

Implementation of Extraordinary Review (Pk) For the Public Prosecutors after the Decision of the Constitutional Court Number 33/Puu-Xiv/2016



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ABSTRACT: The background of this paper is inspired and triggered to observe and study the legal uncertainty between the public prosecutor and the convict/his heirs regarding the authority to submit a PK Application as regulated in Article 263 paragraph (1) of the Criminal Procedure Code. The article states "the right of the public prosecutor" to apply for a PK application. However, what is expected by the Petitioner's wife is that Article 263 paragraph (1) of the Criminal Procedure Code can be interpreted in this way, "PK applications can only be filed by the convicted person or their heirs". This condition was exacerbated by the issuance of the Constitutional Court decision Number 33/PUU-XIV/ 2016 regarding "the right of the public prosecutor to file a PK application in a criminal case". This study aims to determine the application of extraordinary legal remedies by the public prosecutor and the implications of implementing these extraordinary remedies. The research method used is normative legal research. The results showed the application of extraordinary PK legal remedies for the public prosecutor after the Constitutional Court decision Number 33/PUU-XIV/2016, had direct implications for the Petitioner and his family. This implication is detrimental to the Petitioners' constitutional rights based on Article 28G of the 1945 Constitution because the protection of personal, family, honor and dignity has clearly been lost. It is better if the Constitutional Court reaffirms the legal principles in the article through constitutional interpretation which is an integral part that is not separate from the article in question and is able to provide fair legal certainty.

KEYWORDS: Extraordinary Legal Remedies for Reconsideration, Public Prosecutor, law.

INTRODUCTION

The position of judge on the one hand is a very noble position, and on the other hand, if you are not careful, it can be degrading because of the many temptations that are ready to plunge you. Regarding the position of judge, the Prophet once said "two thirds of the judges will go to hell". The message seemed very strong, and it was difficult for the judge to avoid the threat. This is nothing but because the temptation that will be faced by the judge in deciding a case is very large.

Although the temptations for a judge are great, the office of judge is not a meaningless office. The position of a judge is a noble position because the judge's decision is carried out honestly and uses a sincere mind, will produce the correct value so that an idiom "justice can't do wrong" appears. In the language of religion, such a judge's decision can be called "ijtihad". A judge's decision based on ijtihad will always get added value, that is, if the decision is correct, it will get an added value of two degrees, and if the decision is wrong, it will still get added value, one degree. The judge's decision which has the value of "ijtihad", not only contains the value of truth, but will also be able to prevent the judge from disgraceful acts so that the judge will avoid falling into the "two-thirds law" category above.¹

The legal reality that occurs in the community (das sein) is after the issuance of the decision of the Constitutional Court (MK) Number 33/PUU-XIV/2016 regarding "the right of the Public Prosecutor to apply for a Judicial Review in criminal cases",² creates legal uncertainty and legal justice for the convict/his heirs. The following is a brief explanation of the origins of the issuance of the Constitutional Court's decision Number 33/PUU-XIV/2016, starting from the Public Prosecutor's dissatisfaction with the decision of the South Jakarta District Court Judge who decided that the suspect in the Cessie case was free from all lawsuits even though the suspect is serving a prison term. Dissatisfaction of the Public Prosecutor by submitting a request for judicial review to the Panel of Judges of the Constitutional Court based on the Decision of the South Jakarta District Court Number 156/Pid.B/2000/Jak.Sel juncto

¹ Taufiqurrohman Syahuri, *Tafsir Konstitusi Berbagai Aspek Hukum*, (Jakarta: Kencana, 2011), hlm.77-78.

² Putusan Mahkamah Konstitusi (MK) Nomor 33/PUU-XIV/2016 mengenai "hak Penuntut Umum mengajukan permohonan Peninjauan Kembali (PK) dalam perkara pidana."

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Decision Number 1688 K/Pid/2000. However, the negligence made by the Public Prosecutor, namely submitting a PK after 8 (eight) years since the two decisions mentioned above have permanent legal force, even the cassation decision has been carried out as stated in the Order for Execution of the Court's Decision/Supreme Court Number Prin-139/o.1.14/Fu.1/09/2001 dated 28 September 2001 along with its Minutes of 29 September 2001 (Evidence P.16) and has also been executed by the Public Prosecutor as evidenced in the Minutes of Execution Number WKMA/73/VIII/2002 dated 22 August 2002 (Evidence P.7). From these evidences (Evidence P.16 and Exhibit P.7). The Public Prosecutor continues to file a Judicial Review which is contrary to the Law. Because apart from the fact that the Public Prosecutor is not given the right to do so, the PK is filed against a decision free from lawsuits, which clearly contradicts Article 263 paragraph (1) KUHAP.

The impact of submitting a PK by the Public Prosecutor and being granted by the Constitutional Court, causes the convict and/or his heirs to feel disadvantaged and uncomfortable or there is no legal certainty, so that the heirs of the convict file a lawsuit against the PK application which was granted by the Constitutional Court on the basis of Article 263 paragraph (1) Criminal Procedure Code.³ The article should be interpreted as "only the convict and his heirs are given the right to apply for a PK." From all of this, the petitioner requested that Article 263 paragraph (1) of the Criminal Procedure Code be interpreted as "an application for a judicial review can only be submitted by the convict or his heirs. This interpretation is supported by the four main foundations of Article 263 paragraph (1) of the Criminal Procedure Code, covering judicial review that are only submitted to decisions that have permanent legal force, judicial review cannot be filed against decisions that are acquitted or free from all demands, judicial review applications can only be submitted to the convict or his heirs, and a judicial review can only be filed against a sentencing decision.

The polemic after the issuance of the Constitutional Court Decision Number 33/PUU-XIV/2016) reflects "injustice and legal uncertainty for victims" as a result of the First Travel case. In this First Travel case, the panel of judges decided that "all the results of the auction of evidence belonging to the managers of the three First Travel convicts were confiscated for the State". In other words, the decision of the panel of judges indicated that "all orders were confiscated for the State". Even though the results of the auction are entirely owned by the victims (pure public money and not money from crime) from the crime of fraud and embezzlement by the three First Travel suspects by promising "Umrah worship with below-standard Umrah fees" so that many people are interested in Umrah fees its so cheap. The First Travel problem has not yet reached a common ground and has harmed hundreds of victims who were not dispatched, while the pilgrims have already deposited a sum of money with a nominal value that is not small to the First Travel manager. From this it is reflected "where is the aspect of legal justice for the community, especially victims of fraud, embezzlement of customer funds and/or money laundering crimes."

Therefore, through this paper, the author will examine aspects of legal injustice and legal uncertainty from law enforcement officials in Indonesia, which are outlined in the article entitled "Implementation of extraordinary legal remedies for judicial review for the Public Prosecutor after the decision of the Constitutional Court Number 33/PUU-XIV/2016.

THEORETICAL BASIS

Theories or concepts relevant to this paper include:

1. Judicial Review (PK)

Referring to the Criminal Procedure Code (KUHAP) in Chapter XVIII, Judicial Review is one of the extraordinary legal remedies in the justice system in Indonesia.⁴ Extraordinary legal remedies are exceptions to ordinary legal remedies, namely trials at the District Court, appeal hearings at the High Court, and cassation at the Supreme Court.

Judicial review can be filed against the Supreme Court's cassation decision if in the previous decision it is known that there was an error or mistake by the judge in deciding the case or there is new evidence (novum) that has never been disclosed in the trial.

According to Soerodibroto (in Soeparman), Judicial review or Herziening is a review of decisions that have obtained permanent legal force containing sentences, which cannot be applied to decisions where the accused has been acquitted.⁵

According to Soeparman, the elements of Judicial review are:

- a. Revisit;
- b. Decisions that have definite legal force (*in kracht van geiwijdsde*);
- c. Not an acquittal or acquittal;
- d. Submitted by the convict or his heirs.

³ KUHAP, Pasal 263 ayat (1).

⁴ M. Yahya Harahap, *Upaya Hukum Luar Biasa: Pembahasan Permasalahan dan Penerapan KUHAP (Pemeriksaan Sidang Pengadilan, Banding, Kasasi, dan Peninjauan Kembali)*, (Jakarta: Sinar Grafika, 2000), hlm.224-226.

⁵ P. Soeparman, *Pengaturan hak mengajukan upaya hukum Peninjauan Kembali dalam perkara pidana bagi korban kejahatan*, (Bandung: Refika Aditama, 2009), hlm.17.

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According to Tirtaamijaya (in Zainal Asikin, 2015), *Herziening* or Judicial Review is a way to improve a decision that has become permanent so that it cannot be changed again with the aim of correcting a judge's negligence which is detrimental to the convicted, however, if the repair is to be carried out, then he must meet the conditions, namely there is a situation which when examined by the judge, the judge does not know it, and if he knows the situation, he will give another decision.⁶

2. The Light Weight of the Judge's Decision

The position of a judge is a mandate from God and the 1945 Constitution. The essence of a judge is "to judge", not "to punish". According to the author, the true judge is "a judge who fears God". Judges do not arbitrarily make decisions at a glance, but will try and decide cases with conscience and in accordance with legal facts in a comprehensive and objective manner. When the judge is dealing with various cases in court, he will easily actualize his experience, knowledge, and legal resources as well as the laws that apply to the case. Then the facts are packaged and elaborated into an inseparable series with the existing evidence. From the basis of the legal considerations, a conclusion emerges that the defendant is guilty or not, then what punishment is appropriate and commensurate with the actions of the defendant. Regarding this worthy punishment, it is a separate problem for the judge.⁷

When the judge formulates a criminal decision, the judge must carefully consider the indictment of the public prosecutor carefully obtained through legal facts based on evidence such as witness statements, expert statements, letters, instructions and statements of the defendant (vide Article 184 paragraph 1 of the Criminal Procedure Code). Because even one of the criminal elements in the public prosecutor's indictment is not proven, the defendant must be released (*vrijspraak*), see Article 191 paragraph (1) of the Criminal Procedure Code or escape from all lawsuits (*onslaag*), see Article 191 paragraph (1) of the Criminal Procedure Code.

When the elements of the prosecutor's indictment are proven, the most difficult thing for the judge to face is determining "strafmaat" (the severity of the crime). This is because the standard of staff is not regulated in law, but only depends on feelings, namely the sixth sense or the judge's conscience. The consideration of a judge's conscience from one another must be different. That is why in almost every judge's decision in Indonesia, even though the facts and articles of indictment are the same, the severity or lightness of the judge's verdict is not the same.⁸

To prove how difficult it is for judges to take a stand in making decisions on cases, it can be seen for example Article 2 in conjunction with Article 3 of Law Number 31 of 1999 which has been updated with Law Number 20 of 2001 concerning Corruption Crimes. One of the provisions states that "may harm the state's finances/economy". This element will be proven and explored in a comprehensive trial in the consideration of the judge's decision. For example, in the trial it turned out that "State financial losses have been returned to the State through the Attorney General or the Corruption Eradication Commission (KPK). According to Article 4 of the Corruption Law, "refunding money (state financial losses) does not abolish the crime, but becomes a mitigating factor for the defendant's sentence." However, in practice, the defendant's sentence was actually aggravated by the demands of the public prosecutor. The consideration is that large amounts of money that have been corrupted for years have hampered the wheels of development.⁹

RESEARCH METHODS

The research method used in this article is normative legal research, namely research techniques that are guided by several legal principles, legal rules and legal principles related to the substance of legislation, which are expected to answer legal issues that occur. The legal issue in question is the problem of the issuance of the decision of the Constitutional Court Number 33/PUU-XIV/2016.

RESEARCH RESULT

The polemic over the issuance of the Constitutional Court's decision Number 33/PUU-XIV/2016 originated from :¹⁰

1. The Constitutional Court's decision states that Article 263 paragraph (1) of the Criminal Procedure Code is conditionally contradictory to the 1945 Constitution, as long as it is explicitly interpreted in the a quo norm.
2. Article 263 paragraph (1) of the Criminal Procedure Code does not have a legally binding conditional force, that is, as long as it is interpreted differently than explicitly stated in the a quo norm.

⁶ Zainal Asikin, *Hukum Acara Perdata di Indonesia*, (Jakarta: Prenadamedia, 2015), hlm.142.

⁷ Binsar M. Gultom, *Pandangan Kritis Seorang Hakim*, (Jakarta: Gramedia Pustaka Utama, 2020), hlm.9.

⁸ *Ibid.*, hlm.10-11.

⁹ *Ibid.*,

¹⁰ Hasil penelitian penulis melalui pengkajian Putusan MK Nomor 33/PUU-XIV/2016.

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In essence, the decision stated that the Public Prosecutor could not apply for a judicial review in a criminal case. If the Prosecutor is still given the right to file a judicial review, even though he has been given the right to file ordinary legal remedies (appeal and cassation), it will create legal uncertainty as well as unfairness. Therefore, for the sake of fair legal certainty, it is deemed important to reaffirm Article 263 paragraph (1) of the constitutional KUHAP as long as it is not interpreted other than the meaning of judicial review, it can only be submitted by the convict or his heirs and may not be submitted against an acquittal or acquittal.

Another reason for the Constitutional Court is that extraordinary legal efforts aim to find justice and material truth. Justice cannot be limited by time or the provisions of formalities that limit extraordinary legal remedies, in the Criminal Procedure Code can only be submitted once. It is possible that after a judicial review is submitted and a decision is made, there are new circumstances found during the previous review, which have not been found or are known as novum (new evidence).

In dealing with the juridical problem that the criminal procedure law is not explicitly regulated in the Criminal Procedure Code, the Supreme Court through the decision in this case wishes to create its own criminal procedure law, in order to accommodate the lack of regulation regarding the rights or authority of the Public Prosecutor to apply for a Judicial Review (PK) in criminal case.

DISCUSSION

Referring to legal uncertainty and the absence of guarantees for legal protection and justice in cases of arbitrariness the Public Prosecutor submits a PK application that violates Article 263 paragraph (1) of the Criminal Procedure Code, which is reflected in not providing legal certainty, is multi-interpretive and does not contain strict regulations regarding "juridical consequences" when the Judicial Review is carried out not in accordance with the methods specified in the Criminal Procedure Code. The legal uncertainty and the multi-interpretational nature of the article above open up space for repressive, unfair and human rights violations that are detrimental to the Petitioner, the Petitioner's husband, children and family.

The constitutional loss of the Petitioner (wife of the convict of the cessie case) as a result of the judicial review proposed by the Public Prosecutor has caused the loss of constitutional rights to protection of self, family, honor, dignity and the right to security and protection from threats of fear (vide Article 28G of the 1945 Constitution), and in her capacity as a legal wife who is given the right to file a judicial review according to Article 263 paragraph (1) of the Criminal Procedure Code, so that the Petitioner feels aggrieved due to the loss of protection and guarantee of fair legal certainty when the Public Prosecutor submits a judicial review of the decision free from lawsuits.

Observing the above case, according to the author, the authority of the Constitutional Court (MK) by issuing the Constitutional Court's decision Number 33/PUU-XIV/2016 implies placing the existence of the Constitutional Court as a state institution that maintains the constitution in accordance with the people's will and democratic ideals.¹¹

In relation to the interpretation of Article 263 paragraph (1) of the Criminal Procedure Code which is considered to have multiple interpretations by the wife of the Petitioner, it can be understood that the interpretation or interpretation is one of the methods used by judges in handling cases in court to find the law. Methods of interpretation or legal interpretation that can be used by judges in handling cases in court, namely grammatical, historical, systematic, teleological or sociological interpretations, authentic (official), comparative, anticipatory or futuristic, extensive, and restrictive interpretations.

Mertokusumo & Pitlo argue that authentic interpretation is not included in the teaching of interpretation. Authentic interpretation is an explanation given by law and contained in the text of the law and not in the additional State Gazette.¹²

Referring to the decision of the Constitutional Court Number 33/PUU-XIV/2016, among others, it is stated that the wife of the judicial review Applicant who is still alive is interpreted as an heir so that she has the right to also apply for a judicial review in a criminal case. The interpretation is carried out by linking to the inheritance law system in force in Indonesia. According to the Supreme Court Justices, one of the heirs recognized in the Indonesian inheritance law system is the wife as her husband's heir. The Criminal Procedure Code itself does not provide limitations on the meaning or meaning of the term "heir" in Article 263 paragraph (1) of the Criminal Procedure Code is not intended in the inheritance relationship to inherit the property of the convict. However, it is only addressed to people who have the position as heirs of the convict who are entitled to also submit a request for judicial review to the Supreme Court.¹³

The request for PK is a legal remedy provided to fight a court decision that has obtained permanent legal force (inkracht van gewijsde) which contains a sentence (veroordeling) originating from the court of first instance, the court of appeal, and the court of cassation. Meanwhile, those who are entitled to submit a request for a PK in accordance with Article 24 paragraph (1) of the Law on Judicial Power are the parties concerned, whose full formulation is "Against a court decision that has obtained permanent legal

¹¹ Dahlan Thaib, dkk., *Teori dan Hukum Konstitusi*, (Depok: Rajawali Pers, 2019), hlm.5.

¹² Mertokusumo, S., & Pitlo, A, *Bab-bab tentang Penemuan Hukum*, (Bandung: Citra Aditya, 2013), hlm.14.

¹³ Ramiyanto, Makna "Ahli Waris" Sebagai Subjek Pengajuan Peninjauan Kembali (Kajian Putusan Nomor 97/PK/Pid/Sus/2012), *Jurnal Yudisial* Vol.9 No.1 April 2016, hlm.60.

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force, the parties concerned may apply for a judicial review to the Supreme Court, if there are certain things or conditions specified in the law."

Therefore, the interested parties who are entitled to submit a request for reconsideration are the convict or his heirs as stipulated in Article 263 paragraph (1) of the Criminal Procedure Code. In practice, the public prosecutor is also included as one of the interested parties who have the right to also submit requests in criminal cases on the legal basis of Article 261 paragraph (3) of the Criminal Procedure Code. Thus, interested parties who can submit requests for reconsideration in criminal cases are the convicts, heirs, and public prosecutors. Thus it is clear that the heirs of the convict are one of the interested parties who have the right to also file a request for reconsideration in a criminal case.

Based on the discussion above, the Constitutional Court should reaffirm the legal principles in the article through constitutional interpretation which is an integral part of the article, so that it can fulfill the constitutional mandate to provide fair legal certainty. Although in principle the criminal procedure law does not contain criminal sanctions, sanctions or consequences for wrong and arbitrary law enforcement are needed to ensure that the constitutional mandate to provide protection of human rights and fair legal certainty can be realized in law enforcement in Indonesia.

For this reason, it is necessary to affirm the prohibition of law enforcement using methods not regulated in the Criminal Procedure Code by declaring such law enforcement "null and void". This interpretation is not an addition or change to norms, but only reaffirms the legal principles contained in Article 263 paragraph (1) of the Criminal Procedure Code through a constitutional interpretation of the article. This is intended as a sanction that is expected to encourage law enforcers to enforce the law carefully, responsibly and in accordance with applicable legal provisions.

Thus, it is clear that the norms of the law as regulated in Article 263 paragraph (1) of the Criminal Procedure Code are not in accordance with the constitutional rules which state that the Republic of Indonesia is a "State of Law", as regulated in Article 1 paragraph (3) of the 1945 Constitution. The law is also not in accordance with the constitutional rules that regulate the recognition, guarantee, protection, and legal certainty that is fair and equal treatment before the law, as regulated in Article 28D paragraph (1) of the 1945 Constitution. This is in line with the government's cq. The Prosecutor's Office in guaranteeing the protection and enforcement of human rights in law enforcement based on Article 28 letter I paragraph (4) of the 1945 Constitution. In the end, the absence of protection of human rights and legal certainty in law enforcement against the Petitioner's husband gave birth to discriminatory treatment (vide Article 28 letter I paragraph (2) the 1945 Constitution) and detrimental to the constitutional rights of the Petitioner in the form of loss of protection for the family, loss of sense of security and protection from fear of doing or not doing something as mandated by Article 28 G of the 1945 Constitution.

In the end, in this case the author interprets/initiates that the unclear regulation of Article 263 paragraph (1) of the Criminal Procedure Code on Judicial Review by the Public Prosecutor is often seen as a legal vacuum, so that legal discovery by the judge is required (Rechtvindng). In principle, law enforcement actions, whether investigating, prosecuting and adjudicating are legal discovery processes (Rechtvindng) which will end in 2 (two) things, namely first, legal discovery which states that a certain event fulfills the element of offense. Second, the discovery of a law that states an event does not meet the element of offense.

Rechtvindng or legal discovery by judges is a process of law formation by judges/other law enforcement officers in the application of general regulations to concrete legal events and the results of legal findings are the basis for making decisions. Van Apeldorn stated, a judge in his duty to carry out law formation must pay attention to and firmly base on Article 20 letters A and B that "Judges must judge based on the law" and Article 22 letters A and B and Article 14 of Law Number 14 of 1970 require " Judges not to refuse to try cases that are submitted to him on the grounds of incomplete or unclear laws governing them, but are obliged to try them. If there is a legal void or the rules are unclear, then to overcome it, it is regulated in Article 27 of Law Number 14 of 1970 which states "Judges as law and justice enforcers are obliged to explore, follow and understand the legal values that live in society. This means that a judge must have the ability and activity to find the law (Rechtvindng), namely by adjusting the law to concrete facts, and being able to add to the law if necessary.

Judges make laws because laws are lagging behind the development of society. Judges as enforcers of law and justice also function as inventors who can determine what is law and what is not. It is as if the judge is the holder of legislative power, namely the legislature forming body. Article 21 letters A and B state that "the judge cannot give a decision that will apply as a general rule". Actually, the law produced by judges is not the same as the legislative product. Laws produced by judges are not promulgated in the State Gazette. The judge's decision does not apply to the general public but only applies to the litigants. In accordance with Article 1917 paragraph (2) of the Civil Code which stipulates that "the power of a judge's decision only applies to matters decided in the decision". Therein lies the role of the judge to adjust the laws and regulations with the prevailing reality in society so that they can take truly fair legal decisions according to the purpose of the law.

CONCLUSION

The implementation of extraordinary legal remedies for Judicial Review for the Public Prosecutor after the Constitutional Court's decision Number 33/PUU-XIV/2016, has direct implications for the Petitioner, children and family so that they cannot gather with

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the Petitioner's husband and cannot enjoy the guaranteed rights. the constitution based on Article 28G of the 1945 Constitution because obviously personal, family, honor and dignity protections have been lost.

The review proposed by the Public Prosecutor is not related to the implementation of norms, but is the result of the norms and rules of Article 263 paragraph (1) of the Criminal Procedure Code which does not explicitly regulate the prohibition of judicial review by the Public Prosecutor, giving rise to various interpretations.

RECOMMENDATION

The Attorney General's Office cq the Public Prosecutor should be responsible for the protection, enforcement and fulfillment of human rights in law enforcement (vide Article 281 paragraph (4) of the 1945 Constitution) and ensure that every citizen who has received a decision that has legal force must still obtain his rights to guarantees, protection and fair legal certainty, including for the Petitioner and his family (vide Article 28D paragraph (1) of the 1945 Constitution) so that a judicial review is not proposed by the Public Prosecutor.

The Constitutional Court should reaffirm the legal principles in the article through a constitutional interpretation which is an integral part of the article, so that it can fulfill the constitutional mandate to provide fair legal certainty.

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