



**CONSTITUTIONAL COURT  
OF THE REPUBLIC OF INDONESIA**

**SUMMARY OF DECISION  
FOR CASE NUMBER 140/PUU-XXI/2023**

**Concerning**

**The Phrase “Anyone” in Criminal Acts  
Against the Giving of Freedom to a Minor**

<b>Petitioners</b>	: 1. Aelyn Halim 2. Shelvia 3. Nur 4. Angelia Susanto 5. Roshan Kaish Sadarangani
<b>Type of Case</b>	: Judicial Review of the Indonesian Criminal Code (Criminal Code) against the 1945 Constitution of the Republic of Indonesia (1945 UUD Constitution)
<b>Subject Matter</b>	: Article 330 paragraph (1) of Criminal Code is contrary to Article 28B paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution
<b>Verdict</b>	: To dismiss the Petitioners' petition in its entirety
<b>Date of Decision</b>	: Thursday, 26 September 2024
<b>Overview of Decision</b>	:

The Petitioners are individual Indonesian citizens who believe that their constitutional rights have been violated due to the implementation of the phrase "anyone" in Article 330 paragraph (1) of the Criminal Code. According to the Petitioners, the phrase "anyone" in the *a quo* Article has caused a criminal report submitted to the police under Article 330 paragraph (1) of the Criminal Code to be dismissed or at least deemed invalid on the grounds that the person who ran and took the child was the biological father of the said child, even though the Petitioners (except Petitioner II) has received the custody and guardianship right for the child under a court decision that has permanent legal force. Therefore, the *a quo* article has eliminated the constitutional rights of the Petitioners to receive recognition, guarantees, protection and fair legal certainty.

Regarding the Court's authority, because the Petitioners petition for a review of the constitutionality of the norms of law, *in casu* Article 330 paragraph (1) of Law against 1945 Constitution, therefore the Court has the authority to hear the *a quo* petition.

Regarding the legal standing of the Petitioners as individual Indonesian citizen, they have described their specific rights which they believe are violated actually or at least potentially and according to reasonable reasoning would certainly occur because of the enactment of Article 330 paragraph (1) of the Criminal Code. The Petitioners' alleged constitutional losses are suffered due to the arbitrary actions of the ex-husband or father of the child who until today is still hiding the child and blocking any access of the Petitioners to reach each of their children, when in fact, under a court decision, the Petitioners have been granted custody and guardianship right. The said constitutional losses incurred due to the lack of a clear interpretation of the phrase "anyone" in Article 330 paragraph (1) of the Criminal Code.

Therefore, it is evident that there is a causal relationship (*causal verband*) between the alleged constitutional loss of the Petitioners and the enactment of the norm of Article 330 paragraph (1) of the Criminal Code which is being petitioned for review. Therefore, if the *a quo* petition is granted by the Court, the alleged constitutional loss as described will not or at least will no longer occur. Therefore, regardless of whether the unconstitutionality issue of the norms being petitioned for review is proven or not, the Court is of the opinion that the Petitioners have the legal standing to act as Petitioners in the *a quo* petition.

Regarding the *a quo* petition, the Court has received written statements from both institutions and individuals as *Amicus Curiae*, namely from Asosiasi Pengacara Syariah Indonesia (Sharia Lawyers Association), Komisi Nasional Perlindungan Anak Indonesian (the National Commission for Child Protection), Sentoso Selamat, Rudy E. Mamanua, Azi Firmansyah, Moeldoko Center, and Riko Pranata Ginting. In addition to the submitted written statements, the Court appreciates the form of public participation in an open and accountable judicial process. This matter, of course, is in line with *khittah* (outline) of trials to uphold the law and justice as stated in Article 24 paragraph (1) of the 1945 Constitution Republic of Indonesia.

Regarding the meaning of the phrase "anyone" in Article 330 paragraph (1) of the Criminal Code which is being questioned by the Petitioners, it cannot be separated from the determination of child custody due to divorce, the provisions of which can be seen, among other things, in Law Number 1 of 1974 concerning Marriage (Law 1/1974) as amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, Law Number 23 of 2002 concerning Child Protection (Law 23/2002) as amended by Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, *Kompilasi Hukum Islam* (KHI or Compilation of Islamic Law) whose existence is made pursuant to Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law, and the Circular Letter of the Supreme Court Number 1 of 2017 concerning the Enforcement of the Formulation of the Results of the 2017 Supreme Court Chamber Plenary Session as a Guideline for the Implementation of Duties for the Court (SEMA 1/2017).

Whereas pursuant to the various provisions governing child custody as mentioned above, there are no provisions that expressly state that child custody after divorce is granted to the mother or the father, only Article 105 letter a of the Compilation of Islamic Law explains that for any children under 12 years of age, child custody belongs to the mother. However, without the Court intending to assess the legality of the Compilation of Islamic Law including SEMA 1/2017 as mentioned above, in principle the in the event of a dispute regarding child custody upon the end of the parents' marriage, such dispute is entirely within the domain of the court. The court will determine whether child custody is granted to the mother or the father. In this case, the court may require the principle of the best interests of the child as a basis for determining the custody/guardianship right. In accordance with the principle of the best interests of the child, there is no presumption that the father or the mother has a greater right to claim the custody of the child. Because what the court wishes to achieve is to place the child in the most beneficial environment and allow the child to grow and develop safely and healthily. Therefore, what is actually desired in the various provisions governing child custody is joint custody as a childcare procedure based on the best interests of the child. Therefore, even if the court determines that one of the parents has custody of the child, it may not restrict the access of the other parent who does not have custody to meet with the child. In this case, the legal formulation of the religious chamber of SEMA 1/2017, once again without the Court intending to assess the legality of the said provisions, has formulated that the decision regarding the child custody (*hadlanah*) must include the obligations of the holder of *hadlanah* (child custody) to give access to the parent who does not hold the *hadlanah* right to meet the child. Likewise, in legal considerations, the panel of judges must also consider that if the holder of *hadlanah* right does not give access to the parent who does not hold the *hadlanah* right, it can be used as a reason to file a lawsuit for revocation of the said *hadlanah* right. This means that a parent who does not have custody may not be restricted to meet his/her child as long as the access is known to and permitted by the parent holding the custody. On the other hand, the parent holding the custody may not block the access, prohibit, or deny permission for the parent who does not hold custody

to meet with his/her child.

Whereas regarding the Petitioners' argument that the meaning of the phrase "anyone" in Article 330 paragraph (1) of the Criminal Code should not exclude the biological father or mother of the child, so that the father or mother may be held criminally responsible for the accusation of kidnapping his/her own biological child and therefore the said "phrase" is contrary to the 1945 Constitution of the Republic of Indonesia, the Court considers the following.

Whereas the phrase "anyone" in Article 330 paragraph (1) of the Criminal Code is the equivalent of the Dutch word "*hij die*" which is widely used in the formulation of the Criminal Code which refers to anyone or a person who commits an act that is punishable by criminal law. Whereas the legal subject who is subject to the phrase "anyone" in the provisions of Article 330 paragraph (1) of the Criminal Code and in the formulation of other articles in the Criminal Code which are general in nature and do not provide limitations, exceptions or qualities for a person as a legal subject (*naturalijk person*). In this regard, in Attachment II of Law Number 12 of 2011 concerning the Formation of Laws and Regulations in Chapter I of the Laws and Regulations Framework, number 119, it is stated that if criminal provisions apply to every person, the subject of the criminal provisions is formulated with the phrase "every person". For this reason, in Law Number 1 of 2023 concerning the Criminal Code (Law 1/2023) which will come into effect in January 2026, the formulation of Article 330 paragraph (1) of the Criminal Code has been revised and adjusted to the formulation rules by using the phrase "every person". Article 452 paragraph (1) of Law 1/2023 states, "Every person who takes a child from under the authority asserted to the said child in accordance with the provisions of the laws and regulations or from under the supervision of an authorized person, shall be punished with a maximum imprisonment of 6 (six) years or a maximum fine of category IV." This means that, without having to refer to Law 1/2023, the meaning of the phrase "anyone" has been expressly stated in Attachment II number 119 of Law 12/2011, which is interpreted as "every person". Moreover, regarding the intended meaning, the Constitutional Court Decision Number 33/PUU-XIX/2021 which was declared in a plenary session open to the public on 29 September 2021, in its legal considerations, among other things, stated that if criminal provisions apply to every person (both natural and legal person) then the legal subject of the criminal provisions is formulated with the phrase every person, however if the criminal provisions only apply to certain subjects, then the subject is formulated explicitly, for example foreigners, civil servants, witnesses [*vide* number 119 and number 120 of Attachment II of Law 12/2011]. Therefore, the use of the phrase "anyone" in Article 330 paragraph (1) of the Criminal Code, which is the same as other articles in the Criminal Code, actually contains the meaning "every person", without interpreting a particular quality or qualification. Thus, in the context of Article 330 paragraph (1) of the Criminal Code, the phrase "anyone" automatically also includes the child's biological father or mother because the word does contain the meaning "every person".

Whereas in addition to containing the *addressaat norm* by using the phrase "anyone", Article 330 paragraph (1) of the Criminal Code also contains prohibited actions (*strafbaar*) namely "intentionally taking a child from under the authority asserted to the said child in accordance with the provisions of the laws and regulations or from under the supervision of an authorized person" In this case, it also includes the action of any of the child's biological parent who is not the holder of custody who forcibly takes and controls the child, such action can be considered a criminal act as long as the act fulfils the elements of a crime. Therefore, even though the person who takes the child is the biological parent, if it is done forcibly without rights/permission, then this action falls under Article 330 paragraph (1) of the Criminal Code. This means that if the child is taken by the biological parent who does not hold the custody under a court decision, without the knowledge and permission of the parent holding the custody, especially if coercion or threat of coercion is used, then this action can be categorized as violation to Article 330 paragraph (1) of the Criminal Code. Therefore, in applying Article 330 paragraph (1) of the Criminal Code, there must be evidence that the desire to take the child without the permission of the parent holding custody truly came from the perpetrator, even if the child's biological parent did this.

Furthermore, the Court is of the opinion that regarding the problem faced by the Petitioners, namely the that the Petitioners' report is dismissed on the ground that the reported party is not the perpetrator of the crime in Article 330 paragraph (1) of the Criminal Code, this case is not within the Court's authority to review. However, if we look closely at the Court's affirmation in the legal considerations above, there should be no doubt for the law enforcers, especially police investigators, to accept any report regarding the implementation of Article 330 paragraph (1) of the Criminal Code, because the phrase "anyone" automatically refers to every person or everyone without exception, including in this case the child's biological parents, either the father or the mother.

Whereas after the Court considers it entirely and comprehensively, Article 330 paragraph (1) of the Criminal Code is a provision that regulates clearly and firmly (*expressive verbis*), therefore the said provision does not need to be given or provided with any other meaning, that the phrase "anyone" includes every person, without exception the biological father or mother of the child, as argued by the Petitioners. Within the limits of reasonable reasoning, adding a new meaning to Article 330 paragraph (1) of the Criminal Code, including as petitioned by the Petitioners, will actually give a distinction (anomaly) to the *a quo* norm compared to all the norms in the Criminal Code which use the phrase "anyone" which actually means "every person" or "everyone", without the needs to interpret a certain quality. In fact, this has the potential to narrow the scope of the legal subjects being the *addressat norm* in Article 330 paragraph (1) of the Criminal Code, including any other articles in the Criminal Code which use the phrase "anyone". In addition, adding the element "including every person, without exception" in Article 330 paragraph (1) of the Criminal Code as desired by the Petitioners, it will potentially give rise to legal uncertainty because if in other criminal provisions there are special legal subjects, this could give rise to multiple interpretations if the Court does not first provide a new interpretation. Therefore, the Court concludes that Article 330 paragraph (1) of the Criminal Code no longer requires a new interpretation because it provides legal certainty and legal protection for the child and the biological parent who hold the custody.

Pursuant to all the above considerations, it has been proven that the norm of Article 330 paragraph (1) of the Criminal Code which regulates criminal acts against the giving of freedom to a minor has provided legal protection for the child and fair legal certainty as stated in Article 28B paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, instead of as argued by the Petitioners. Therefore, the Petitioners' arguments are entirely legally unjustifiable.

Accordingly, the Court subsequently passed down a decision which verdict states to dismiss the Petitioner's petition in its entirety.