Constitutional Court Justices, namely Moh. Mahfud MD, as Chairperson and concurrent Member, Achmad Sodiki, M. Arsyad Sanusi, Maria Farida Indrati, Hamdan Zoelva, M. Akil Mochtar, Harjono, Ahmad Fadlil Sumadi, and Muhammad Alim, respectively as Members on Wednesday, dated February the Second year two thousand and eleven and was pronounced in a plenary session open to the public on Thursday, February the twenty-fourth year two thousand and eleven by seven Constitutional Court Justices, namely Moh. Mahfud MD, as Chairperson and concurrent Member, Achmad Sodiki, Hamdan Zoelva, M. Akil Mochtar, Harjono, Ahmad Fadlil Sumadi, and Muhammad Alim, respectively as Members assisted by Ida Ria Tambunan as Substitute Registrar, in the presence of the Petitioners/their Attorneys, the Government or its representative, and the People's Legislative Assembly or its representative.

CHAIRPERSON,

Moh. Mahfud MD.

MEMBERS,

Achmad Sodiki

M. Arsyad Sanusi

Maria Farida Indrati

Hamdan Zoelva

M. Akil Mochtar

Harjono

Ahmad Fadlil Sumadi

Muhammad Alim

6. DISSENTING OPINION

With regard to the decision on this case, 1 (one) Constitutional Court Justice, namely M. Akil Mochtar, has a dissenting opinion as follows:

[6.1] Dissenting Opinion of Justice M. Akil Mochtar

Dissenting Opinion of Constitutional Court Justice M. Akil Mochtar regarding Article 1 sub-article 2 point b of Law Number 3 Year 1997 regarding Juvenile Court to the extent of the phrase "...*or according to other regulations of law existing and applicable in the relevant community*." I have a dissenting opinion as follows:

The 1945 Constitution as the State Constitution guarantees a democratic constitutional state, such principle being applied determined expressly in Article 28**I** paragraph (5) which states "*For the purpose of upholding and protecting human rights in accordance with the principle of a democratic and constitutional state, the implementation of human rights shall be guaranteed, regulated, and set forth in laws and regulations*". Therefore, all products produced by the state, including its legal products, must be intended for people's welfare towards fair and prosperous Indonesian society. A characteristic which is universally

acknowledged by democratic constitutional states is the recognition of the principle of legality in all forms. The legality principle is used to guarantee other principles, namely among other things, the principles of limitation to government's power and human rights (Lunshof);

In Indonesia the legality principle is regulated in Article 1 paragraph (1) of the Indonesian Criminal Code (KUHP) which states, "*No act shall be punished unless by virtue of a criminal provision existing before the act*", which in Latin is known as "***Nullum delictum nulla poena sine praevia legi poenali***". The Formulation of the legality principle in the aforementioned Article 1 paragraph (1) of the Criminal Code bears the meaning of the principle of *lex temporis delicti*, which means that the applicable Law shall be the Law existing at the time of occurrence of an offense (non-retroactive).

The Legality Principle is very fundamental in criminal law which in itself consists several elements, namely the principle of *lege praevia*, which means that there is no criminal act without any previous criminal law; the principle of *lege scripta* which means there is no criminal acts without written criminal Law; the principle of *lege certa*, which means there is no criminal act without a clearly defined criminal Law; and the principle of *lege stricta* which means there is no criminal act without a strict criminal Law.

In accordance with the principle of *lex certa*, the formulation of criminal law must prioritize clarity, non-ambiguity, and legal certainty. The principle of *lex certa* according to criminal law doctrine adheres to the principles of:

1. an offense cannot be punished unless based on criminal provisions

according to Law;

2. no analogical implementation of criminal law;
3. an offense cannot be punished solely based on custom;
4. Law cannot be implemented retroactively;
5. there is no other criminal sanctions other than those determined by Law;
6. criminal prosecution can only be conducted according to procedures determined by Law.

Such principles, which are based on the values to avoid authoritarianism from law enforcers, guarantee the legal certainty and the imposition of criminal sanctions based on written law as the source.

Since its inception, criminal law has been formed to regulate and apply criminal sanctions towards a person's act (*daad–strafrecht*), but in its development under the influence of humanism movement, criminal law is also obliged to consider a person committing a criminal act, but when such an act is committed by an underage person or someone who is insane, the application of criminal provisions is exempted for the person, so that the term of *daad-dader strafrecht* has emerged in criminal law*.* Therefore, *adressat* of criminal law is a person's action violating criminal regulations rather than social status or legal status of the person involved (both adults and children) [Romli Atmasasmita (2005:2)];

Decision of the Constitutional Court Number 003/PUU-IV/2006, dated July 25, 2006 regarding Judicial Review to Law Number 31 Year 1999 *juncto* Law Number 20 Year 2001 concerning the Eradication of Criminal Acts of Corruption,

has provided considerations with respect to the theory of the nature against substantive law in the Law *a quo* which is inconsistent with the legality principle, whose considerations are as follows:

"… Whereas therefore , the Court is of the opinion that there is indeed a constitutionality problem in the first sentence of the Elucidation of Article 2 Paragraph (1) of the PTPK Law, and hence the Court needs to further take the following matters into account:

1. *Article 28D paragraph (1) recognizes and protects the citizens' constitutional rights to obtain definite legal guarantee and protection, which is interpreted in the field of criminal law as the legality principle as provided for in Article 1 Paragraph (1) of the Indonesian Criminal Code, that this principle is a demand for legal certainty whereby a person can only be prosecuted and brought before a court based on the previously existing written laws and regulations (lex scripta);*

2. *The foregoing requires that a criminal act must have the elements of unlawfulness, which must be previously applicable in writing, formulating what actions or what consequences of a person's actions that are clearly and strictly restricted and can, therefore, be prosecuted and subjected to criminal sanctions with the nullum crimen sine lege stricta principle;*

3. *The concept of formal unlawfulness (formele wederrechtelijk), obligating legislators to formulate laws as accurately and as in detail as possible (please refer to Jan Remmelink, Hukum Pidana (The Criminal Law,*

2003:358) is required to guarantee legal certainty (lex certa) or which is also known with the term Bestimmheitsgebot;

Considering whereas based on the foregoing, the concept of material unlawfulness (materiele wederrechtelijk), referring to unwritten law in relation to propriety, prudence, and accuracy standards in the society, as an equity norm, is an uncertain standard, and is different in each society, so that what is unlawful in one place may be accepted and recognized as something legal and lawful in another place, based on the standards recognized by the local community, ... and so on;

Whereas therefore, the first sentence of the Elucidation of Article 2 Paragraph (1) of the PTPK Law concerned is contradictory to the just legal certainty protection and guarantee set forth in Article 28D Paragraph (1) of the 1945 Constitution. Therefore, the Elucidation of Article 2 Paragraph (1) of the PTPK Law, insofar as it is related to the phrase ""Referred to as "unlawfully" in this Article shall include actions violating the law both in formal and material sense, namely that, even though such actions are not set forth in the law, but if such actions are deemed contemptible, as they are inconsistent with either the sense of justice or social norms, such actions may therefore be subject to punishment", must be declared with the 1945 Constitution;…"

Based on the Decision *a quo* of the Constitutional Court, the implementation of the legality principle included in Article 1 paragraph (1) of the Criminal Code is a demand for legal certainty where a person can only be prosecuted and tried on the basis of an existing written regulations (*lex scripta*)

prior to the action, which is an acknowledgement and protection of citizen's constitutional rights to receive a fair guarantee, protection, and legal certainty in accordance with Article 28D paragraph (1) of the 1945 Constitution;

Therefore, in the event that a person suspected to have committed a criminal act corruption only receives constitutional protection and guarantee, it would be injustice if an Indonesian child suspected to have committed a criminal act, while such an act is not regulated in a detailed, certain, and accurate manner in Law, is imposed with a criminal sanction which constituting criminalization of all Indonesian children. Meanwhile, in fact, the purpose of the legality principle is to protect every person from authoritarianism of law enforcement officers in arresting, detaining or prosecuting a child in a court without specifying the criminal provisions or event being violated;

The ultimate purpose of criminal law is protection of the legal system so that the interpretation made based on an unclear purpose would mean that we change a dam with a fence which is unable to provide strict limitation, and we will tend to accept the principle adopted in Russia during the era of Stalin: any action considered socially dangerous will be considered as a criminal act (Jan Remmelink, Criminal law, 2003 53-54);

Therefore, based on the foregoing description, in my opinion, the Constitutional Court is supposed to declare Article 1 sub-article 2 point b of Law Number 3 Year 1997 regarding Juvenile Court to the extent of the phrase, " ... ***or according to other regulations of law existing and applicable in the relevant community***" inconsistent with the 1945 Constitution;

SUBSTITUTE REGISTRAR,

SGD.

Ida Ria Tambunan

The Copy of this Decision is valid and in accordance with the original published to the public based on Article 14 of Law Number 24 Year 2003 regarding the Constitutional Court.

Jakarta, February 24, 2011

Registrar,

Kasianur Sidauruk

Complete decision can be seen in the site www.mahkamahkonstitusi.go.id or can be obtained free of charge at the Secretariat General and Registry Office of the Constitutional Court, Jl. Medan Merdeka Barat No. 6 Central Jakarta, Tel. (021) 23529000