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Legal Reasoning of a Judge's Dissenting Opinion in the Decision of the Constitutional Court No. 1/PUU-VIII/2010 Against the Judicial Review of Law No. 3 of 1997 on Juvenile Courts

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ABSTRACT

Purpose of the study: This paper aims to analyze the judicial considerations of the dissenting opinion of Constitutional Court judge member Akil Mochtar on Constitutional Court No. 1/PUU-VIII/2010 Against the Judicial Review of Law No. 3 of 1997 on Juvenile Courts.

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Methodology: This normative research was based on literary sources. It aimed to discuss the problems that have been formulated to then obtain the expected results. To maximize discussion, this study uses a statute approach and other concepts obtained from literary sources.

Results: The dissenting opinion conveyed by judge member Akil Mochtar only discussed the law as a written rule in the application of the law. Meanwhile, the Constitutional Court attempted to find substance in the Constitutional Court's decision. People's need for justice encourages constitutional judges as law enforcers to make various breakthroughs considering that the Constitutional Court's decisions are final and binding and have a general influence on the legal system. Observing the age range of children in Law No. 3 of 1997, which is between 8 and 18 years, legal provisions indirectly consider children in that age range to be able to commit criminal acts so that they can be sentenced like adults. In human development, a person of 8 years is still said to be immature (*minderjarig*) or still unable to be responsible. They have imperfect knowledge of the causes and consequences of their actions committed. Mistakes and wrongdoing should be considered child delinquency rather than a crime.

Applications of this study: This paper can be applied by the Constitutional Court to make betterment to laws that are proposed for review by attempting to find the legal substance.

Novelty/ Originality of this study: No previous researchers have studied the dissenting opinion in this decision

Keywords: Constitutional Court, Juvenile Court, dissenting opinion, judicial review, legal reasoning.

ABSTRAK

Tujuan*: Tulisan ini bertujuan untuk menganalisis pertimbangan yuridis atas dissenting opinion anggota hakim Mahkamah Konstitusi Akil Mochtar tentang Mahkamah Konstitusi No. 1/PUU-VIII/2010 Terhadap Uji Materi Undang-Undang No. 3 Tahun 1997 tentang Peradilan Anak .*

Metodologi: *Penelitian normatif ini didasarkan pada sumber literatur. Hal ini bertujuan untuk membahas masalah yang telah dirumuskan untuk kemudian memperoleh hasil yang diharapkan. Untuk memaksimalkan pembahasan, kajian ini menggunakan pendekatan undang-undang dan konsep lain yang diperoleh dari sumber normative.*

Hasil: *Dissenting opinion yang disampaikan oleh anggota hakim Akil Mochtar hanya membahas undang-undang sebagai aturan tertulis dalam penerapan undang-undang. Sementara itu, Mahkamah Konstitusi berupaya mencari substansi dalam putusan Mahkamah Konstitusi tersebut. Kebutuhan masyarakat akan keadilan mendorong hakim konstitusi sebagai penegak hukum melakukan berbagai terobosan mengingat putusan MK bersifat final dan mengikat serta berpengaruh secara umum terhadap sistem hukum. Mencermati rentang usia anak dalam UU No. 3 Tahun 1997, yaitu antara 8 hingga 18 tahun, ketentuan hukum secara tidak langsung menganggap anak dalam rentang usia tersebut dapat melakukan tindak pidana sehingga dapat dipidana seperti orang dewasa. Dalam perkembangan manusia, seseorang yang berumur 8 tahun masih dikatakan belum dewasa atau masih belum mampu bertanggung jawab. Mereka memiliki pengetahuan yang tidak sempurna tentang sebab dan akibat dari tindakan yang mereka lakukan. Kesalahan harus dianggap sebagai kenakalan anak daripada kejahatan.*

Kegunaan: *Kajian ini dapat digunakan oleh Mahkamah Konstitusi untuk melakukan perbaikan terhadap undang-undang yang diajukan untuk diuji dengan mencoba menemukan substansi hukumnya.*

Kebaruan/ Orisinalitas: *Belum ada penelitian sebelumnya yang mempelajari dissenting opinion dalam putusan ini*

Kata Kunci: Mahkamah Konstitusi, Pengadilan Anak, Dissenting Opinion, Peninjauan Kembali, Penalaran Hukum.

INTRODUCTION

The Constitutional Court showed their awareness of the importance of child protection related to early criminalization in the Constitutional Court Decision Number 1/PUU-VIII/2010 dated February 25th, 2011. This decision confirmed the granting of the request for review of Article 1 point 1, Article 4 paragraph (1), Article 5 paragraph (1) Law Number 3 of 1997 concerning Juvenile Courts. The age limit for children, which was originally set at 8 years, was declared to have violated the constitution regarding children's human rights to have their life development guaranteed. The decision signifies a new shift in the thought of protecting children's rights. Protection of children's rights must be given to children, whether or not they conflict with the law. In other words, child protection must thoroughly be carried out in every business related to children.

Case Number 1/PUU-VIII/2010 regarding the review of Law Number 3 of 1997 concerning Juvenile Courts was filed by the Indonesian Child Protection Commission (KPAI/*Komisi Perlindungan Anak Indonesia*) and the Medan Child Protection and Study Center Foundation (YPKPAM/*Yayasan Pusat Kajian dan Perlindungan Anak Medan*). KPAI and YPKPAM tested the constitutionality of Article 1 point 2 letter b, Article 4 paragraph (1), Article 5 paragraph (1), Article 22, Article 23 paragraph (2) letter a, and Article 31 paragraph (1) of Law No. 3 of 1997 against Article 28B paragraph (2), Article 28D paragraph (1), and Article 28I paragraph (1) of the 1945 Constitution. Based on the case that was filed to the Constitutional Court, the Court finally made a decision, that the age limit of a child that can be requested criminal liability is 12 years. The Constitutional Court considered that the minimum age limit of 12 years guarantees a child's right to grow and develop. This is so that they can receive protection as guaranteed in Article 28B paragraph (2) of the 1945 Constitution (Satriya, 2011).

Article 28B paragraph (2) of the 1945 Constitution states that every child has the right to survive, grow, and develop. Each child is entitled to protection from violence and discrimination. Children are included as subjects and representatives of the state who are entitled to have their constitutional rights protected. This includes guaranteeing laws and regulations that support children's rights or juridical products that protect and bridge the needs of children's physical and psychological development. The discussion regarding children is very important, because in children lies the future of humanity’s destiny. They have a great role in determining the nation's future. Research on the nature of children began at the end of

the 19th century when children were used as "objects" to scientifically be studied (Munawwarah, 2010).

The Indonesian positive law commonly defines a child as an immature person (*minderjarig*), an underage person (*minderjarigheid*/a minor), or a child who is under the supervision of a guardian (*minderjarige ondervoordij*) (Soetodjo, 2005). Based on the aforementioned aspects, it turns out that Indonesia's positive law (*ius constitutum/ius operatum*) does not regulate a standard and universal law that determines the age criteria for a child. The Decision of the Constitutional Court No. 1/PUU-VIII/2010 regulates the minimum age limit for a child in the field of legal competence or crime, i.e., 12 years. The following are some age limits for children according to Indonesian law (Hadiwidjoyo, 2009):

a) Law No. 3 of 1997 Concerning Juvenile CourtsArticle 1 paragraph (1) determines that a child is a person who has reached the age of 8 (eight) years before reaching the age of 18 (eighteen) years and has never been married;
b) Law No. 3 of 1997 is still the jurisdiction of the juvenile trial. Article 1 number 8 letters a, b and c of this law determines that juveniles (including child criminals, children of the state, and civilian children) in correctional institutions can be educated in these institutions until they are 18 (eighteen) years old. Article 32 paragraph (3) of this law states that civilian children can be placed in a juvenile prison and their placement can be extended until they are 18 (eighteen) years old;
c) Law No. 1 of 1974 Article 47 paragraph (1) and Article 50 paragraph (1) state that children are people who have not reached the age of 18 (eighteen) years or have never been married;
d) Law No. 8 of 1981 on the Criminal Procedural Code states that the age limit for a child before an examinable court hearing without an oath is 15 (fifteen) years and has never been married;
e) Article 330 of the Civil Code stipulates that children are those who have not reached 21 (twenty-one) years of age and are not yet married;
f) Law No. 4 of 1979 Article 1 paragraph (2) stipulates that a child is someone who has not reached the age of 21 (twenty-one) years and has never been married; and
g) According to Law No. 23 of 2002 concerning Child Protection, a child is someone who is not yet 18 (eighteen) years old.

There is a dissenting opinion containing judicial considerations from a constitutional judge, namely Akil Mochtar, which is different from the opinion of the other Constitutional Court judges. Aside from the concern shown by the Constitutional Court through its verdict which was considered to protect children, there was a different opinion from one of the Supreme Court justices. Based on the background above, how is the analysis of this dissenting opinion?

RESEARCH METHOD

This research is legal research which requires a method to be prepared. This was normative research that was conducted by examining the Constitutional Court decision No. 1/PUU-VIII/2010 concerning the judicial review of Law No. 3 of 1997 regarding the juvenile court. In the legal considerations of judges, there was a different opinion regarding the minimum age limit for a child who can be convicted. This research was based on literary sources. It aimed to discuss the problems that have been formulated to then obtain the expected results. To maximize discussion, this study uses a statute approach and other concepts obtained from literary sources.

RESULTS AND DISCUSSION

The case at the Constitutional Court was filed by the Child Protection Commission. The party filing the lawsuit was the chairman, namely Hadi Sipeno and Ahmad Sopian. The respondents were the Republic of Indonesia's government and the Legislative House. This case was a request for the review of Law Number 3 of 1997 concerning Juvenile Courts against the Republic of Indonesia's 1945 Constitution. The Special Power of Attorney Number 412 KPAI/XII/2009 dated 23 November 2009 and 25 November 2009 authorizes: 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; and 6. Azmiati Zuliah, S.H. as members of the "Litigation Team for the Elimination of Child Criminalization, Indonesian Child Protection Commission (KPAI), located at Teuku Umar Street, Number 10-12 Menteng, Jakarta, to act on behalf of the Authorizer, as they both individually and jointly filed for a judicial review of the Juvenile Justice Law. There was a dissenting opinion when the Constitutional Court decided with the following verdict:

Order of the Decision
Verdicts that the Constitutional Court,

• Partially granted the plea of the Petitioners;
• The phrase, "... 8 (eight) years...," in Article 1 point 1, Article 4 paragraph (1), and Article 5 paragraph (1) of Law Number 3 of 1997 concerning Juvenile Court (Gazette of the Republic of Indonesia of 1997 Number 3, Supplement to the State Gazette of the Republic of Indonesia Number 3668), along with the explanation of the Law specifically related to the phrase "...8 (eight) years..." is conditionally (conditionally unconstitutional)contrary to the Republic of Indonesia's 1945 Constitution, meaning unconstitutional, unless it is defined as "...12 (twelve) years...";
• The phrase, "... 8 (eight) years...," in Article 1 point 1, Article 4 paragraph (1), and Article 5 paragraph (1) of Law Number 3 of 1997 concerning the Juvenile Court (Gazette of the Republic of Indonesia of 1997 Number 3, Supplement to the State Gazette of the Republic of Indonesia Number 3668), along with an explanation of the Law specifically related to the phrase "...8 (eight) years..." does not have a conditionally unconstitutional force, meaning that it is unconstitutional unless it is interpreted as "...12 (twelve) years...";
• Rejecting the plea of the Petitioners for other things and the rest;
• Ordering the publication of this Decision in the Republic of Indonesia's State Gazette as appropriate.

This was decided in the Judicial Deliberation Meeting by nine Constitutional Judges, namely Moh. Mahfud MD, as Chairman as well as Member, and Achmad Sodiki, M. Arsyad Sanusi, Maria Farida Indrati, Hamdan Zoelva, M. Akil Mochtar, Harjono, Ahmad Fadlil Sumadi, and Muhammad Alim, as Members on Wednesday, February 2nd, 2011. This was pronounced in a plenary session open to the public on Thursday, 24th, 2011 by seven Constitutional Justices, namely Moh. Mahfud MD, as Chairman as well as Member, and Achmad Sodiki, Hamdan Zoelva, M. Akil Mochtar, Harjono, Ahmad Fadlil Sumadi, and Muhammad Alim, as Members. It was accompanied by Ida Ria Tambunan as Alternate Registrar. Apart from that, it was attended by the Petitioner/their Attorney, the government or its representative, and the House of Representatives or its representative.

Legal Reasoning of a Judge's Dissenting Opinion

Regarding the decision in this case, there was 1 (one) Constitutional Judge with a dissenting opinion on Article 1 number 2 letter b of Law Number 3 of 1997 concerning Juvenile Courts throughout the phrase "*... or according to other legal regulations that exist and apply in the community concerned*", namely Judge M. Akil Mochtar. His dissenting opinion was as follows:

The 1945 Constitution as the State Constitution guarantees a democratic rule of law. This principle is expressly stipulated in Article 28I paragraph (5) which states, "*To uphold*

and protect human rights according to the principles of a democratic rule of law, the implementation of human rights is guaranteed, regulated, and set forth in statutory regulations". Therefore, all products produced by the state, including legal products, must be aimed at achieving the welfare of society and creating a just and prosperous Indonesian society. One of the characteristics that are universally recognized by a democratic rule of law is the recognition of the legality principle in all its forms. The principle of legality is a principle that is used to guarantee other principles, including the principle of limiting government powers and human rights.

In Indonesia, the principle of legality is regulated in Article 1 paragraph (1) of the Indonesian Criminal Code which states, "*No act may be punished, except for the strength of the criminal provisions in the law, which existed before the act*". In Latin, it is known as "*Nullum delictum nulla poena sine praevia legi poenali*". The formulation of this principle in Article 1 paragraph (1) of the Criminal Code contains the meaning of the *lex temporis delicti* principle, meaning that the applicable law is the law that existed at the time the offense occurred (non-retroactive).

The legality principle is very fundamental in criminal law. It encompasses the *lege praevia* principle (i.e., there is no criminal act without a previous law); the *lege scripta* principle (i.e., there is no criminal act without a written law); the *lege certa* principle (there is no criminal act without clear laws); and the *lege stricta* principle (there is no criminal act without a strict law). Following the *lex certa* principle, the formulation of criminal law must prioritize clarity. They must not contain multiple interpretations. According to the doctrine of criminal law, the *lex certa* principle adheres to the following principles:

1. One cannot be punished except based on criminal provisions according to the law;
2. There is no analogical application of criminal laws;
3. One cannot be punished on the basis of mere habit;
4. Retroactive penal provisions are not enforced;
5. There are no other crimes except those determined by law; and
6. Criminal prosecution must only follow the method determined by law.

This is based on the values of preventing the arbitrariness of law enforcers, guaranteeing legal certainty, and punishing only based on written law. Criminal law was initially formed to regulate and apply criminal sanctions to a person's actions (*daad-strafrecht*). But in its later development, with the influence of the humanism movement,

criminal law must also consider the crime perpetrator. When the act is committed by a minor or mentally disturbed person, the criminal provisions are excluded against those perpetrators. Thus, the term *daad-dader strafrecht* appears in the criminal law doctrine. Thus, it is very clear that the address of criminal law is the act of a person who violates criminal rules and not the social or legal status of that person (adults and children) (Atmasasmita, n.d.)

The decision of the Constitutional Court Number 003/PUU-IV/2006, on July 25th, 2006 associated with the Review of Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 concerning the Eradication of Corruption, has given consideration to the teaching of law-violating behaviors.

The material in the Act *a quo* is contrary to the principles of legality, the considerations of which are as follows: "… Considering that thus the Court considers that there is indeed a constitutionality issue in the first sentence of the Elucidation of Article 2 paragraph (1) of the Law No. 20 of 2001, thus the Court needs to further consider following matters:

a) Article 28D paragraph (1) recognizes and protects the constitutional rights of citizens to obtain guarantee and legal protection. In the field of criminal law, this is translated into the principle of legality and is contained in Article 1 paragraph (1) of the Criminal Code. This principle is a demand for legal certainty, where people can only be prosecuted and tried on the basis of existing written statutory regulation (*lex scripta*);
b) This requires a crime to have a law-violating element, which was already written and defines the actions or consequences of human actions that are clearly and strictly prohibited. This is so that the perpetrators can be prosecuted and punished, following the *nullum crimen sine lege stricta* principle;
c) The concept of violating formally written laws (*formele wederrechtelijk*), requires legislators to formulate as carefully and in detail as possible (Remmelink, 2003b). This is a requirement to guarantee legal certainty (*lex certa*) or also known as *Bestimmheitsgebot*;

Based on the description above, the concept of violating material laws (*materiele wederrechtelijk*), which refers to unwritten laws in terms of decency, prudence and accuracy that lives in society, as a norm of justice, is an uncertain measure, and different from one

particular community environment to another. So that what is against the law in one place may be accepted and recognized as legal according to the standards of a different society.

Thus, the elucidation of Law No. 20 of 2001, Article 2 paragraph (1) of the first sentence is inconsistent with the protection and guarantee of fair legal certainty contained in Article 28D paragraph (1) of the 1945 Constitution. Thus, the Elucidation of Article 2 paragraph (1) Law No. 20 of 2001 concerning the phrase "unlawful" in this article includes acts against the law in the formal and material sense. This means that even though these actions are not regulated in statutory regulations, if these actions are deemed disgraceful because they violate the sense of justice or norms in society's societal life, then the said act can be punished. Such actions must be declared contrary to the 1945 Constitution.

Based on the *a quo* Constitutional Court Decision, the implementation of the principle of legality contained in Article 1 paragraph (1) of the Criminal Code is a demand for legal certainty where people can only be prosecuted and tried on the basis of an existing written law (*lex scripta*). It is an acknowledgment and protection of citizens' constitutional rights to obtain guarantees, protection, and fair legal certainty following Article 28D paragraph (1) of the 1945 Constitution.

Thus, in the event that a person suspected of having committed a criminal act of corruption receives constitutional protection and guarantees, it would be unfair for an Indonesian child who is later suspected of having committed a criminal act that is not regulated in detail and with certainty in the law, is punished. This is an act of criminalizing all Indonesian children. On the contrary, the purpose of the legality principle is to protect people from the arbitrary actions of law enforcement officials in arresting, detaining, or prosecuting a child to court without stating the violated provisions or criminal events.

The ultimate goal of criminal law is to protect the rule of law. So, if an interpretation is based on vague objectives, meaning that we are unable to provide firm boundaries, we will tend to accept the principle that prevailed in Stalin's Russia.

Any act that is socially deemed harmful will be considered a criminal offense (Remmelink, 2003a). Based on the description above, judges suggested that the Constitutional Court should have declared that the phrase, "*...as well as according to other legal regulations that exist and apply in the community concerned*" in Article 1 number 2 letter b of Law Number 3 of 1997 concerning Juvenile Courts is contrary to the 1945 Constitution.

The decision above was taken by the Constitutional Court with a conclusion. Based on all evaluations of the facts and law as described above, the Court has concluded as follows: [1] The Court has the authority to examine, try, and decide on the *a quo* case; [2] The Petitioners have legal standing to act as petitioners in the *a quo* case; and [3] The Petitioners' arguments in the substance of the petition have been partially proven according to law.

The author disagrees with the dissenting opinion submitted by a Constitutional Court judge member, Akil Mochtar. This is because of the problem with the application for Article 1 point 1, Article 4 paragraph (1), and Article 5 paragraph (1) of Law No. 3 of 1997 seems to materially aim to knock on the conscience of Constitutional Court judges. The point of the request is so important, considering that the Juvenile Court Law does not protect children from the negative impacts of the justice system, which tends to leave trauma to children as well as create a negative social stigma against children. It is possible for legal provisions made with the intention of protecting children's rights to turn around and become a means of repealing children's rights. Changes in the minimum age limit for children to 12 years clearly have an extraordinary impact on child protection (Christianto, 2011).

It is very interesting to study the basic considerations of the Constitutional Court Panel of Judges which decided that 12 years is the minimum age for a child to be processed in a juvenile court if he commits a crime based on applicable laws or customary law. The Constitutional Court here seeks to make legal discoveries. According to Sudikno Mertokusumo as quoted by Martitah, a legal discovery is the process of establishing law by judges or legal apparatus (Martitah, 2013). According to Meuwissen, a legal discovery is a reflection of law formation (Rifai, 2011). Judges must consider various aspects, such as sociological aspects in society, norms, anthropological conditions, and other things aside from the written law in the role of the Constitutional Court as negative legislators (Bhakti, 2003).

Negative legislators are judicial bodies or (state) institutions that can act to form laws. But the laws are formed with an assessment mechanism by the judiciary (adjudication) on whether or not a statutory regulation is valid, followed by an annulment or a statement that has no legal force (Statsky, 1995).

The dissenting opinion conveyed by Judge Mochtar only discussed law as a written rule in the application of law. Meanwhile, the Constitutional Court attempted to find substance in its decision through legal discovery, which is a process of concrete juridical

decision-making activities which directly gives rise to legal consequences. Law itself is an institution that continuously builds and changes itself to become better for the sake of justice and prosperity. This is the essence of law as a process, the law in the making (Haryono, 2009). Citizens' need for justice encourages constitutional judges as law enforcers to create various breakthroughs considering that the Constitutional Court's decisions are final and binding and have a general influence on the legal system. This contrasts with other judicial decisions which only bind the litigants.

The dissenting opinion conveyed by constitutional Judge Mochtar is more appropriate if it is submitted in a trial where the decision is based on the law rather than a Constitutional Court trial. This is because the latter is a moment of legal formation or discovery through the submission of a judicial review. It is not in the framework of implementing statutory regulations. Former Supreme Court Justice, as well as former Constitutional Court Judge, Laica Marzuki stated that people should let the Constitutional Court make regulatory decisions, as an innovation or renewal in accordance with justice. This is called the decision-making process of the Constitutional Court through a different approach. Judicial activism is also understood as the dynamism of judges who hold judicial power when making judicial review decisions by amending, canceling, or declaring a law invalid. Justice that is upheld is justice that is substantial, essential and is felt by the public as real justice (Nurhayati, 2015). That's why, in deciding on a judicial review, Constitutional Court Judges are not shackled by what is stipulated in the legal text. The Constitutional Court has the authority to examine laws against the constitution where the Constitution must be read and understood as a different type of law or legislation. It is not just an ordinary legal document, but a document on morals and ground norms. Due to the nature of the constitution, there is a need for a method of its reading. This is what Ronald Dworkin specifically calls moral reading or reading while seeking profound meaning (MD, 2009).

The judicial review of Article 1 point 1 of Law no. 3 of 1997 stipulates "*A child is a person in a delinquent case who has reached the age of 8 (eight) years but has not yet reached the age of 18 (eighteen) years and has never been married.*" The term 'child' in Law No. 3 of 1997 is better understood as a criminal child (a delinquent child) and not children in general. The age limit in Article 1 point 1 of Law No. 3 of 1997 was finally revoked by the Constitutional Court Decision No. 1/PUU-VIII/2010. The age limit for a child as a perpetrator of a crime in this law was 8 years old which is contrary to the 1945 Constitution. Thus, an age

limit of 12 years must be applied. Only once, these legal provisions emphasize the status of children as perpetrators of crimes as stipulated in the Juvenile Court Act (Lubis, 2010).

Article 1 point 1 Law No. 3 of 1997 states "*a child is a person who in the case of delinquency has reached the age of 8 (eight) years but has not yet reached the age of 18 (eighteen) years and has never been married*." The legal provisions explain the scope of children who can be processed in juvenile court hearings are children with juvenile delinquency cases between the ages of 8 and 18 years and are not yet married. There are two reasons for placing a child in court hearings, namely that child must be a suspect in the juvenile delinquency case and he/she must be aged between 8 to 18 years and was never married. Normatively, Law No. 3 of 1997 has a different definition when compared to other laws that regulate children. Article 330 BW uses an age limit of 21 (twenty-one) years, and has not been married before (Supeno, 2010).

Article 1 point 4 of Law No. 4 of 2008 concerning pornography determines the age limit of children to be 18 (eighteen) years old. Article 1 point 5 of Law No. 21 of 2007 concerning the Eradication of the Crime of Human Trafficking determines children as those under 18 (eighteen) years of age, including children who are still in the womb. Article 1 point 5 of Law No. 39 of 1999 concerning Human Rights determines the age limit of children to be 18 (eighteen) years old and unmarried, including children who are still in the womb if this is in their interests. Article 1 Number 31 of Law No. 13 of 2003 concerning Labor determines the age limit for children as also 18 (eighteen) years.

Some of the legal provisions above set an age limit of 18 years with one reason being that the ability and maturity of a child at that age are already like an adult. Observing the age range of children in Law No. 3 of 1997, namely 8 years, the legal provisions indirectly consider children in that age range to be able to commit criminal acts so that they can be sentenced like adults. In the development of human beings, the age of 8 years is clearly said to be immature (*minderjarig*). People of this age still lack responsibility and they are immature (*minderjarig*). People aged 8 years to 18 years have imperfect knowledge of the causes and consequences of the actions they committed. So, they must be protected by responsible parties. Mistakes and misconduct, both in the family and in relationships with other people in society, should be considered child delinquency and should not be categorized as criminal acts.

Constitutional Court Decision Number 1/PUU-VIII/2010 dated February 25th, 2011 has set a 12-year-old age limit for a child who can be brought to a juvenile court hearing. This decision is indeed progress in protecting children from early criminalization which was previously set at a minimum age of 8 years who could not be held accountable.

The author is of the opinion that the Constitutional Court's consideration regarding the age of 12 years as the age limit for criminal responsibility for children is appropriate based on the Recommendation of the Committee on the Rights of the Child in the United Nations General Comment, February 10th, 2007. This is in accordance with the legal provisions of Article 26 paragraphs (3) and (4) of Law No. 3 of 1997. Children at that age relatively have better emotional, mental, and intellectual capabilities under child psychology and Indonesian culture and by comparing to the age setting of children in the revision of the Criminal Code and the Juvenile Court Bill which is 12 years.

CONCLUSION

The dissenting opinion conveyed by judge member Akil Mochtar only discussed the law as a written rule in the application of the law. Meanwhile, the Constitutional Court attempted to find substance in the Constitutional Court's decision. Legal discovery is a process of concrete juridical decision-making activities which directly gives rise to legal consequences. Law itself is an institution that continuously builds and changes itself to become better for the sake of justice and prosperity. This is the essence of law as a process, law is the making. People's need for justice encourages constitutional judges as law enforcers to make various breakthroughs considering that the Constitutional Court's decisions are final and binding and have a general influence on the legal system.

Observing the age range of children in Law No. 3 of 1997, which is between 8 and 18 years, legal provisions indirectly consider children in that age range to be able to commit criminal acts so that they can be sentenced like adults. In human development, a person of 8 years is still said to be immature (*minderjarig*) or still unable to be responsible. They have imperfect knowledge of the causes and consequences of their actions committed. So, they must be protected by responsible parties. Mistakes and wrongdoing, both in familial and societal relationships, should be considered child delinquency rather than a crime.

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