

Legal Standing of Submission of Judicial Review on Criminal Judgements by Public Prosecutor in Establishing Justice of the Law

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ABSTRACT. The paradigm of submitting a review of a criminal judgment does not reduce the steps of the Supreme Court to accept the submission of a review by the Public Prosecutor as in the judgment of the case of Joko S. Tjandra Number 12 PK/Pid.Sus/2009. This phenomenon is interesting to study related to the reality in practice that has raised questions regarding the consistency of the principles of criminal procedural law as well as theories and norms of criminal law regarding the existence and purpose of regulating legal efforts to review criminal decisions that have permanent legal powers. This type of research used in this study is normative juridical research with a statute approach and a case approach. The results of the study are expected to reinforce the authority of the Supreme Court in regulating restrictions on the use of legal attempt of judicial review

Keywords: *Judicial Review, Public Prosecutor, Legal Justice.*

1. INTRODUCTION

Reconsideration (PK), as an extraordinary legal remedy in criminal decisions, have permanent legal force (*inkracht van gewijsde*) as regulated in Law Number 8 of 1981 concerning Criminal Procedure Law (KUHP). The provisions of Article 263 paragraph (1) of the Criminal Procedure Code clearly regulate court decisions that have permanent legal force, unless the decision is free or free from all legal claims, the convict or his heir can submit a request for reconsideration to the Supreme Court. The provisions of Article 263 paragraph can have 2 (two) meanings, namely: first, for an acquittal or acquittal of all lawsuits, a review cannot be made. Second, the legal reconsideration effort is aimed at protecting the interests of the convicted person so that only the convicted person or their heir has the right to file it.

Three basic things are the reasons for the filing, namely: first, if there is a new situation that gives rise to a strong suspicion that if the situation was already known at the time the trial was still in progress, the result would be an acquittal or an acquittal of all lawsuits or the Public Prosecutor's claim not acceptable or the case applies lighter criminal provisions. Second, if in various decisions there is a statement that something has been proven, but the matter or condition as the basis and reasons for the verdict which is stated to have been proven, is in fact contradicting one another. Third, if the verdict clearly shows a judge's mistake or an obvious mistake [1]. The three bases of the provisions of Article 263 paragraph (2) of the Criminal Procedure Code provide limitations for filing a review which is not only freely

submitted, due to its character as an "extraordinary" remedy. Therefore, the limitative limits are regulated in detail, both the basis for submission and the parties that can submit them.

Based on the limitative nature of the Criminal Procedure Code in regulating applications for reconsideration, the Supreme Court in its decision Number: 84 PK / Pid / 2006 in the criminal case H. Mulyar bin Samsi did not accept the Public Prosecutor's request for reconsideration. As the verdict reads: "Declaring that the request for reconsideration by the Public Prosecutor is not accepted at the District Court in Muara Teweh" As for the consideration of the Panel of Judges for review in the decision of the Supreme Court is "that the provision has stipulated strictly and limitatively that the person who can file a review is the convict or his heir. This means that those who are not convicted or their heirs cannot apply for a Judicial Review [2].

In practice, there are several cases where legal remedies for reviewing criminal decisions that have legal force remain not by the convicted person or their heirs, but by the Public Prosecutor. Several decisions of the Supreme Court were used as the basis for the public prosecutor to file a judicial review. The Panel of Supreme Court Justices had previously received a review. Previously, the Panel of Justices received a review with the accused Mochtar Pakpahan in 1996. Then in 2001, the Supreme Court accepted a reconsideration with the defendant Ram Gulumal. In 2006, the Supreme Court also received a judicial review with the defendant Soetyawati [3]. In 2007, the Supreme Court's submission for reconsideration with the defendant Polycarpus was accepted by the

Supreme Court based on *the consistency of court decision* [4]. She explained, there is a legal practice of the Judges for Review of Judges who rejected the submission of a reconsideration by the Public Prosecutor in the criminal case of H. Mulyar bin Samsi, thus a polemic of the consistency of the Supreme Court arose in terms of accepting and rejecting the request for reconsideration by the Public Prosecutor. Thus, can it be said that the Supreme Court's acceptance of the request for review by the Public Prosecutor can be categorized as jurisprudence?

One of the legal considerations mentioned above, the Panel of Judges to review Polycarpus' case also used an extensive interpretation as a legal consideration in accepting a request for reconsideration by the Public Prosecutor on the legal basis of Article 23 paragraph (1) of Law No. 4 of 2004 concerning Judicial Power in conjunction with Law No. 48 of 2009 concerning Judicial Power. The provisions of Article 23 paragraph (1) reads: "With respect to a court decision that has obtained permanent legal force, the parties concerned can submit a review to the Supreme Court, if there are certain matters or circumstances determined by law" [5]. The provisions of the Article can be interpreted as meant by "the parties concerned" including the Public Prosecutor. Thus Article 263 paragraph (1) of the Criminal Procedure Code is set aside by using the *lex posteriori derogate legi priori doctrine*. Regarding this

interpretation, Adami Chazawi [6] has an opinion that "the Supreme Court has placed the functions, positions and relations between the two sources of law in reverse. Where should Article 263 paragraph (1) of the Criminal Procedure Code take precedence because it is a *lex specialist* and therefore the *lex specialist derogate legi generalis doctrine* must be used."

Legal considerations from the Judicial Review Panel who accepted the request for review by the Public Prosecutor in the Polycarpus case, Polycarpus submitted a judicial review of Article 23 paragraph (1) of Law No. 4 of 2004 concerning Judicial Power in conjunction with Law No. 48 of 2009 concerning Judicial Power. The Constitutional Court's decision rejected Polycarpus' request. The Panel of Justices of the Constitutional Court had an opinion that there are decisions of the Supreme Court which accept the application for review submitted by the prosecutor / public prosecutor based on a broad interpretation of the phrase "the parties concerned", in Article 23 paragraph (1) of Law No. 4 of 2004 in conjunction with Law No. 48 of 2009 concerning Judicial Power, with the exclusion of Article 263 paragraph (1) of Law no. 8 of 1981 concerning Criminal Procedure Law, which determines in a limited manner who is entitled to file a review in a criminal case is related to the application or implementation of laws, which are not

related to the constitutionality of norms in Article 23 paragraph (1) of the a quo Law [7].

In the consideration of the Panel of Justices, the Constitutional Court did not agree with the considerations of the Supreme Court in accepting the application for a review by the public prosecutor. As the consideration reads as follows: "Regardless of the history of the formation of Article 23 paragraph (1) of Law no. 4 of 2004 in conjunction with Law No. 48 of 2009 concerning Judicial Power which was influenced by the decision of the Supreme Court accepting requests for re-review of prosecutors / public prosecutors in certain cases before and during the revision of laws relating to judicial bodies under the Supreme Court in 2003, as explained by the DPR, so that for justice it is necessary to formulate the authority or right to propose a PK which allows such a broad interpretation in Law No. 4 of 2004.

The Constitutional Court does not agree with this historical interpretation which justifies the practice of overriding Article 263 paragraph (1) of the Criminal Procedure Code by using the *lex posteriori derogate legi priori doctrine*, because of Law No. 4 of 2004 does not regulate the material regulated in Law No. 8 of 1981. However, as previously explained, judges have the authority to independently interpret the unclear provisions of the law. Such a matter, even if it is true that it is deemed to violate the provisions of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), is merely a matter of the application or implementation of the law. According to the Constitutional Court, this right is not a matter of the constitutionality of the norm of Article 23 paragraph (1) of Law No. 4 of 2004 in conjunction with Law No. 48 of 2009 concerning Judicial Power. Even if judicial practice as evident in the two decisions submitted by the applicant as evidence can show inconsistencies that have occurred, and even if such practice also creates legal uncertainty as regulated in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, thus detrimental to the constitutional rights of the applicant, the Court The Constitution maintains that this right is not the authority of the Constitutional Court. Such a matter can only become the authority of the Constitutional Court if the Constitutional Court is given the authority by the 1945 Constitution of the Republic of Indonesia to examine, try, and decide cases of constitutional complaint as the authority of the Constitutional Court in many other countries [8]. With such legal considerations to the Constitutional Court, if the Constitutional Court at any time has the authority to decide on a constitutional complaint case, it can be ascertained that the decision of the Supreme Court that accepts the request for review from the public prosecutor can be questioned again.

A request for a judicial review that is submitted to the Constitutional Court but its

substance falls into the category of constitutional complaint. Based on data from the registrars of the Constitutional Court, in 2005 there were at least 48 letters or requests that could be categorized as constitutional complaints. According to Hamdan Zoelva, the number was three times the request for a judicial review in the same year. Likewise, there are many cases that injure the constitutional rights of citizens but do not find the answer, only because there is no constitutional complaint authority that the Constitutional Court or other state organs have. Like the complaint filed by Pollycarpus, the convict was sentenced to 20 years in prison in the case of the murder of human rights activist Munir Said Thalib. Pollycarpus, who was acquitted of the indictment of premeditated murder of Munir by the Supreme Court through a cassation decision, was sentenced again by the Supreme Court after a Judicial Review (PK) was filed by the Prosecutor. In the theory of criminal procedural law (Article 263 paragraph of the Criminal Procedure Code), only the convict or his family have the right to file a judicial review, so Pollycarpus feels that he has been convicted by a court decision which has permanent legal force, but uses the wrong procedural law. Herein lies the violation of the constitutional rights of citizens [9].

Judging from the opinion of the Constitutional Court, this indicates that there is still a polemic regarding the legal position of the request for reconsideration by the Public Prosecutor. Some legal experts disagree with the Supreme Court regarding its consistency in accepting requests for review by the Public Prosecutor. Leden Marpaung has an opinion that "the submission of requests for reconsideration by the Prosecutor / Public Prosecutor has not been commonplace", some experts have expressed objections or disagreements, some of the opinions of these experts are underestimating the Supreme Court [10]. Furthermore, Adami Chazawi [11] mentioned that:

"The decision of the Supreme Court justifying the reasons for filing a request for review by the public prosecutor is a verdict that clearly shows a judge's mistake over an obvious mistake as referred to in Article 263 paragraph (2) letter c of the Criminal Procedure Code. This can be included in the judicial decision which is heretical in terms of law, not deviant in terms of facts. Thus the Supreme Court, which accepted the request for reconsideration by the Public Prosecutor on the grounds of seeking justice by digging to find the law, was not justified. The Supreme Court has exceeded its authority, because the Supreme Court is no longer exploring the law by means of interpreting it, the Supreme Court has made

new legal norms beyond the original provisions, which are actually the authority of the legislators."

The request for a judicial review is not limited to a period of time (article 263, article 254, and article 268 KUHAP). Article 268 paragraph (3) of the Criminal Procedure Code clearly stipulates that the use of legal remedies for judicial review can only be done once, as well as the provisions in article 24 paragraph 2 of Law Number 48 of 2009 concerning Judicial Power and article 66 paragraph (1). Law Number 3 of 2009 concerning the Supreme Court.

However, the Constitutional Court, on March 6, 2014 issued decision No. 34 / PUU- XI / 2013, which granted the request of the former Chairman of the Corruption Eradication Commission, Antasari Azhar, along with his wife and child. Antasari and his wife and children asked the Constitutional Court to cancel article 268 paragraph (3) of the Criminal Procedure Code, which stipulates that a review in a criminal case can only be filed once. In the consideration of the Constitutional Court Decision Number 34 / PUU-XI / 2013 which granted Antasari Azhar's petition, it was stated that the search for justice could not be limited either by time or by formal provisions which stated that it could only be submitted once. This is because it is very possible that there are new circumstances (novum) that are discovered after the application for judicial review and decision [12].

The decision of the Constitutional Court further revealed that the right to life and freedom is one of the fundamental rights of humans. Therefore, legal review efforts must be viewed in such a framework, namely to uphold law and justice. Efforts to achieve legal certainty deserve to be limited, but efforts to achieve justice are not the case. The Constitutional Court acknowledges the existence of the Litis Finiri Oportet principle, that every case must have an end, which principle is related to legal certainty, but related to legal certainty, this has been resolved when there is a court decision that has permanent legal force. This is in accordance with the provisions of article 268 paragraph (1) of the Criminal Procedure Code, which regulates that Reconsideration does not delay / stop the implementation of a decision [13].

The Constitutional Court Decision Number 34 / PUU-XI / 2013 had an impact on the discourse on the execution of a number of death row inmates by the prosecutor's office. The death sentence that has been imposed by the court and has been legally enforceable remains hampered because the convicted person filed a request for reconsideration, even though in fact the review effort did not delay the execution.

On December 31, 2014, the Chief Justice of the Indonesian Supreme Court issued Supreme Court Circular Letter Number 7 of 2014, which in essence states that criminal case review can only be filed once. The SEMA is based on article 24 paragraph (2) of

Law Number 48 of 2009 concerning Judicial Power and article 66 paragraph (1) of Law Number 3 of 2009 concerning the Indonesian Supreme Court. The SEMA is intended to provide legal certainty regarding the case of reconsideration following the decision of the Constitutional Court Number 34 / PUU-XI / 2013 mentioned above.

The Supreme Court has previously issued a Supreme Court Circular (SEMA) Number 10 of 2009 in essence that a request for reconsideration can only be filed once, unless there are two or more judgments on judicial review that contradict one another in a civil case. as well as criminal cases and among them a request for reconsideration is submitted, the application can be accepted [14].

Upon the issuance of SEMA Number 7 of 2014, the Constitutional Court criticized State Institutions for not implementing their final and binding decisions. The Supreme Court's move to issue SEMA is considered to be disobedient to the Constitutional Court decision, which is a violation of the constitution, because the Constitutional Court is "The Sole Interpreter of Constitution", so the existing State Institutions cannot interpret it themselves. constitution according to its authority.

This polemic condition did not prevent the Supreme Court from accepting the request for reconsideration by the Public Prosecutor as in the case decision of Joko S. Tjandra Number 12 PK / Pid.Sus / 2009. Interesting this phenomenon to be studied in a research related to the reality in practice that has raised questions regarding the consistency of the principles of criminal procedure law and the theory and norms of criminal law with regard to the existence and objectives of regulating legal remedies for reviewing criminal decisions that have been signed.

1.1 Formulation of the problem

Based on the background of the problems above, the following problems can be formulated:

- a. What is the legal position of the submission of a review by the Public Prosecutor in a criminal decision?
- b. What is the authority of the Supreme Court in regulating restrictions on the use of judicial remedies for judicial review?
- c. What is the legal spirit of review in Indonesian criminal procedural law to achieve legal justice?

1.2 Research purposes

Based on the formulation of the problems raised in writing this law, the objectives of this study are as follows:

- a. To analyze the legal position of a request for reconsideration by the public prosecutor in a court decision.
- b. To analyze the authority of the Supreme Court in regulating restrictions on the use of legal

remedies for judicial review.

- c. To analyze the legal spirit of review in Indonesian criminal procedure law to achieve legal justice.

2. RESEARCH METHOD

Actually, legal research is basically a systematic and planned process to find legal rules, legal principles and legal doctrines in order to answer legal issues faced contextually. Legal research is carried out to produce rational arguments, new theories or concepts as prescriptions in solving the problems at hand [15].

The type of research used in this study is juridical legal research with a statute approach and a case approach. In the statutory approach research will be carried out on the hierarchy and principles in statutory regulations. Meanwhile, in the case approach what needs to be understood is the ratio decidendi, namely the legal reasons used by the judge to arrive at his decision.

In principle, this juridical legal research uses the main source in the form of secondary data or library materials [16]. The secondary data in question includes primary legal materials in the form of laws and court decisions, then secondary legal materials and tertiary legal materials.

So this research is an attempt to find an in-concreto law which aims to find laws that are appropriate and which will be applied in a particular problem, especially those related to limiting the use of legal remedies for reconsideration [17]. This is the same as applied legal research. Bagir Manan explained that applied legal research is a research that aims to answer legal problems or those related to law in a concrete situation. The applied research field in the field of law chosen is normative application, namely research on positive legal principles and legal principles, in the form of legal evaluation research [18].

3. RESULT AND DISCUSSION

3.1 Legal Status of Submission of Reconsideration by Public Prosecutors in Criminal Decisions

Review (PK) of a Criminal Decision by the Public Prosecutor is certainly interesting, because until now, there are two extreme views among legal experts and practitioners, namely those who agree with the PK submission by the Public Prosecutor and thoughts that do not justify the PK submission by the public prosecutor against a decision that has permanent legal force. In view of these differences of view, the Supreme Court itself has accepted several times, but has been inconsistent in examining and deciding PK,

namely in the cases of Muchtar Pakpahan, Djoko Tjandra, and Syahril Sabirin, Pollycarpus and H. Mulyar bin Samsi.

So the Public Prosecutor continues to file a PK even though Article 263 paragraph (1) of the Criminal Procedure Code has explicitly determined that only the convict or his heir can file for such extraordinary remedies. The submission of a PK by the public prosecutor is based on the provisions in the Law on Judicial Power, both in Law No. 4 of 2004 and in Law no. 48 of 2009. Debates, discussions and recommendations regarding the importance of a clearer regulation regarding PK, have actually been submitted before Law no. 4 of 2004 replaced by Law No. 48 of 2009. However, Law no. 48 of 2009 still contains the same formula as Law No. 4 of 2004. This means that the improvement of Law no. 4 of 2004 does not accommodate or provide a clear answer regarding differences of opinion on the authority of the public prosecutor to propose a PK.

So it is necessary to look for ideas or principles, as well as legal theory that can clarify the formulation and legal provisions regarding the review (PK) by the public prosecutor. The Supreme Court's response to the judicial review (PK) by the Prosecutor's Office is one of the extraordinary legal remedies (*buitengewone rechtsmiddelen*) in the Indonesian criminal procedural law system as regulated in CHAPTER XVIII Part two of the Criminal Procedure Code; particularly the provisions of Article 263 paragraph (1) of the Criminal Procedure Code, which states that only the convicted person or their expert can file a legal remedy against a court decision that has permanent legal force. The formulation of Article 263 paragraph (1) states: "For hundreds of courts that have obtained permanent legal force, except for hundreds of acquittals or acquittals of all legal charges, the convict or their heirs can submit a request for reconsideration to the Supreme Court."

Article 263 paragraph (2): The review is carried out on the basis.

- a If there is a new condition which gives rise to a strong suspicion that if the situation was known at the time the trial was still in progress, the result would be an acquittal or an acquittal of all lawsuits or the demands of the public prosecutor which could not be accepted or the case was applied to a more severe criminal law. light;
- b If in various decisions there is a statement that something has been proven, but the matter or condition as the basis and reasons for the verdict which is stated to have been proven, is in fact contradicting one another;
- c When the verdict clearly shows a judge's mistake or an obvious mistake.

Problems arose in connection with the provisions of Article 24 paragraph (2) of Law Number 48 of 2009 concerning Judicial Powers, which includes the right to the parties to apply for a PK. The formulation of Article 24 paragraph (2) is as follows:

- (1) With respect to a court decision that has obtained permanent legal force, the parties concerned can submit a review to the Supreme Court, if there are certain things or circumstances that are determined in law, Elucidation: What is meant by certain things or conditions include finding evidence. new (*novum*) and / or the judge's mistake or mistake in applying the law.

- (2) A judicial review decision cannot be reviewed.

This is often used as a legal argument for some parties to justify that filing a judicial review in a criminal case (*herziening*). Apart from these provisions, the Supreme Court decision on behalf of the defendant Muchtar Pakpahan seems to have been accepted as jurisprudence. Strengthened by the Supreme Court Regulation No. 1 of 1980 Article 11 which states: "if the Attorney General submits a request for reconsideration, then it will be immediately notified to the convicted person".

The empirical fact is that the Supreme Court is in a position to accept and acknowledge the power of the public prosecutor to file a re-inquiry. The first verdict was the Supreme Court decision which decided the PK in the Muchtar Pakpahan case. The Muchtar Pakpahan Council's verdict was followed by the Carpus Council of Polly (Decision No. 109/PK/Pd/2007). The second is to accept PK submissions by prosecutors to the Supreme Court in the case of Djoko Tjandra. The Supreme Court accepted the PK and annulled the cassation decision. The PK's decision also caused controversy, because the ruling was heavier than the previous verdict. The Supreme Court's consideration is that there is a legal vacuum in the KUHAP so that the Supreme Court needs to look for legal breakthroughs, creating new laws. The attitude of the Supreme Court accepting re-submissions is a thought that is structural in the form of the Supreme Court which refers to the Law on Judicial Powers. Meanwhile, a more specific law regulating the substance of PK in KUHAP does not become an important consideration by the Supreme Court. Strengthening this practice, the right of prosecutors to apply for PK is needed as a last resort in law enforcement to protect public interests. This right is required in cases classified as extraordinary crimes and detrimental to the public interest, such as corruption. Thus, the idea that supports the submission of a PK by the public prosecutor is limited to certain cases. However, in certain cases the Supreme Court refuses based on the provisions of Article 263 (1) of the Criminal Procedure Code, namely in the case of H.

Mulyar bin Samsi (Supreme Court Decision No. 84 PK / Pid / 2006 of 2006). Thus, the Court's decision on the Muchtar Pakpahan case was not followed by the verdict of the Mulyar bin Samsi case.

3.2 The Authority of the Supreme Court in Regulating the Limitation on the Use of Judicial Review Remedies

3.2.1 There is no strong legal basis for a judicial review by the public prosecutor

There is no solid basis, either normatively or theoretically or philosophically, regarding the authority of the public prosecutor to file a review. Therefore, the attitude of rejecting the authority of the public prosecutor to submit a review is based on legal arguments:

- a. In line with the institutional structural approach described earlier, we are of the view that the Law on Judicial Power is a lex generalist for the course of the judicial process. Meanwhile, the provisions in the Criminal Procedure Code are lex specialis. Based on this relationship, the lex generalis must be disregarded if it is contrary to a more specific law (lex specialis). If we look further, there are other special provisions in the Criminal Procedure Code related to PK, namely the time limit for PK requests in criminal cases as stipulated in Article 264 paragraph (3) of the Criminal Procedure Code, cannot exceed the penalties imposed in the PK decision than in the original decision. , as regulated in pasal266 paragraph (3) of the Criminal Procedure Code, and various other applicable provisions regarding legal remedies for PK in a criminal case. This provision was deviated by the Supreme Court when in the case of the PK decision in the Djoko Tjandra case, the sentence was heavier than the previous verdict.
- b. Whereas a review by the public prosecutor may result in the convict losing his human rights. The right of the convict and the sense of justice in the community can be killed. Since the beginning, PK was only intended for convicts or their families. Laws are not made to defend the state but to protect the people from the state. To apply for a PK there are requirements, rules and formal aspects that must be met. If PK is proposed by the prosecutor, it means that the people are not protected and the law has been harmed by the State. The PK submission undermines the

Indonesian legal order that calls for protection and respect for human rights. The PK that the prosecutor has requested has violated the law. The editor of the Criminal Procedure Code did not mention the prosecutor filing a PK. Historically, PK was actually given as a last resort for the convicted person or their heir to change.

- c. That the submission of a judicial review by the prosecutor is not in accordance with legal logic. The review is intended as a legal tool to protect the human rights of the convicted person. So far, the prosecutor's PK efforts are thick with political interests. The prosecutor's filing for a PK was very strong in 1996 "in the Muchtar Pakpahan case. Previously, the founder of the Indonesian Prosperous Labor Union was acquitted in the case of workers' demonstrations in Medan. At that time, it was clear that PK was filed because of President Soeharto. Not satisfied with Muchtar's release. The Supreme Court itself should not become an instrument of power for certain parties which will then affect the independence of the judiciary. Therefore, in the future, the Supreme Court will not let the prosecutor file a PK on a case.
- d. Whereas Muchtar Pakpahan's Judgment on Review does not have a strong reason to be used as jurisprudence. Therefore, Indonesian judges are basically independent, and not bound by jurisprudence. after all, an erroneous judgment cannot possibly constitute jurisprudence. The political background at the time of the Supreme Court had influenced the prosecutor's PK request in the Muchtar Pakpahan case. At that time, the law was controlled by the political interests of the rulers. Muchtar, who at that time was accused of having other special provisions in the KUHAP related to PK, namely the time limit for PK requests in criminal cases as stipulated in article 264 paragraph (3) of the Criminal Procedure Code, could not exceed the penalties imposed in PK decisions than the original decision, as provided for in pasal266 paragraph (3) of the Criminal Procedure Code, and various other applicable provisions regarding PK legal remedies in a criminal case. This provision was deviated by the Supreme Court when in the case of the PK decision in the Djoko Tjandra case, the sentence was heavier than the previous verdict.

- e. Whereas a reconsideration by the public prosecutor may result in the convict losing his human rights. The right of the convict and the sense of justice in the community can be killed. Since the beginning, PK was only intended for convicts or their families. Laws are not made to defend the state but to protect the people from the State. To apply for a PK there are requirements, rules and formal aspects that must be met. If PK is proposed by the prosecutor, it means that the people are not protected and the law has been harmed by the State. The PK submission undermines the Indonesian legal order which calls for protection and respect for human rights. The PK that the prosecutor has requested has violated the law. The editor of the Criminal Procedure Code did not mention the prosecutor filing a PK. Historically, PK was actually given as a last resort for the convicted person or their heir to change.
- f. That the submission of a judicial review by the prosecutor is not in accordance with legal logic. PK is intended as a legal tool to protect the human rights of convicts. So far, the prosecutor's PK efforts are thick with political interests. The prosecutor's submission of a PK was very thick, which was first filed in 1996 in the Muchtar Pakpahan case. Previously, the founder of the Indonesian Prosperous Labor Union was sentenced to acquittal in the case of the workers' demonstration in Medan. It was clear at that time that a PK was proposed because President Soeharto was not satisfied with Muchtar's release. It is best if the Supreme Court itself does not become a tool of power for certain parties which will then affect the issue of the independence of the judiciary. Therefore, in the future the Supreme Court will not allow the prosecutor to file a PK on a case.
- g. Whereas Muchtar Pakpahan's decision on reconsideration does not have a strong reason to be used as jurisprudence. Therefore, Indonesian judges are basically independent, and not bound by jurisprudence. Moreover, a wrong decision cannot possibly be used as jurisprudence. The political background at the time of the Supreme Court had influenced the prosecutor's PK request in the Muchtar Pakpahan case. At that time, the law was ruled by the political interests of the rulers. Muchtar, at that time accused of being the mastermind

behind the labor demonstrations, was indeed the target of the authorities. So all possibilities were used to drag Muchtar Pakpahan to court.

- h. Whereas the reconsideration in the Muchtar Pakpahan case and other cases such as Djoko Tjandra and Syahril Sabirin where the PK was filed by the prosecutor could be a judicial error (*rechtelijk dwaling*). Such a step by the prosecutor is like breaking through or breaking the KUHAP rules. The prosecutor's move is a legal arbitrariness that should not be continued, let alone become jurisprudence. The Supreme Court must have the courage to admit judicial errors.

3.2.2 *Thought of Article 263 paragraph (3) as a legal basis for filing a PK by the public prosecutor*

On the basis of the premise that Article 263 paragraph (3) is the basis for the Public Prosecutor to file a PK. The formulation of Article 263 (3) states, "On the basis of the same reasons as referred to in paragraph (2) against a court decision that has obtained legal force, it can still be submitted a request for reconsideration if in that decision an act accused has been declared proven but not. followed by a conviction. "

If the opinion that agrees with the submission of a PK by the public prosecutor is that the formulation of Article 263 (1) is the basis for the convict or his heir, whereas Article 263 paragraph (3) is for the public prosecutor. We remain in the position that the formulation of Article 263 paragraph (3) is systematically a continuation of Article 263 paragraph (1), because the substance of Article 263 paragraph (1) is different from Article 263 paragraph (3). The substance of Article 263 paragraph (1) is related to Article 191 "KUHP, namely:

- If the court has an opinion that from the results of the examination at trial, the guilt of the defendant for the act he is accused of has not been legally and convincingly proven, the defendant shall be acquitted.
- If the court has an opinion that the act of which the defendant is accused is proven, but the act does not constitute a criminal act, the defendant shall be acquitted of all legal charges.

It means that the provisions of Article 263 paragraph (1) are related to Article 191 (onslag), namely an act which is proven, but not a criminal act, so that the defendant is freed from all legal charges. The provisions of Article 263 paragraph (3) are proven to be a criminal act, but not accompanied by punishment.

Therefore the defendant whose act is proven proven can apply for a PK to get a better decision for himself, namely that he is not proven to have committed a criminal act. This means that for the person concerned, not only the conviction, but also the matter of whether

or not he has committed a criminal act as charged by the Public Prosecutor. In other words, the verdict clearly shows an oversight of the Judge or an obvious mistake as regulated in Article 263 paragraph (2) letter c, which is the right of the defendant or his heir as stated in paragraph (1) which is a linear matter. The definition of a court decision which is accused as proven proven but not followed by a conviction is not the same as release / onslag as regulated in Article 191 which states an act which is proven but is not a criminal act.

For example the case "Sandal AAL" is an example that can be applied to Article 263 paragraph (3). The court in its ruling stated that AAL was proven to have committed a criminal act, but was not given a criminal sanction or conviction but rather gave action. 1997 Concerning Juvenile Court, Article 25 clearly distinguishes between Criminal as referred to in Article 23 and imposing Actions as stipulated in Article 24. This is as regulated in Article 25 which distinguishes Judges imposing Crime as stated in Article 1 number 2 letter a, namely; commits a criminal act, and the Judge imposes the action as referred to in Article 1 point 2 letter b, namely a child who commits an act which is declared prohibited for a child either according to statutory regulations or according to other legal regulations that live and apply in the community concerned.

3.2.3 *Legal Spirit of Review in Indonesian Criminal Procedure Law to Achieve Legal Justice*

Conventional criminal justice with a conventional working mechanism which is often opposed to a restorative justice model has always been complained about as the cause of the difficulty in fighting for the rights of victims. This thinking is not completely wrong considering that victims basically have no place in the conventional justice model. Based on the social contract theory that gives birth to the state's right to prosecute and punish (*jus puniendi*), criminal justice is no longer a place for victims of a criminal act to seek justice but merely a state tool to prove a person guilty and punish him. The complaint of a lawyer friend who is in charge of providing assistance in a criminal case, which "stated confusion when his client's car which was the evidence in a theft case, was stated in the ruling at the cassation level" confiscated by the state "and not" returned to the victim " What form of resistance can the victim take in responding to such a decision? Whereas the conventional criminal justice

model currently working is very "offender oriented" has long been recognized by a number of criminal law experts. by the prosecutor as public prosecutor. This is confirmed by the definition of a criminal act and a measure of justice based on a paradigm set based on the

conventional justice system. Criminal action in this case is defined as "is a violation of the state, defined by law breaking and guilty", and justice understood as "proof of indictment and conviction na to perpetrators by the state as the holder of sovereignty in imposing crimes. This definition emphasizes that there is no place for victims in the criminal justice system. This is also done by means of a type of sanction that does not provide room for the needs of the victim as regulated in Article 10 of the Criminal Code.

So reconsideration as a right demands a paradigm shift in the criminal justice system that runs as the above demands in reality are "far from burning". Presenting a material truth in a criminal court is not an easy matter. Mistakes on the judgment of a fact may occur. Therefore legal remedies as a means of correction are important, not only that the appeal and cassation mechanisms have not been able to guarantee the realization of material truth.

Reviewing the translation of the word "Herziening" according to Tirtaamijaya explained herziening as a way to correct a decision which has become irreversible with the intention of correcting a judge's negligence that has harmed the convicted person, if the repair is to be carried out then he must meet the requirements, namely: a situation which during the examination of the judge, which the judge does not know, if he finds out about the situation, will give another verdict [19]. Law is a method that can be carried out in examining cases submitted to court with the hope of achieving the objectives of the law, namely obtaining justice, getting the benefits of law enforcement which is expected and ensuring that there is a legal review (PK) / Herziening is one of the legal efforts extraordinary in Indonesian criminal law. Legal review (PK) / Herziening efforts are carried out against court decisions that have obtained permanent legal force.

The initial emergence of this institution in the formulation of Law No.8 of 1981 on KUHAP has basically been based on a controversial reality in practice. The case of Sangkon and Karta in 1977 which was legendary and was often suspected of being a practical reality of the need for a review agency. The case began with a story about the robbery and murder of the husband-wife couple Sulaiman and Siti Raya in Bojongan Village, Bekasi, West Java and led to the determination of Sangkan and Karta as suspects and later found guilty by the Court. Both were sentenced to 12 years in prison for Sengkon and 7 years for Karta. This case was

reopened due to Gunei's admission that he was the perpetrator of the murder of the Sulaiman- Haya husband and wife. The problem arose because the 1977 District Court Sengkon Karta decision was legally binding.

In fact, the regulations regarding reconsideration do not automatically arise solely because of the case mentioned above, in Article 15 of Law no. 19 of 1964 concerning Basic Provisions of Judicial Power²⁰ formulated: "Regarding a court decision which has permanent legal force, it can be requested for reconsideration, only if there are things or circumstances, which are determined by law."

The explanation of this provision is counterproductive because it states that this Article regulates the review of court decisions or *herziening*. Judgment review constitutes a special legal instrument and in its essence it only takes place after other legal instruments have been used without success. The conditions are stipulated in the Procedural Law. In general, a decision can only be reviewed if there is a *nova*, namely new facts or conditions, which at the time of the previous trial, did not appear or receive attention".

The provisions regarding reconsideration are then regulated in Law no. 8 of 1981 concerning the Criminal Procedure Code. Article 263 KUHAP is formulated:

- (1) With respect to court decisions that have permanent legal force, unless the verdict is acquittal or acquitted of all legal claims, the convict or his heir may submit a request for reconsideration to the Supreme Court.
- (2) A request for reconsideration is made on the basis of:
 - a If there is a new condition that gives rise to a strong suspicion that if the situation was known at the time the trial was still in progress, the result would be an acquittal or an acquittal of all lawsuits or the demands of the public prosecutor which could not be accepted or a lighter criminal provision was applied to it ;
 - b If in various decisions there is a statement that something has been proven, but the matter or condition as the basis and reasons for the verdict which is stated to have been proven, is in fact contradicting one another;
 - c When the verdict clearly shows a judge's mistake or an obvious mistake.
- (3) On the basis of the same reasons as referred to in paragraph (2), a court decision that has obtained legal force can still be submitted a request for reconsideration if in that judgment an act accused has been proven proven but not

followed by a conviction.

In contrast to the previous PERMA provisions where the attorney general has the right to file a review, in the provisions of Article 263 of the Criminal Procedure Code mentioned above, the Attorney General is no longer mentioned as the party who filed a PK.

Law Number 48 Year 2009 and in this amendment the provisions contained in Article 76 of Law Number 14 Year 1985 have not changed, which means that these provisions remain in effect. Article 23 paragraph (1) of Law Number 48 of 2009 concerning Judicial Powers states that, "With respect to court decisions that have obtained permanent legal force, the parties concerned can submit a review to the Supreme Court, if there are certain things or circumstances that specified in law."

One of the things that has not been agreed upon in relation to the history of the arrangement for submitting a request for review is whether or not the public prosecutor can submit a review. Some circles think that PK or *Herzeining* can only be submitted by the convict, legal adviser or their heirs so that the PK by the prosecutor is not in place. Especially if you see that the Supreme Court has granted several requests in principle of criminal law, legal remedies, in this case in the form of legal defense, the latter is only sentenced to the defendant or convict, not to the prosecutor (vide article 182 paragraph (1) letter b of the Criminal Procedure Code). In the history of justice in Indonesia, there are several cases that have surfaced in which the submission or review was carried out by the Public Prosecutor, namely:

- a. Case No. 55 PK / Pid / 1996 on behalf of Muchtar Pakpahan regarding incitement.
- b. Case No. 03 / PK / Pid / 2001 on behalf of Ram Gulumal regarding the forgery of Gandhi Memorial School deeds.
- c. Case No. 15 / PK / Pid / 2006 on behalf of Sulistyawati regarding Counterfeiting.
- d. Case No. 109 / PK / Pid / 2007 on behalf of Policarpus on Murder.
- e. Case No. 07 / PK / Pid / 2009 on behalf of Syahril Syabirin; and
- f. Case No. 12 / PK / Pidsus / 2009 on behalf of Joko S. Chandra, among the decisions the most controversial is the "PK on PK" in the case of Joko S. Chandra. The case that was raised was related to the polemic of the prosecutor's review, the controversy over the prosecutor's review was raised following the Supreme Court's decision that granted the prosecutor in the corruption case of transferring the right to collect receivables (*cessie*) of Bank Bali. The Supreme Court sentenced the owner of PT. Era Giat Prima (EGP), Djoko Tjandra and former

Governor of Bank Indonesia Syahril Sabirin. On the verdict, Djoko filed a review on the grounds that the convict and his heirs had reviewed the property, not the prosecutor. The review by Djoko Bandar was basically a PK against the PK or the second PK which became a resistance against the PK proposed by the laksa. There is little illustration that this polemic has set a bad precedent that provides legal uncertainty.

4. CONCLUSION

- Logically and in legal conviction regarding the existence of a special case review effort to protect the human rights of the convicted convict, and to avoid political intervention in the PK institution, my opinion that PK is a legal remedy that can only be submitted by the convict or his heirs.
- Normatively and legally positivistic (positive law) as stipulated in the Criminal Procedure Code are *lex specialis* for Law no. 48 of 2009 (*lex generalis*). KUHAP only recognizes the right of convicts and their heirs to apply for PK. Relying on this legalistic thinking, the idea of giving the public prosecutor the right to propose a PK must be clearly stated in a law.
- To accommodate the opinion arguing the need for a democratic reform direction towards the balance of the rights of the public prosecutor to take extraordinary legal measures on behalf of the state, it would be appropriate to revise the law, in this case the Criminal Procedure Code as *lex specialis* for criminal procedural law or to precede revision, the Supreme Court can issue a Supreme Court Regulation.

5. ADVICE

- Whereas the Defendant should be the subject who directly represents himself against the legal remedy for reconsideration because of a *novum* or other reason justified by law.
- Whereas the public prosecutor should represent the public interest to file a review effort to realize fair criminal law enforcement. Legal action proposes a reconsideration if the court's decision has injured public justice (society) or the principles of public justice. Because the public does not have direct access to the court, the Public Prosecutor can capture these aspirations of justice by submitting a review of decisions that have permanent legal force.

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