

Judicial Review by Public Prosecutors in Criminal Cases



Brahmantio Dwiputra¹, Handoyo Prasetyo²

^{1,2}Faculty of Law, Universitas Pembangunan Nasional Veteran Jakarta, Indonesia

ABSTRACT: Law enforcement efforts should begin to consider and make victims as parties who have an interest in the judicial process. Victims of criminal acts so far have not received enough attention in an effort to fight for justice. The things that are considered and considered include legal certainty, expediency and justice. Legal certainty is closely related to the guarantee of protection to the community against arbitrary actions aimed at public order, while expediency is to create the greatest benefit or happiness to the community, while justice is truth, impartiality, can be accounted for and treats every human being at the same time. equal position before the law (equality before the law). Likewise, the judicial review institution as part of an extraordinary effort in enforcing the law should also be based on these three objectives. On the other hand, the unaccommodated or unaccommodated interests of the victims in the legal provisions encourage interpretations that lead to the defense of interests and justice for the victims, even though in the end it is considered contrary to the law. On this basis, reforms or formal legal reforms summarized in the Criminal Procedure Code, especially in the discussion on review, should be carried out immediately. Of course, these reforms must make the Criminal Procedure Code better and able to accommodate various problems that have not been accommodated so far. This new formal legal provision can later annul conflicting legal provisions between PERMA, the Constitutional Court's Decision and so on. In addition, it is hoped that the new KUHAP will also be able to end the pros and cons and confusion regarding the submission of a judicial review that has so far occurred in a criminal justice process.

KEYWORDS: Law enforcement efforts

INTRODUCTION

The Judicial Review (PK) of criminal cases is based on the philosophy of restoring the rights and justice of residents who have been illegally confiscated by the state through judges' verdicts, where there is no longer legal (usual) remedy. The state is responsible for restoring justice and the rights of the deprived population.¹ The judicial review based on Law Number 8 of 1981 concerning the Criminal Procedure Code is only owned by the convict or his heirs. Despite the existing interpretations and controversies, it has now emerged that such cases have graced the horizons of our judicial practice. Based on considerations of a sense of justice and the principle of balance by using the perspective of the victim's central position and the shift in the criminal justice system, other than the Public Prosecutor in his capacity to represent the victim, the general public, the nation and the state, as well as the victim in quality as an interested third party, the victim in terms of quality as a victim witness, there is also a reason to be given the right to file a review. In order to provide a strong basis for victims to be able to submit requests for reconsideration in the future, the provisions of Article 263 of the Criminal Procedure Code as the basis for submitting requests for judicial review of criminal cases need to be revised and flexed in such a way that it can also give rights to crime victims and their families to apply for legal remedies for judicial review.

Therefore, the problems that the author finds will be written in an article entitled, "Legal Efforts for Judicial Review by Victims and Public Prosecutors in Criminal Cases", will elaborate further on how the views of the criminal justice system are reflected in several of its decisions in response to legal remedies. committed by victims of crime.

STUDY OF LITERATURE

The appointment of the Public Prosecutor to represent the victim, often in practice, the aspirations of the victim in the criminal justice process are not paid attention to, causing dissatisfaction from and or their families to the demands of the prosecutor and the judge's decision. One of these aspects was triggered because procedurally the victim did not have the opportunity to express his dissatisfaction with the prosecutor's demands and the judge's decision.²

Article 263 paragraph (1) to paragraph (3) of the Criminal Procedure Code, which regulates legal remedies for judicial review must provide a sense of justice, both to the perpetrators of the crime and the victims of the crime, by providing procedural

¹ Muladi dan Barda Nawawi Arief, Bunga Rampai Hukum Pidana, PT. Alumni, Bandung, 1992, hlm. 78

² H. Parman Soeparman, *op.cit.*, hlm. 8

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justice to both parties. Meanwhile, the victim's interests are represented by the Public Prosecutor/Prosecutor. In line with the above thought, in the jurisprudence (Case Number 275 K/Pid/1983 dated December 10, 1983) it can be explained, among other things, from the consideration of human rights between individual interests (the Respondent for Judicial Review) and the public interest, the nation and the state.³

Unfair treatment (unequal treatment) in a statutory regulation will be difficult to find material truth in a criminal case process, if it turns out later it can be known that there is a real error or mistake that has been made by a judge in deciding a criminal case, which results in losses for victims of crime or the general public. If an incident like this occurs, the Supreme Court as the highest judicial institution in Indonesia, which has the duty and authority to find a way out and resolve it, is in place to take action based on the problem and if the Supreme Court as an institution has the task of resolving the problem, if it decides the case is merely what the law says as a mouthpiece of the law, so it can be imagined that victims of crime or the general public will forever be unable to defend their interests.

Starting from these facts and facts, the Supreme Court is in a position to take action based on the principles of justice, this is done with the consideration of providing a sense of justice for those who are directly dealing with the issue.

RESEARCH METHODS

The type of research used is normative or doctrinal legal research. Normative or doctrinal legal research is a legal research method that uses secondary data sources or by examining existing library materials.

The type of approach is the use of what approach or method will be applied in the research to be carried out. In connection with the type of research used, namely normative juridical research, the approach used is the statute approach. The statute approach is carried out by reviewing all laws and regulations related to the legal issues being handled. The statutory approach is an approach using legislation and regulations. This type of approach is used keeping in mind the problem under study based on the laws and regulations in terms of the relationship between one another and its relation to its application in practice.

DISCUSSION AND RESEARCH RESULTS

The settlement of a criminal case is carried out as a form of law enforcement through the judicial process, which is a process related to examining, deciding and adjudicating cases. In the judicial process of a criminal case, the procedures and stages in the judicial process are generally regulated by the Criminal Procedure Code which formally manifests the legality and truth of the law. From the perspective of the convict or the public prosecutor who represents the victim or the state, if they encounter or feel that the decision issued by the judge on a case is inappropriate, the interested parties can take legal action which is formally something justified by law.

Legal effort is an effort through legal channels from parties who are dissatisfied with the judge's decision which is considered unfair or inappropriate. Meanwhile, in the guidelines for implementing the Criminal Procedure Code, legal remedies are understood as the right of the defendant or public prosecutor not to accept the court's decision. Normatively, legal remedies are divided into two, namely ordinary legal remedies which are manifested in the form of appeals and cassation and extraordinary legal remedies in the form of cassation in the interest of law and herziening.

This legal remedy is available to interested parties in a criminal case as a form of legal protection for every citizen to protect their human rights. According to Setiono, legal protection is an act or effort to protect the public from arbitrary actions by authorities that are not in accordance with the rule of law, to create order and peace so as to enable humans to enjoy their dignity as human beings.⁴ Thus, a person who has been determined as a defendant or convict also has the opportunity to fight for his rights through a mechanism that has been regulated by law in the form of legal remedies.

In cases where a criminal case has been decided and has permanent legal force (*Inkracht Van Gewijsde*), the Criminal Procedure Code has provided formal guidelines on how the convict or his heirs can take legal action through judicial review (PK). This is stated in Chapter XVIII of the Criminal Procedure Code from article 263 to article 269. The judicial review (PK) can be understood as an extraordinary legal effort to be able to change or improve court decisions that have permanent legal force that contain the judge's error. [2]

In general, if referring to the discussion that is explicitly stated in the points of articles and paragraphs in Chapter XVIII articles 263 to 269 of the Criminal Procedure Code with regard to the judicial review procedure, it can be seen that the convict or his heirs are parties that are explicitly stated to have the right to apply for reconsideration. Apart from the convict or his heirs, it is not explicitly stated that there are parties who have the authority and have the right to file a judicial review. Whereas in the judicial

³ Muladi, *Kapita Selektta Hukum Pidana*, (Semarang, Bajan Penerbit Universitas Diponogoro, 1995), hlm 5

⁴ Andi Muhammad Sofyan, Dkk., *Hukum Acara Pidana*, (Jakarta: Kencana, 2014), hlm. 261-262.

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process of a criminal case, apart from the convict, there is also a public prosecutor who represents the victim or the state and the public interest.⁵

Regarding parties who have the right to apply for a review as well as the general provisions for judicial review, it is normatively stated in Article 263 of the Criminal Procedure Code which stipulates that:

1. Against a court decision which has permanent legal force, unless the decision is acquitted or free from all legal claims, the convict or his heirs may submit a request for reconsideration to the Supreme Court;
2. Requests for reconsideration are made on the basis of:
 - a. If there is a new situation that gives rise to a strong suspicion that if the situation was known at the time the trial was still ongoing, the result would be an acquittal or an acquittal of all lawsuits or the demands of the public prosecutor could not be accepted or a lighter sentence would be applied ;
 - b. If in various decisions there are statements that something has been proven, but the things or circumstances as the basis and reasons for the decisions which are stated to have been proven, are in fact contradicting one another;
 - c. If the decision clearly shows a judge's error or a real mistake.
3. On the basis of the same reasons as referred to in paragraph (2) of a court decision which has permanent legal force, a request for reconsideration may be submitted if in that decision an act that has been accused has been declared proven but not followed by a conviction.

The provisions contained in the articles above show that the review is limited. Article 263 of the Criminal Procedure Code does not explicitly authorize the Public Prosecutor/Prosecutor to apply for a review. The basic interests protected under this article are the legal interests of the convict or his heirs. Thus, if viewed from a formal legal perspective, if the Prosecutor/Public Prosecutor submits a review regarding a criminal case that has permanent legal force both on the basis of its legal interests representing the state or the public interest or also the victim, then the step is considered to have deviated or violated.⁶

However, in practice, the legal dynamics related to the judicial review process are not stagnant. In several cases, the Supreme Court as the highest state judicial institution as well as the institution authorized to give decisions related to judicial review issues several times granted the request for judicial review by the Prosecutor/General Prosecutor. Among the examples is the granting of the judicial review proposed by the Prosecutor/General Prosecutor in the Muchtar Pakpahan case in the Supreme Court's (MA) Decision Number 55 PK/Pid/1996. The decision to accept the request for reconsideration in the Muchtar Pakpahan case inspired the emergence of similar decisions in the case of judicial review by the Prosecutor/Prosecutor, as in the Ram Gulumal case relating to the Gandhi Memorial School (Decision Number 3 PK/Pid/2001), the Soetiyawati case regarding the destruction of goods (Decision Number 15/PK/Pid/2006), the case of Pollycarpus regarding premeditated murder and letter falsification (Judgment Number 109 PK/Pid/2007), and the case of Joko S. Tjandra related to corruption (Decision Number 12 PK/Pid. Sus/2009).

In the Muchtar Pakpahan case, where the Judge granted the request for reconsideration by the Prosecutor/General Prosecutor as stated in Decision Number 55 PK/Pid/1996, the acceptance of the judicial review proposed by the Prosecutor/Public Prosecutor was based on the consideration that there was no firm regulation in the KUHAP. regarding the right of the prosecutor to submit a request for reconsideration, it requires a legal action to clarify the right of the public prosecutor/prosecutor to file a review which is implied in several laws and regulations.

In addition, from the perspective of the Prosecutor/Prosecutor, a request for reconsideration by the Prosecutor/Prosecutor can be justified based on several considerations, including:

1. In Law Number 14 of 1970 concerning the Basic Provisions of Judicial Power, Article 21 contains the phrase "interested parties" related to the provision of requests for review to the Supreme Court. This phrase can be interpreted that the parties with an interest in a criminal case are none other than the convict on the one hand and the Prosecutor/General Prosecutor on the other.
2. Article 263 of the Criminal Procedure Code paragraph (1) states: "Against a court decision that has obtained permanent legal force, unless the decision is acquitted or released from all legal claims, the convict or his heirs may submit a request for reconsideration to the Supreme Court." The article does state explicitly that the convict or his heirs are allowed to submit a judicial review, but it does not explain or does not state that the public prosecutor/prosecutor is prohibited or not allowed to apply for a judicial review. In addition, the phrase "except for acquittal or acquittal" contained in the article may not be intended for the convict or his heirs. In other words, the Prosecutor/General Prosecutor is an interested party and the party referred to in the phrase. Even if this is not the case, there is an opinion which states that Article 263 paragraph (1) contradicts the term itself (*contradictio in terminis*).⁷

⁵ Soerjadi Trimoelja D., *Kendala Menegakkan Kebenaran dan Keadilan*, Cetakan Pertama, Guna Widya, Surabaya, 2004, hal. 3.

⁶ Budi Suhariyanto, "Pelenturan Hukum dalam Putusan Peninjauan Kembali yang Diajukan Oleh Jaksa Penuntut Umum", *Jurnal Yudisial*, Vol. 8 No. 2, 2015, hlm. 196.

⁷ Nys. Arfa, Dkk., "Pengaturan Peninjauan Kembali Dalam Perspektif Sistem Peradilan Pidana di Indonesia", *Jurnal Sains Sosio Humaniora*, Vol. 4 No. 1, 2020, hlm. 104.

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3. Article 263 paragraph (3) of the Criminal Procedure Code states: "On the basis of the same reasons as referred to in paragraph (2) against a court decision that has permanent legal force, a request for review can be submitted if in that decision an act that has been accused has been declared proven but not followed by a punishment." As in paragraph (1), the phrase used in paragraph (3) shows that it is not the convict or his heirs who act as interested parties, considering that this will most likely harm them. Thus, it can be concluded that the interested party in this case is the Public Prosecutor/Prosecutor, because in a criminal event, the interested party other than the defendant or his heirs is the Prosecutor/Public Prosecutor.

Although there are several reasons and considerations that allow and strengthen the approval or acceptance of a request for judicial review by the Prosecutor/General Prosecutor, until now there has been no clear and definite rule or legal umbrella regarding Judicial Review by the Prosecutor/Public Prosecutor. This has resulted in the issue of Judicial Review by the Prosecutor/General Prosecutor becoming uncertain.

This uncertainty can be seen in several cases of rejection of requests for Supreme Court review submitted by the Prosecutor/Public Prosecutor by the Court. For example, in Decision Number 84 PK/Pid/2006, the Supreme Court rejected the request for judicial review of the Public Prosecutor in the case of forestry crime (illegal logging). The Supreme Court's refusal of the request for reconsideration was based on several reasons, including that Article 263 paragraph (1) of the Criminal Procedure Code has determined that only the convict or his heirs can submit a request for a judicial review of a decision that has permanent legal force, except for an acquittal or an acquittal. free from all lawsuits. That the provisions have explicitly and limitatively regulated that those who can apply for a review are the convict or his heirs. Apart from these parties, it is not possible to apply for a reconsideration. In this case of rejection of judicial review by the Prosecutor/General Prosecutor, Gunarto is of the opinion that the panel of judges is more focused on aspects of justice based on the law and legal certainty. [5]

In another case, the panel of judges also rejected the request for reconsideration submitted by the Public Prosecutor in the fraud case committed by Roediyanto. This is stated in Decision Number 57 PK/Pid/2009. The refusal was based on the consideration that the public prosecutor could not demonstrate the existence of public interests or state interests that must be protected. The Supreme Court in this regard is also of the opinion that the provisions for judicial review which can only be submitted by the convict or his heirs can be flexed if there are matters stating that the request for judicial review by the Public Prosecutor is made to protect a public interest and the greater interest of the state. In the sense that if the Public Prosecutor in this case can show that there is a public interest and a larger state interest, then there is a possibility that the petition for review can be accepted.

Reflecting on several cases of requests for reconsideration by the Public Prosecutor, whether or not the request for reconsideration by the Public Prosecutor is accepted is the authority of the panel of judges handling the case. In several cases, the panel of judges gave considerations based on the previous judge's interpretation of the Muchtar Pakpahan case which was a legal reform and had become jurisprudence so that it accepted or granted a request for reconsideration. In another case, the panel of judges stated that Article 263 paragraph (1) of the Criminal Procedure Code[6] stated limitatively that the only party entitled to submit a request for review was the convict or his heirs. In addition, the panel of judges also took into consideration the inability of the Public Prosecutor to show the existence of a public interest or greater state interest as a consideration, so that in both cases the panel of judges rejected the request for reconsideration by the Public Prosecutor.

In connection with the ambiguity of the judicial review by the Public Prosecutor and the provisions of the Criminal Procedure Code regarding the review of multiple interpretations which resulted in the uncertainty of the authority of the Public Prosecutor/Prosecutor in submitting a judicial review, several parties submitted a judicial review to the Constitutional Court as one of the perpetrators of judicial power in Indonesia. The petition for judicial review of the Criminal Procedure Code related to the judicial review is at least reflected in two decisions of the Constitutional Court. The first decision relates to the review of the Legal Rules in Article 268 paragraph (3) of the Criminal Procedure Code as stated in the Constitutional Court's Decision Number 34/PUU-XI/2013 which essentially states that legal remedies for judicial review can be carried out more than once if a novum is found. In its decision, the Constitutional Court stated that the application for judicial review which was only allowed once was against the principle of justice. ⁸

The decision is actually quite a dilemma, because on the one hand it is permissible to review it more than once is an effort to protect the rights of the community to obtain justice, but on the other hand there is an opinion that PK more than once is a violation of the principle of legal certainty. However, in practice the Supreme Court maintains the principle that a review can only be done once. Responding to the decision of the Constitutional Court, the Supreme Court then issued SEMA No. 7 of 2014 concerning the Submission of Requests for Judicial Review in Criminal Cases, which still limits the review to only one time.

The second decision related to the judicial review is contained in the Constitutional Court Decision Number 33/PUU-XIV/2016. The article being tested in the decision is Article 263 paragraph (1) of Law no. 8 of 1981 concerning the Criminal Procedure Code (KUHAP) related to the polemic of whether or not the Prosecutor/General Prosecutor may submit a review. The

⁸ Marcus Priyo Gunarto, "Mengembalikan Pelaksanaan Peninjauan Kembali Sesuai Asas Hukum", *Mimbar Hukum*, Vol. 21 Nomor 3, 2009, hlm. 473.

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judicial review was requested by Anna Boentaran, the wife of the convict of the Bank Bali cessie (collection rights) case, Djoko S Tjandra, who felt that she had been treated unfairly in the case facing her husband. In its decision, the Constitutional Court affirmed that the Public Prosecutor could not apply for a judicial review. This decision legally confirms that only the convict or his heirs have the right to file a judicial review, while the Public Prosecutor does not have this right.

The Constitutional Court has interpreted in its Decision No. 33/PUU-XIV/2016 that Article 263 paragraph (1) of the Criminal Procedure Code is conditionally contrary to the 1945 Constitution as long as it is interpreted differently than what is explicitly stated in the a quo norm. This is based on the consideration that the judicial review institution has the objective of protecting the interests of the convict or his heirs, not the interests of the Public Prosecutor or the victim. Thus, only the convict or his heirs are allowed to submit a request for reconsideration.

Concepts and Legal Procedures for Judicial Review Proposed by the Public Prosecutor

Constitutional Court Decision Number 33/PUU-XIV/2016 constitutionally provides legal certainty regarding the authority of the Public Prosecutor/Prosecutor in submitting requests for reconsideration. In the decision, it was emphasized that the Public Prosecutor was not allowed to submit a request for reconsideration because it was contrary to the provisions of Article 263 paragraph (1) of the Criminal Procedure Code. This decision is expected to end the polemic about whether or not the Prosecutor/General Prosecutor who represents the victim and the state in submitting a judicial review is allowed.

However, the question that then arises is whether the interpretation of the panel of judges of the Constitutional Court as outlined in the decision can be applied or applied consistently in the existing judicial process. This certainly deserves attention, considering that in its history, especially with regard to law/review institutions, the Constitutional Court has issued several decisions which in fact show differences or even contradictions between one another. For example, related to the number of times a review can be carried out. In its decision Number 16/PUU-VIII/2010, the Constitutional Court stated that in order to provide legal certainty for the settlement of a case, the review may only be carried out once and is not justified repeatedly. However, in the decision contained in Decision No. 34/PUU-XI/2013 regarding the same matter, the Constitutional Court stated that the submission for judicial review was only once in a criminal case contrary to justice.

On this basis, even though the decision of the Constitutional Court regarding the prohibition of the Prosecutor/General Prosecutor to submit a request for reconsideration, in practice it may still be repeated that a Prosecutor/General Prosecutor submits a request for reconsideration to the Supreme Court. Moreover, the Constitutional Court Decision Number 33/PUU-XIV/2016, according to Ramdan, overrides the jurisprudence of the Supreme Court regarding the authority of the Prosecutor/General Prosecutor to file a review in a criminal case to represent the state and also the victim.

Restrictions on filing for judicial review as regulated in Article 263 paragraph (1) of the Criminal Procedure Code in which a judicial review can only be submitted by the convict or his heirs is a form of the principle of legal certainty (*lites finiri oportet*). However, the principle of legal certainty is felt to limit the principle of justice because there is no legal balance between the parties concerned in a criminal case, between the convict, the victim and also the Prosecutor/General Prosecutor. In fact, in practice, the paradigm pendulum that remains in the decisions of the Supreme Court regarding the acceptance or failure of a judicial review from the Public Prosecutor/Prosecutor has so far always moved dynamically between legal certainty and justice.⁹

According to Gustav Radbruch, the objectives to be achieved in the law enforcement process include legal certainty, expediency and justice. Legal certainty is closely related to the guarantee of protection to the community against arbitrary actions aimed at public order, while expediency is to create the greatest benefit or happiness to the community, while justice is truth, impartiality, can be accounted for and treats every human being at the same time. equal position before the law (equality before the law).¹⁰ Likewise, the judicial review institution as part of an extraordinary effort to enforce the law should also be based on these three objectives.

The realization of these three objectives requires fair and balanced treatment between the convict and his heirs, victims and prosecutors/public prosecutors who represent victims or the state. Aspects of legal certainty, justice and expediency must be considered and must be implemented proportionally. Prioritizing and prioritizing one of the three and ignoring the others will result in the injury of the rights of the parties involved, in this case especially the victims of criminal acts who have so far been minimally involved in the settlement of criminal cases.

By not being given an opportunity for the Prosecutor/Public Prosecutor, as well as victims of a criminal act, in submitting a request for reconsideration contained in the Decision of the Constitutional Court Number 33/PUU-XIV/2016, it means that there is no room for the victim or the Prosecutor/Public Prosecutor who represents the victim. or the state to fight for justice. This has been a problem that has long surfaced, especially related to the crisis and the collapsing interests of victims of criminal acts. The

⁹ Ajie Ramdan, "Kewenangan Penuntut Umum Mengajukan Peninjauan Kembali Pasca Putusan Mahkamah Konstitusi No. 22/PUU-XIV/2016" *JIKH*, Vol. 11 No. 2, 2017, hlm. 190.

¹⁰ Adi Harsanto, Dkk., "Upaya Hukum Peninjauan Kembali Dalam Perkara Pidana Pasca Putusan Mahkamah Konstitusi", *e Jurnal Katalogis*, Vol. 5 No. 3, 2017, hlm. 9.

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position of victims in the current criminal justice system has not been placed fairly and even tends to be forgotten, especially in the Criminal Procedure Code and Law Number 1 of 1946 concerning the Criminal Code (KUHP).

In the future, law enforcement efforts should begin to consider and make victims as interested parties in the judicial process. Victims of criminal acts so far have not received enough attention in an effort to fight for justice. He is very rarely involved in the decision-making process, his interests and disadvantages are not considered in the judicial process. Even so, the provision of space for victims to fight for justice must also be given proportionally so that they do not displace or obscure legal certainty. That is, there must be clear and firm boundaries if the victim of a crime will be given a defense room for his interests in the case in question.

Legal reform towards restorative justice by involving victims in the judicial process really needs to be pursued to create legal norms that are in accordance with the times and current conditions of society. Restorative justice (restorative justice) is the settlement of perkara of criminal acts by involving the perpetrator, victim, family of the perpetrator/victim and other related parties to jointly seek a fair solution by emphasizing restoration of all circumstances, and not retaliation. The basic principle of restorative justice is the existence of recovery for victims who have suffered as a result of crime by providing compensation to victims, peace, perpetrators doing social work or other agreements.¹¹

The concept of a restorative justice approach is an approach that focuses more on the conditions for creating justice and balance for the perpetrators of crimes and the victims themselves.¹² This can be done by adding or including provisions that mention and at the same time benefit victims of criminal acts in the new Law. The revision of the Criminal Procedure Code is an urgent necessity so that legal certainty, justice and benefit for the parties concerned in a case are truly guaranteed. A rigid legalistic formal approach in law enforcement or the judiciary that does not create justice in society should be replaced with a more just humanist approach.

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¹¹ Ajie Ramdan, "Kewenangan Penuntut Umum....", hlm. 183.

¹² Budi Suhariyanto, "Pelenturan Hukum dalam Putusan Peninjauan Kembali yang Diajukan Oleh Jaksa Penuntut Umum", *Jurnal Yudisial*, Vol. 8 No, 2, 2015, hlm. 202.