

## **Juridical Analysis of Judges' Consideration of Working Age Discrimination based on the UUD 1945 and Legislations (Study of Constitutional Court Decision Number 35 / PUU-XXII / 2024)**

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### **Abstract**

The emergence of Decision MK Number 35/PUU-XXII/2024 is a response to a conflict related to discrimination in working age requirements in Indonesia. This conflict stems from the conflict between the company's freedom to determine the conditions for recruiting workers, which is regulated in Article 35 Paragraph (1) of the Manpower Law, and workers' rights, which are regulated in Article 28D Paragraph (2) of the 1945 Constitution. This issue is raised because the age limit applied by companies not only limits access to employment, but also violates the principles of non-discrimination and social justice which have been regulated by Pancasila and the 1945 Constitution. The type of research chosen in this research is normative legal research. This type of normative legal research was chosen for this research because there is a blurring of norms in the judge's consideration and the judge's verdict in Decision MK Number 35/PUU-XXII/2024, namely that there is a conflict with Article 28D Paragraph 2 of the 1945 Constitution. However, unfortunately the verdict stated that the judge rejected the applicant's petition in its entirety. But there is also a dissenting opinion by one of the judges which can be a supporting material. Therefore, this research is expected to provide recommendations on the possibility of further legal remedies, such as a review of Article 35 Paragraph 1 of the Labor Law, to ensure that labor regulations in Indonesia do not conflict with the constitutional rights of citizens.

**Keywords** : Judges Consideration, Discrimination, Working Age Requirement, Dissenting Opinion

### **INTRODUCTION**

Discrimination is one of the obstacles to creating justice in society, both socially and economically. The term comes from the Latin *discriminatus*, which means to separate or distinguish, and is often used in social contexts to describe the behavior of majority groups who use their power or influence to limit the rights of minority groups. In the context of human rights, discrimination is an act that violates the principles of democracy and morality because it does not treat individuals equally regardless of background or personal characteristics (Fatah, 2024). Legally, Article 1 Point 1 of Law Number 39/1999 on Human Rights (Human Rights Law) defines discrimination as any form of restriction, harassment, or exclusion that is directly or indirectly based on differences in religion, tribe, race, ethnicity, group, class, social status, economic status, gender, language, or political beliefs that result in the reduction or elimination of human rights and basic freedoms in various aspects of life. Article 3 of the Human Rights Law also affirms that everyone is entitled to the protection of human rights and basic freedoms without discrimination. Based on these two articles, discrimination can be defined as the limitation or exclusion of individuals or groups based on different backgrounds and can occur directly or indirectly, which results in the loss of recognition, exercise, or utilization of human rights in various aspects of life.

The principle of non-discrimination is an important pillar in building a just and equal society. It emphasizes that everyone has equal rights and access to the protection of human rights and fundamental

freedoms. Aspects of non-discrimination include equality before the law, equal access to public services, education, and employment, as well as equal opportunities regardless of individual backgrounds. Based on the values contained in Pancasila and the 1945 Constitution (UUD 1945), especially the fifth principle that emphasizes social justice for all Indonesians, there should be equality and fair treatment in various aspects of life, including in employment opportunities. However, this principle is often not in line with the reality on the ground, especially in the world of work in Indonesia (Kurniawan, Khoirunnisa, and Firmansyah, 2024).

Employment is a fundamental element in realizing community welfare and economic growth. Article 27 Paragraph (2) of the 1945 Constitution states that every citizen has the right to work and a livelihood worthy of humanity. This basic right obliges the state to guarantee equal opportunities for all citizens to obtain decent work without discrimination. However, in practice, age discrimination in employment often occurs in Indonesia. Many companies set an age limit in recruiting workers which results in disadvantages for older job seekers who are still in their productive age and have adequate competence. An example of age discrimination can be seen in one of the recruitment of State-Owned Enterprises (SOEs) that requires a maximum age limit of 24 years or before the 25th birthday on December 31, 2024. The Labor Party condemned this policy as a discriminatory act that violates the principles of equality and justice in the world of work (Ghulam, 2024).

One of the impacts of age discrimination in employment is the increase in unemployment in Indonesia. Based on the latest data from the Central Statistics Agency (BPS) from August 2023 to August 2024, the open unemployment rate in Indonesia was recorded at 4.91 percent. Some of them come from certain age groups that should still have the opportunity to work (Badan Pusat Statistik Indonesia 2024). For companies, the working age requirement is necessary to improve efficiency and consistency of operations and higher age may impair flexibility and adaptation in a fast-changing work environment. This is not only detrimental to individuals, but also has long-term repercussions for the national economy. As unemployment increases due to age discrimination, the potential of a productive workforce that can support economic growth is not optimally utilized.

Table 1.1 Table of Open Unemployment Rate by Characteristics, August 2023 - August 2024

Characteristics	August 2023-August 2024 (percent)
<b>Open Unemployment Rate (TPT)</b>	4,91
<b>Unemployment Rate by Age</b>	
15-24	17,32
25-29	2,94
60 Years and above	1,49

Source : (Indonesia Central Bureau of Statistics 2024)

The phenomenon of age discrimination in employment not only impacts the affected individuals, but is also detrimental to national economic growth. Age restrictions in job qualifications lead to an increase in unemployment and a waste of potential productive human resources. The latest data from the Central Bureau of Statistics (BPS) shows that in the period August 2023 to August 2024, the open unemployment rate in Indonesia was recorded at 4.91 percent, of which most came from the age group that should still be productive (Badan Pusat Statistik Indonesia, 2024). On the other hand, companies often use age qualifications to ensure operational efficiency and performance consistency. Age restrictions are considered to assist companies in obtaining a workforce that suits their operational needs, especially in the face of a fast-changing work environment. However, the principle of equal is not always fair emphasizes that fairness does not always mean equality, but rather takes into account different needs (Asmarani, 2017). Therefore, the current practice of age discrimination in Indonesia requires further evaluation to ensure equal employment opportunities in accordance with the principles of social justice and non-discrimination.

Socially, age discrimination widens economic disparities and increases reliance on social assistance, which in turn burdens the state budget. Psychological impacts are also experienced by victims of age discrimination, including decreased self-esteem, frustration, and depression. From a constitutional perspective, the issue of age discrimination in employment raises legal dilemmas related to the application of Article 35 Paragraph (1) of the Manpower Law, which gives employers the freedom to determine the qualifications for hiring workers, including age requirements. This freedom raises questions of constitutionality and fairness, particularly in relation to Article 28D Paragraph (2) of the 1945 Constitution which guarantees the right of every person to work and to receive fair treatment in employment. Therefore, it is necessary to examine Article 35 Paragraph (1) of the Labor Law to assess its compliance with the principles of fairness and non-discrimination as mandated by the 1945 Constitution.

Decision Number 35/PUU-XXII/2024 emerged as a response to the problem of working age discrimination in Indonesia. This issue was triggered by the conflict between the freedom of companies to set conditions for hiring workers and the right of workers to equal and fair employment opportunities as guaranteed in Article 28D Paragraph (2) of the 1945 Constitution. This decision is important in evaluating the constitutionality of the working age requirement and its impact on the principles of social justice and non-discrimination in Indonesia. Thus, a comprehensive legal study is needed to assess the implications of the decision for labor regulations in Indonesia, so that a more inclusive and fair labor market can be realized for all citizens regardless of age.

## **METHODS**

The type of research chosen in this study is normative legal research. Normative legal research is a process to find the right rules, principles, and legal doctrines to solve legal problems that are being faced (Marzuki 2021). To examine cases, researchers use library materials as the main data and do not conduct field research. Therefore, this type of normative legal research was chosen because of the vagueness of the norms of judges' considerations in Article 35 paragraph (1) of the Manpower Law which is the object of law in Decision Number 35/PUU-XXII/2024.

This research approach uses a statutory research approach (statute approach) which is carried out by analyzing the rules and regulations relating to these legal issues. Based on the research, there are problems in Article 35 Paragraph (1) of the Manpower Law which causes injustice and discrimination against certain age groups. In addition, this research uses a conceptual approach, which is a type of approach in providing an analytical point of view of solving problems in legal research seen from the aspect of the legal concepts behind it. The conceptual approach method is used in this research to describe the concept of age requirement discrimination to answer the problems in Article 35 Paragraph (1) of the Manpower Law because the article states that the employer has the freedom of authority in recruiting the required workforce himself or through a labor placement implementer, then a conceptual approach is needed to answer whether the concept of discrimination according to decision number 35/PUU-XXII/2024 is in accordance with the 1945 Constitution. Then the last one uses a comparative approach, which is carried out by comparing the regulation of age requirement discrimination in Indonesia with the Philippines (Marzuki 2021).

There are three data sources, namely primary legal materials, secondary legal materials, and non-legal materials. Secondary legal material is in the form of all publications on law that are not official document documents. Secondary legal materials can be in the form of textbooks, legal dictionaries, legal journals, and comments on court decisions (Marzuki 2021). Primary legal materials are materials that are authoritative which have authority. Primary legal materials are in the form of laws and regulations, official records or minutes in the making of

laws and regulations and judges' decisions (Marzuki 2021). Non-legal materials are in addition to primary and secondary legal materials. Non-legal material aims to enrich and broaden the researcher's horizons. Non-legal materials can be exemplified such as: Big Indonesian Dictionary (KBBI), encyclopedia, cumulative index and so on.

This research uses a literature study to collect legal materials. Researchers looked at various legal materials, both primary and secondary. For primary legal materials, the collection technique includes laws and regulations that are in accordance with the legal hierarchy and apply as positive law, as well as collecting other laws relevant to the central issue of research (Marzuki 2021). Meanwhile, secondary legal materials are collected as supporters that provide further explanation regarding primary legal materials. The collection of secondary materials includes various scientific works such as books on labor law, research journals, and theses related to discrimination in working conditions.

This research uses prescriptive analysis techniques. Prescriptive technique is a method of analyzing legal materials used to find solutions to legal and non-legal problems. The nature of this analysis aims to provide arguments for the results of the research it has conducted (Muhaimin 2020).

## **RESULTS AND DISCUSSION**

### **1. The vagueness of judges' considerations related to discrimination according to Constitutional Court Decision Number 35/PUU-XXII/2024**

Age discrimination in employment in Indonesia is becoming an increasingly relevant issue in the context of protecting the constitutional right to work. Based on Article 28D paragraph (2) of the 1945 Constitution, everyone has the right to work and to receive fair and appropriate remuneration and treatment in employment, which implicitly contains the principle of non-discrimination, including in terms of age. This right should guarantee equal access for all citizens regardless of age. However, in practice, there are still legislative provisions that explicitly or implicitly limit this right based on age, especially in the labor recruitment process. This can be seen in Article 35 paragraph (1) of the Manpower Law, which regulates the age requirement to enter the workforce. This regulation is intended to adjust to the needs of the labor market, but in its implementation it is often the basis for employers to carry out age discrimination in labor recruitment.

The Constitutional Court Decision No. 35/PUU-XXII/2024 became the main spotlight on the issue of age discrimination, because in its ruling, the Court rejected all requests for judicial review related to age limits in employment. In its reasoning, the Court argued that determining the working age is part of a legitimate legislative policy and is needed to maintain labor market balance. However, this decision is not in line with one of the dissenting opinions from a constitutional judge who argued that the application of age limits has the potential to violate the constitutional rights of citizens, especially the right to work guaranteed by the 1945 Constitution. The judge considered that the age requirement in job recruitment does not consider individual capacity and competence fairly, but rather generally limits access to employment based on age, thus contradicting the principles of equality and non-discrimination. In the Manpower Law, the age limit in labor recruitment is intended to adjust to the dynamic needs of the labor market. However, the application of this age limit is often a discriminatory reason that hinders access to labor, especially for older workers who are still productive. As a result, workers over 35 years old often find it difficult to get a job, even though they are still physically and mentally capable of working optimally. From a human rights perspective, this is contrary to the principle of non-discrimination stipulated in Article 28I paragraph (2) of the 1945 Constitution, which states that everyone has the right to be free from discriminatory treatment on any basis and has the right to protection against discriminatory treatment.

Therefore, the application of age requirements in labor recruitment needs to be reviewed in order to comply with the principles of justice and equality.

Table 1.2 Table of Labor Force (AK) by Age Group, February 2024

Age Group	% Employed/Labor Force 2024
15-29	82,26
20-24	84,06
25-29	92,68
30-34	93,36
35-39	97,51
40-44	97,95
45-49	98,03
50-54	98,51
55-59	98,86
60+	95,18

Source : (Indonesia Central Bureau of Statistics 2024)

Based on data on the percent of people working or the labor force by age group in February 2024 collected through the National Labor Force Survey (Sakernas) conducted by the Central Bureau of Statistics (BPS) (Badan Pusat Statistik 2024). Data from the Labor Force (LF) table shows the actual number of people in a particular age group who are working or looking for work. If a certain age group (for example, 50-60 years old) has a significant labor force figure, this proves that they are still active and productive in the labor market. The data can be an indicator that individuals in certain age groups, such as 15-24 years old (young workers) or 50-60 years old (senior workers) have a good contribution in the world of work. By looking at the contribution of the labor force (AK) in each age group, it can be proven that competence does not only depend on age, but also on the role and experience of the individual. Based on this table, it can be concluded that the maximum working age requirement in recruitment has no definite reason, which disadvantages certain groups and creates injustice. Younger or older age groups still deserve to be given the opportunity to work because the data shows that in fact all age groups are still active and still productive in competing in the labor market. Thus, data on the Labor Force by Age Group can be a strong basis to prove that the 15-60 age group remains competent, relevant, and productive in the labor market.

Internationally, Indonesia has ratified ILO Convention No. 111 on Discrimination in Employment and Occupation through Law No. 21 Year 1999, which prohibits discrimination in employment based on various grounds, including age. In addition, ILO Convention No. 142 also encourages the elimination of age barriers in employment to create fair and inclusive employment opportunities. Nevertheless, in practice, age discrimination is still common in Indonesia, especially through job advertisements that include a maximum age limit. Research shows that around 60% of job advertisements in Indonesia include a maximum age limit, which is generally below 35 years old. This condition reflects discriminatory policies that have not been fully regulated and effectively monitored by the government. In addition, the corporate culture that tends to favor young workers based on the assumption of higher productivity and flexibility is also a factor that reinforces age discrimination in employment.

On the other hand, some countries already have specific regulations that strictly prohibit age discrimination in employment. For example, the Philippines has a specific law prohibiting age discrimination in employment, namely Republic Act No. 10911 or known as the Anti-Age Discrimination in Employment Act. This law expressly prohibits employers from setting age



limits in the recruitment, promotion, placement, and termination processes, unless there is a legitimate and reasonable justification related to job requirements. With this law, the Philippines demonstrates its commitment to creating equal employment opportunities free from age discrimination. In addition, the implementation of this law is also followed by socialization and strict supervision by the Philippine government, so that the practice of age discrimination in employment can be minimized. Indonesia can take the Philippines as an example in drafting more inclusive regulations related to employment, especially in addressing age discrimination.

To address this issue, a revision of the Manpower Law is needed, especially regarding Article 35 paragraph (1), to ensure that there is no age discrimination in labor recruitment. This revision is expected to clarify the rules regarding age limits with a more inclusive and fair approach. In addition, the government needs to improve socialization and supervision of the implementation of labor regulations to prevent discriminatory practices that harm certain age groups. Education to companies regarding the importance of age diversity in the world of work also needs to be improved so that age discrimination can be effectively eliminated.

Efforts to create fairness in employment and protect the constitutional rights of every citizen can be effectively realized if all stakeholders, including the government, companies, and communities, work together to create an inclusive work environment that is free from age discrimination. Collective awareness of the importance of equality in the world of work will be a strong first step in eliminating age discrimination that still occurs frequently in Indonesia. Thus, the constitutional right to work can be realized in a real and equitable manner for all levels of society without exception.

## **2. The dissenting opinion of the judges in Constitutional Court Decision Number 35/PUU-XXII/2024 is the basis for further legal action.**

Dissenting opinion in Constitutional Court Decision Number 35/PUU-XXII/2024 has an important role in opening up opportunities for further legal remedies related to discrimination in employment age requirements in Indonesia. In this decision, the majority of judges rejected all requests for judicial review related to age limits in employment, but there was one dissenting opinion that considered that the application of age requirements has the potential to violate the constitutional rights of citizens, especially the right to work guaranteed in Article 28D Paragraph (2) of the 1945 Constitution. The dissenting judge argues that age requirements in job recruitment do not fairly consider individual capacity and competence, but rather generally limit access to employment based on age. This dissenting opinion provides an alternative legal perspective that can be used as a basis for further legal efforts and encourage the development of more progressive law in Indonesia.

Normatively, the Constitutional Court Law does not regulate in detail the legal force of dissenting opinions. However, Article 14 Paragraph (2) of Law No. 48/2009 on Judicial Power states that dissenting opinions must be included in court decisions. This provision shows that dissenting opinions have legal value even though they are not directly binding, but can be used as consideration in similar cases in the future. In this context, dissenting opinions can be a source of inspiration for new judicial review submissions with stronger and more relevant arguments. This also encourages the development of legal thinking that is more dynamic and adaptive to the development of society.

The decision of the Constitutional Court is final and binding in accordance with Article 24C of the 1945 Constitution and Article 10 of Law No. 24/2003 on the Constitutional Court. This means that the decision cannot be appealed, cassated, or reviewed. However, there is a legal loophole that allows the submission of a judicial review on a different basis. Based on Article 60 Paragraph (2) of Law No. 8/2011, a retrial can be submitted if the content material in the 1945 Constitution used as the basis for the test is different. This provision is in line with

the principle of *ne bis in idem*, which prohibits the same case from being decided more than once, but provides an exception if there is a difference in the basis of constitutionality testing. Thus, the dissenting opinion in this decision can be used as a basis for submitting a new material test using a different article in the 1945 Constitution, for example by using Article 28I Paragraph (2) which guarantees the right to be free from discrimination.

In addition, in a legal context, the *mutatis mutandis* principle is also relevant in filing a judicial review. The *mutatis mutandis* principle allows for flexible application of the law without changing the basic substance, but adapting it to different conditions and contexts. In this case, the submission of a new judicial review can be done by referring to the dissenting opinion that considers the impact of age discrimination on the constitutional rights of citizens. Thus, the legal arguments submitted can be more relevant and adaptive to the social and economic developments that occur in society. This dissenting opinion decision can also be used as a reference in legal reform that is more adaptive, so that the law is not only static but also responsive to changing times.

Based on the dissenting opinion in Constitutional Court Decision Number 35/PUU-XXII/2024 and the application of the principle of *mutatis mutandis*, further legal remedies can be submitted using a different basis of review from the previous test, for example by using Article 28I Paragraph (2) of the 1945 Constitution which explicitly guarantees the right to be free from discrimination. This allows the submission of a new judicial review without violating the principle of *ne bis in idem*, so that it remains relevant to the development of an increasingly inclusive modern society. Thus, the dissenting opinion is not only a record of dissent, but also a foundation for legal reform that is more adaptive and responsive to labor issues in Indonesia, especially related to working age discrimination.

## **CLOSING**

In analyzing the considerations of judges in Constitutional Court Decision Number 35/PUU-XXII/2024 related to age discrimination in the world of work, there are several considerations of judges that can be further considered to ensure compliance with constitutional principles and applicable laws and regulations.

## **CONCLUSION**

The judges' consideration in Constitutional Court Decision Number 35/PUU-XXII/2024 regarding age discrimination in the world of work is not in line with the principles in the 1945 Constitution and existing laws and regulations. There is confusion in interpreting the phrase discrimination by the Constitutional Court. The Constitutional Court's approach, which focuses on the textual interpretation of Article 1 Point 3 of the Human Rights Law, ignores the potential for indirect discrimination due to strict age restrictions in the world of work. Age restrictions, although not explicitly mentioned as a form of discrimination, can create structural injustice and hinder individuals' right to work based on their abilities and qualifications. Discrimination should be interpreted as any behavior or action that singles out or distinguishes one particular group for reasons that are unclear and disadvantageous to that group and do not consider individual characteristics. The Constitutional Court should expand the definition of discrimination to include age, prioritizing the principle of fairness in the context of employment. Unclear age restrictions also have the potential to contradict the principle of justice stipulated in Article 28I Paragraph (2) of the 1945 Constitution. Therefore, more specific and objective regulations are needed regarding age restrictions in employment, which avoid discriminatory practices but still pay attention to the needs of the business world. Take an example from the Philippines, which prohibits age discrimination in employment.

Dissenting opinions in a Constitutional Court decision can be the basis for further legal remedies using the provisions set out in Article 60 Paragraph (2) of Law 8/2011 and Article 78 Paragraph (2) of Constitutional Court Regulation Number 2 of 2021. These articles provide

room for exceptions to the existing provisions if the content material in the 1945 Constitution that is used as the basis for testing is different, or if there are different reasons for the application from the previous application. Therefore, a retrial of a case can be carried out by bringing different content material or new reasons for application, which can open up the possibility of producing decisions that are more progressive or relevant to legal developments and community needs.

### SUGGESTIONS

As a follow-up step to the above conclusions, several suggestions can be made to improve and strengthen the implementation of the principle of nondiscrimination in the world of work, especially in relation to age restrictions as follows:

1. For the Government: The Need for Legal Reform In order for the principle of nondiscrimination to be applied more fairly and equitably in the world of work, there is a need for legal reforms that clarify and specifically regulate age restrictions in employment. This legal reform should include clear, fair, and objective criteria regarding when age restrictions are justified, and avoid discrimination based on age that is irrelevant to the type of job offered.
2. For Companies: Companies need to ensure that recruitment policies should not discriminate against individuals based on age, so that the qualifications used for job selection focus more on ability, skills and relevant experience rather than age. This will help create fairer employment opportunities for all. As well as periodically reviewing and updating policies relating to age restrictions to ensure that they are not discriminatory, and are more attentive to the skills and needs of the company.
3. For Workers: Workers are advised to continuously improve their skills and knowledge to ensure competitiveness in the job market. Training and continuing education can help reduce barriers to age discrimination and open up new opportunities in the world of work. And workers should be more proactive in understanding their rights related to age nondiscrimination, and actively support policies that prohibit discrimination in the world of work. By doing so, workers can fight for fairer and more equal employment opportunities.

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