

The Authority of the Prosecutor in Filing a Judicial Review (PK) Following the Issuance of Constitutional Court Decision Number 20/PUU–XXI/2023

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Abstract. *This study aims to determine and analyze the Constitutional Court Decision Number 20/PUU–XXI/2023 regarding the prohibition of prosecutors filing PK to provide justice and legal benefits. This study uses a normative legal approach. Based on the results of this study, it was found that the Constitutional Court Decision Number 20/PUU–XXI/2023 regarding the prohibition of prosecutors filing PK has provided legal certainty and justice. Legal certainty in the Constitutional Court Decision Number 20/PUU–XXI/2023 related to the lawsuit of Article 30C letter h of the Republic of Indonesia Law Number 11 of 2021, namely preventing abuse of authority by prosecutors, especially in terms of submitting PK to cases that have been declared free or free from all charges. Meanwhile, justice in the Constitutional Court Decision Number 20/PUU–XXI/2023 is that the convict is given the opportunity to prove his innocence by filing a judicial review. The judicial review carried out by the public prosecutor has closed the sense of justice for the convict. This is because the prosecutor's efforts to prove the defendant's guilt in the trial have been deemed sufficient, with the discovery of new evidence (Novum) it should provide an opportunity for the convict to obtain justice. The authority of the prosecutor after the issuance of the Constitutional Court Decision Number 20/PUU–XXI/2023. Basically, after the decision Number 20/PUU–XXI/2023 regarding the revocation of the prosecutor's authority, no new law was created because the regulation of legal remedies for criminal case review was actually regulated in Article 263 paragraph (1) of Law Number 8 of 1981 concerning Criminal Procedure Law (KUHAP).*

Keywords: *authority; judicial; prosecutor's.*

1. Introduction

The Criminal Procedure Code (KUHAP) divides legal remedies into two types, namely ordinary legal remedies and extraordinary legal remedies. Ordinary legal remedies consist of appeal and cassation, while extraordinary legal remedies

consist of cassation level examination in the public interest and judicial review.¹ Extraordinary legal efforts aim to find justice and material truth. Justice cannot be limited by time or formal provisions for filing extraordinary legal efforts such as judicial review because it is very possible that substantial novum will be discovered that was previously undiscovered.²This is the reason why a legal review of a court decision that has permanent legal force was submitted.

Article 263 Paragraph (1) of the Criminal Procedure Code expressly states that the party entitled to file a judicial review is the convict or his heirs and is reinforced by the decision of the Minister of Justice of the Republic of Indonesia Number: M.01.PW.07.03 of 1982 concerning guidelines for the implementation of criminal procedural law which clearly states that the implementation of the right to judicial review is only directed at the convict or his heirs. Based on these provisions, it is clear that judicial review is the right of the convict or his heirs, not the right of the public prosecutor.

In practice, judicial review is sometimes submitted by the public prosecutor, not the defendant or his heirs. Judicial review by the public prosecutor in criminal cases is a paradox that occurs in the criminal law system. This legal practice is a judicial error (*rechtelijke dwaling*) which in its implementation is a way that violates or breaks through the rules of law itself in this case the rules in criminal procedure law. As for the review by the prosecutor, it is certainly very disadvantageous for the convict and his heirs, and this of course violates the human rights of the convict and his heirs.³

The first judicial review was filed in the case of the Supreme Court Decision on October 25, 1996 No.55 PK/Pid/1996 with the convict Mochtar Pakpahan committing the crime of incitement which was carried out continuously and disseminating writings containing incitement. According to Article 160 in conjunction with Article 64 paragraph (1) of the Criminal Code and Article 161 paragraph (1) of the Criminal Code, and strengthened by Article 24 Paragraph (1) of the Republic of Indonesia Law Number 48 of 2009 concerning Judicial Power which states that against a court decision that has obtained permanent legal force, the parties concerned may submit a judicial review to the Supreme Court, if there are certain matters or circumstances specified in the law.

The pros and cons debate regarding the prosecutor filing a judicial review has ended with the decision. The Constitutional Court (MK) Decision No.20/PUU-XX/2023 which Granted the Applicant's petition in its entirety, stated that Article 30C letter h and the Explanation of Article 30C letter h of Law No. 11 of 2021

¹Rendi Renaldi Mumbunan, "Ordinary and Extraordinary Legal Efforts Against Judges' Decisions in Criminal Cases", *Lex Crimen Journal*, Volume VII, Number 10, December 2018. pp. 40-4

²Herri Swantoro et al., "Second Judicial Review Application Based on Justice and Legal Certainty", *Jurnal Mimbar Hukum*, Vol. 29 No. 02, Jakarta, 2017, pp. 189-204.

³Ahmad Fauzi, "Legal Analysis of Extraordinary Legal Efforts of PK by Prosecutors", *Journal of Law and Justice*, Volume 3, Number 1, March 2014: 27-48, p. 42

concerning Amendments to Law No. 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia (hereinafter referred to as Law No. 11 of 2021 concerning the Attorney General's Office) are contrary to the 1945 Constitution of the Republic of Indonesia and have no binding legal force. The provisions of Article 30C letter h of the Attorney General's Office Law read: "In addition to carrying out the duties and authorities as referred to in Article 30, Article 30A, and Article 30B, the Attorney General's Office: h. submits a Judicial Review."

In its considerations, the panel of judges at the Constitutional Court quoted the legal considerations of Case Number 33/PUU-XIV/2016 which emphasized that Article 263 paragraph (1) of the Criminal Procedure Code is a constitutional norm as long as it is not interpreted otherwise than that a PK can only be submitted by the convict or his heirs (not by the prosecutor) and may not be submitted against a verdict of acquittal and release from all legal charges.⁴

Based on the background above, this study aims to determine and analyze the Authority of the Prosecutor in Filing a Judicial Review (PK) after the Issuance of the Constitutional Court Decision Number 20/PUU–XXI/2023.

2. Research Methods

The approach method used in this research is research with a normative legal method with the research specification is analytical descriptive. the type of data used by the author is secondary data consisting of primary, secondary and tertiary legal materials. The data collection method used in this study is the first literature study, and supported by interview and interview methods. The analysis of legal materials used in this study is qualitative analysis.

3. Results and Discussion

The Attorney General's Office of the Republic of Indonesia as the highest prosecution institution in the legal field has a primary role in enforcing the supremacy of law and realizing justice for all people in this country as a government institution that exercises state power in the field of prosecution, and as an authorized body in enforcing law and justice.⁵The prosecutor's office has the task of enforcing the law in criminal cases in the form of prosecution to execution, sometimes the prosecutor files an extraordinary legal remedy, namely a judicial review. This brings up pros and cons because basically the submission of a judicial review is carried out by the public prosecutor, while according to Article 263 Paragraph (1) of the Criminal Procedure Code, a judicial review should be submitted by the convict or his heirs.

⁴ <https://www.Hukumonline.com/berita/a/mk--penambahan-kewerahan-jaksa-ajukan-pk-inkonstitusional-lt6439843cbe9c7/> accessed on October 11, 2023

⁵Rampadio, H., Fauzia, A., & Hamdani, F. (2022). The urgency of arrangement regarding illicit enrichment in Indonesia in order to eradicate corruption crimes by corporations. *Jurnal Pembaharuan Hukum*, Volume 9, Nomor 2, 2022, p. 34

In practice, judicial review has been filed several times by the public prosecutor, not by the defendant or his heirs. The first judicial review by the public prosecutor occurred in the case of Muchtar Pakpahan, October 25, 1996 Decision No.55/PK/Pid/1996.⁶

The public prosecutor in submitting a judicial review refers to Article 263 Paragraph (2) of the Criminal Procedure Code, based on the following:⁷

- a. If there are new circumstances that give rise to strong suspicion, if these circumstances were already known at the time the trial was taking place, the result will be a verdict of acquittal from all legal charges or the public prosecutor's demands cannot be accepted or a lighter criminal provision will be applied to the case.
- b. If in various decisions, there is a statement that something has been proven, but the things or circumstances as the basis and reasons for the decisions that are declared to have been proven are found to be in conflict with each other.
- c. If the decision clearly shows a judicial error or a clear mistake.

The prosecutor has the authority to file a judicial review as stated in the Supreme Court Regulation (Perma) Number 1 of 1980, which states that the Supreme Court can review a criminal decision that "contains a criminal penalty" that has permanent legal force, based on the same reasons as the reasons mentioned "enumeratively". In PERMA No. 1 of 1969 which regulates who has the right to file a judicial review in a slightly different order, consisting of:⁸

- a. Attorney General
- b. Convicted, and
- c. Interested parties.

(The phrase interested parties in this case can be interpreted that the public prosecutor can also file a judicial review because the public prosecutor is an interested party in terms of carrying out the prosecution).

Prosecutors have the authority to file a judicial review as stated in Law Number 3 of 2009 concerning the Second Amendment to Law Number 14 of 1985 concerning the Supreme Court. In Chapter IV concerning the Supreme Court's Procedural Law, Part Four, Examination of the Judicial Review of Decisions that have Obtained Permanent Legal Force, Article 68 paragraph (1) states that the parties who have the right to file a judicial review are:

⁶Slamet Prasetyo Sutrisno, Fadjrin Wira Perdana, Surnata, Yohan Wibisono, Bambang Setiawan, Extraordinary Legal Efforts for Judicial Review in the Perspective of Progressive Law, Indonesian Journal of Social Science, Volume 2, Number 12, 2021, p.56

⁸Mali Diaan Sri Ayu Astuti, Yenny Nuraeni, The Authority of the Public Prosecutor (JPU) in Taking Extraordinary Legal Actions (Judicial Review) Reviewed from Criminal Law (Djoko Chandra Case Study), PAJOUL Journal (Pakuan Justice Journal Of Law), Volume 01, Number 02, 2020, p. 63

- 1) A request for judicial review must be submitted by the parties to the case themselves, or their heirs or a representative who is specifically authorized for that purpose.
- 2) "If during the review process the applicant dies, the application can be continued by his heirs."

Based on the provisions in Article 68 paragraph (1) of Law Number 3 of 2009 concerning the Second Amendment to Law Number 14 of 1985 concerning the Supreme Court, it creates legal interpretation/uncertainty where there is no prohibition on prosecutors filing a PK, in this law it states that only parties to the case can file a judicial review. Therefore, Article 68 paragraph (1) can be interpreted by the panel of judges, the prosecutor can file a PK. The provisions of Article 68 paragraph (1) of Law Number 3 of 2009 are strengthened by Article 24 Paragraph (1) of Law of the Republic of Indonesia Number 48 of 2009 concerning judicial power used by the public prosecutor as the basis for filing a judicial review by the prosecutor. The public prosecutor in filing a judicial review acts for and on behalf of the state and simultaneously represents the victim. In its implementation, the Attorney General issued Attorney General Regulation Number: Per 036/A/JA/09/2011 concerning Standard Operating Procedures (SOP) Handling of General Criminal Cases.

The considerations in the Regulation of the Attorney General of the Republic of Indonesia Number: Per-036/A/JA/09/2011 Concerning Standard Operating Procedures (SOP) for Handling General Criminal Cases state that Article 45 paragraph (1) of the Regulation of the Attorney General Number: Per-036/A/JA/09/2011 Concerning Standard Operating Procedures (SOP) for Handling General Criminal Cases, Chapter VIII concerning Legal Remedies, Section 5 which contains matters concerning the Submission of Extraordinary Legal Remedies for Judicial Review (PK) by the public prosecutor states that the submission of judicial review is carried out based on criminal procedural law by taking into account jurisprudence, legal developments, the public's sense of justice and conscience.⁹

In criminal justice practices in Indonesia, judicial review has been submitted several times by public prosecutors. This is because Article 263 Paragraph (1) of the Criminal Procedure Code does not regulate the prohibition on public prosecutors from submitting judicial reviews. This is reinforced by the issuance of Article 30C letter h of the Republic of Indonesia Law Number 11 of 2021, where this provision gives prosecutors the authority to submit judicial reviews.

The issuance of the provisions of Article 30C letter h in the Revised Law Number 16 of 2004 concerning the Prosecutor's Office which has been approved and ratified as the latest Prosecutor's Office Law regulates the authority of the public prosecutor to conduct a Judicial Review, becoming a new polemic in the realm of

⁹ibid, p. 65

Judicial Review Legal Efforts. Article 30C letter h of the Republic of Indonesia Law Number 11 of 2021 states that the judicial review submitted by the prosecutor is coordinated with Prosecutor's Office. Law of the Republic of Indonesia Number 11 of 2021 limits judicial review submitted by the prosecutor to only court decisions stating that the defendant's actions have been legally proven, but are not followed by a criminal sentence.

The issuance of Law Number 11 of 2021 concerning amendments to Law Number 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia, clarifies the position of the public prosecutor in filing a judicial review. Therefore, the public prosecutor with the formation of an article regulating judicial review by the public prosecutor has a clear reason to file a judicial review. The provisions in Article 30C letter h of Law of the Republic of Indonesia Number 11 of 2021 are considered to cause legal uncertainty and injustice because in Article 263 Paragraph (1) of the Criminal Procedure Code it is constitutional as long as it is not interpreted otherwise than as meaning that a judicial review can only be filed by the convict and his heirs and may not be filed against a verdict of acquittal or release.¹⁰

According to Delfina Gusman, the authority of PK to the prosecutor is unfair if the state continues to prosecute citizens. This is related to the role of the state in realizing the ideals of law as formulated as follows:¹¹

- a. The state protects the entire Indonesian nation and all of Indonesia's territory based on unity;
- b. The state wants to realize social justice for all people;
- c. A state with people's sovereignty, based on democracy and representative deliberation; and
- d. The state is based on the belief in the Almighty God according to the basis of just and civilized humanity.

The legal implications of Decision Number 20/PUU-XXI/2023 regarding the revocation of the prosecutor's authority to be able to conduct a Judicial Review are the return of the position to the convict. In this case, the extraordinary legal efforts made by the convict, the subject who has the right to file a Judicial Review is only the convict or his heirs, while the object of the Judicial Review submission is the decision stating that the alleged act is proven and sentenced to a criminal penalty. Therefore, as a concept of legal efforts for the interests of convicts who are dissatisfied with the decision that has obtained permanent legal force, the decision of acquittal or release from all legal charges is not included in the object of the Judicial Review submission, because the decision of acquittal or release from all legal charges is certainly beneficial to the convict.

¹⁰Suci Devita, *The Authority of the Public Prosecutor in Extraordinary Legal Efforts for Review of Final Legal Decisions* (2022), Thesis, Faculty of Law, University of Jambi, Jambi, p.13

¹¹Delfina Gusman, Op, Cit, p. 1130

The Judicial Review institution is adopted solely for the interests of the convict or his heirs and this is the essence of the Judicial Review institution.¹²

Basically, after the decision Number 20/PUU-XXI/2023 regarding the revocation of the prosecutor's authority to be able to conduct a Judicial Review, it can be submitted by the Attorney General as in the opinion of Yusril Ihza Mahendra, PK by law can only be used by the Attorney General solely for the interests of justice for the convict. For example, the Attorney General finds *novum* that the convict is not the perpetrator of the crime, but someone else, while the convict has been sentenced. In such circumstances, the Attorney General can take the initiative to file a PK to release the wrongly accused convict.¹³In this case, the PK submitted by the Attorney General is beneficial to the convict/his family.

It is basically important to conduct a comparative study of the Judicial Review conducted in Indonesia with the Judicial Review conducted in other countries. Comparative criminal law has an important role in the field of criminal law that crosses national boundaries (international criminal law). Comparative law is an activity of comparing one legal system with another, whether between nations, countries, or even religions, with the intention of finding and indicating differences and similarities by providing explanations and examining how the law functions and how its legal solutions are in practice and which non-legal factors influence it. The explanation can only be known in its legal history, so that scientific comparative law requires a comparison of legal history.¹⁴Furthermore, according to Peter Mahmud Marzuki, legal comparisons can also be made without looking at the legal system or economic level, but only looking at the substance which is a universal need.¹⁵

In the Netherlands, initially, acquittal decisions were also protected by absolute finality. The argument is that it is unfair if the state can continue to prosecute citizens, including through PK, after the person concerned is free from charges. *Novum* in judicial review in the Netherlands is limited by the following criteria:¹⁶

- a. A credible confession by the accused who is free from the charge of murder, that he is the real perpetrator; or
- b. The results of technical research are in the form of "hard evidence" regarding the defendant's guilt. While *falsum* is a crime that contaminates the birth of an acquittal. *Falsum* consists of false evidence and false statements;

¹²Irwan Sapta Putra, Op., Cit., p. 264

¹³ Yusril Ihza Mahendra, Justice in Legal Certainty and Legal Certainty in Justice, <http://www.jpnn.com/read/2014/03/08/220770/Keastian-dalam-Kepastian-Hukum-dan-Kepastian-Hukum-dalam-Justice>, Accessed January 11, 2024

¹⁴Rian Prayudi Saputra, Comparison of Indonesian Criminal Law with England, *Jurnal Pahlawan*, Volume 3 Number 1 Year 2020 p. 48

¹⁵Peter Mahmud Marzuki, (2008), *Legal Research*, Kencana Prenada Media Group, Jakarta, pp. 135 - 136

¹⁶ <https://kepaniteraan.mahkamahagung.go.id/article-Hukum/2045-peninjauan-back-oleh-jaksa-binziad-kadafi>, accessed on January 12, 2024

- c. Crimes against officials or individuals related to a criminal process; or
- d. The bribed judge.

Netherlands for the public interest Procureur General (PG) can file a PK for convicts with certain criteria. Procureur General can help convicts find evidence and strengthen arguments if there is a reason to request a PK. However, Procureur General is not the same as the Prosecutor's Office, in this case the Procureur General heads an office at the Dutch Supreme Court (Hoge Raad) which is responsible for prosecuting criminal acts committed by public officials, as well as submitting opinions to the Hoge Raad on each cassation case. Procureur General can file a cassation for the sake of the law, including filing a PK application.¹⁷

Based on a comparison of the Indonesian and Dutch judicial review laws, there are similarities in the form of the absence of the authority of the public prosecutor to file an extraordinary judicial review. This is in accordance with the provisions of Article 263 of the Criminal Procedure Code strengthened by the Constitutional Court Decision Number 20/PUU-XXI/2023. Meanwhile, the difference between filing a judicial review in Indonesia and the Netherlands is that in the Netherlands there is a Procureur General (PG) with an office at the Supreme Court (Hoge Raad). PG is not the same as the prosecutor's office. The Procureur General (PG) can file a PK for convicts with certain criteria. The Procureur General can help convicts find evidence and strengthen arguments if there is a reason to request a PK.

The comparison of judicial review in the United States is different from Indonesia and the Netherlands, in the United States not all cases can be submitted for judicial review to the United States Supreme Court. Judicial review in the United States is only submitted in relation to certain cases that are considered important by the United States Supreme Court.¹⁸ Judicial review in the United States can be filed more than once. According to Soediro, the implementation of criminal justice in the United States is known as two models in the criminal case examination process (two models of the criminal process), namely the due process model and the crime control model. Both models above are based on the adversary model. While in Indonesia, by looking at the explanation of the pre-adjudication and adjudication stages, the judicial process in Indonesia tends towards the due process model. The structure of law enforcement in America and Indonesia in general has many similarities, although the main tasks and functions of each are different in detail.¹⁹

¹⁷Ibid

¹⁸ Mulyana, Understanding United States Law and Courts, Jurnal Era Hukum, Volume 2, Number 1, 1994, p.90

¹⁹Soediro, Comparison of the United States Criminal Justice System with Criminal Justice in Indonesia, Kosmik Hukum Journal, Volume 19, Number 1, 2019, p. 59

Basically, after the decision Number 20/PUU-XXI/2023 regarding the revocation of the prosecutor's authority, it does not create a new law because the regulation of the legal effort for Criminal Case Review has actually been regulated in Law Number 8 of 1981 concerning Criminal Procedure Law (KUHAP), especially Article 263 paragraph (1) which states, "against a court decision that has obtained permanent legal force, except for a decision of acquittal or release from all legal charges, the convict or his heirs may submit a request for a judicial review to the Supreme Court". Based on the provisions of this article, it is clear that the legal subject who is authorized to submit a PK is the convict or his heirs and not the prosecutor. The provisions of Law Number 8 of 1981 concerning Criminal Procedure Law (KUHAP), especially Article 263 paragraph (1) already existed before Article 30C letter h of Law of the Republic of Indonesia Number 11 of 2021.²⁰

Constitutional Court Decision Number 20/PUU-XXI/2023 restores the philosophy of returning the rights and justice of residents that have been illegally seized by the state through a judge's verdict, where there are no longer any (ordinary) legal remedies. the state is obliged to protect the rights and interests of its citizens so that they are not violated by other parties.²¹ The Constitutional Court's decision restores the prosecutor's authority to file a judicial review (PK) which was previously regulated in a limited manner in the provisions of Articles 263, 264, 265, 266, 267, 268 of the Criminal Procedure Code and on the condition that the provisions and conditions in Article 263 of the Criminal Procedure Code must be met.

The regulation regarding prosecutors being able to file an extraordinary legal remedy of PK was declared invalid following the issuance of Constitutional Court Decision Number 20/PUU-XXI/2023. Constitutional Court Decision Number 20/PUU-XXI/2023 has provided legal certainty. The government should be able to guarantee the realization of legal certainty by complying with Constitutional Court Decision Number 20/PUU-XXI/2023 by not issuing provisions/regulations related to the permission of public prosecutors to file a judicial review in criminal cases. all parties should obey this decision, because state apparatus must also act in accordance with the law.²²

4. Conclusion

Based on the description above, it can be concluded that basically after the decision Number 20/PUU-XXI/2023 regarding the revocation of the prosecutor's authority does not give rise to a new law because the regulation of legal

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<https://pt-kaltara.go.id/id/berita/arsip-berita/578-apresisi-angkatan-mk,-pk-jaksa-inkonstitusional>, accessed January 12, 2024

²¹Rifky Adji Sukmana, Paradigm of Justice in Enforcing State Law Based on the Theory of Truth from the Perspective of Islamic Law, *Jurnal Ilmiah Falsafah*, Volume 2, Number 2, 2022, p. 45

²²Abdul Manan, The Threat of the Death Penalty Against the Eradication of Corruption, *Unissula Law Journal*, Volume 36, Number 1, June 2020, p. 13

remedies for Criminal Case Review has actually been regulated in the Procedural Law Based on the provisions of the Criminal Procedure Code that the legal subject who is authorized to file a PK is the convict or his heirs and not the prosecutor. The binding rule with the permission for the public prosecutor to file a judicial review is declared invalid.

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