

The Authority of the Indonesian Public Prosecutor to Propose A Judicial Review

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Generally, in the practice of the Indonesian judiciary system, court proceedings will finally be finished at the Supreme Court level. However, Indonesian law permits the extraordinary legal effort of judicial review (*peninjauan Kembali or herziening*) with some circumstances. Article 263 of Indonesian Criminal Procedure Code (KUHAP) regulates that merely the convicted person or his/her heirs can request the judicial review to the Supreme Court. Therefore, two problem formulations are presented in this study: what is the legal basis of submitting a judicial review before the Court? and do the public prosecutors have the chance to request the judicial review before the Court? With normative legal research this study analysed the juridical basis of the judicial review under the Indonesian law. This study also applied the statutory approach and conceptual approach to provide comprehensive result analysis. This study also analysed the possibility of the public prosecutor's authority in submitting judicial review under Indonesian law.

Key words: *judicial review, public prosecutor, Criminal Procedure Code.*

Introduction

A human rights activist who is very vocal in upholding human rights in Indonesia, Munir died on a Garuda GA-974 plane with a trip to Amsterdam on September 7, 2004. The mass media never stopped revealing who the perpetrators were behind the human rights activist's death. A number of names were highlighted while still in the process of examination / investigation. The government also formed a Fact-Finding Team for the Munir Case at the end of 2004 which served to assist the National Police in investigating the Munir case. In the end, the name Pollicarpus Budihari Priyanto (later Pollicarpus) became a strong suspect in the Munir case.

The row of judicial proceedings in the Munir case is very interesting: the Panel of Judges in the District Court ruled that Pollicarpus was guilty of a criminal act "Participating in premeditated murder" and "Faking letters" with a 14-year prison sentence (Decision of Central Jakarta District Court, 2005). The High Court then gave a contrasting decision which stated that Pollicarpus was not proven to commit a crime of murder in accordance with the charges of the Public Prosecutor. However, the High Court Judges' Assembly still upheld the District Court's decision regarding the use of fake letters with a 4-year prison sentence (Decision of High Court of Central Jakarta, 2007). At the appeal level, the Supreme Court remained in line with the decision of the High Court, except that the prison sentence was actually reduced to 2 (two) years (Decision of Indonesian Supreme Court, 2006). Eventually in the review process, the Panel of Judges ruled that Pollicarpus was found guilty of committing premeditated murder and falsifying letters by having to sit in jail for 20 years (Decision of Indonesian Supreme Court, 2007).

There is a controversial matter in submitting an application for a review in the Munir case, namely that the Public Prosecutor may submit a review, whereas in the Supreme Court's decision, it had previously provided jurisprudence on the possibility of the Public Prosecutor filing a review. Some legal experts actually see that the judicial review is still not the "authority" of the Public Prosecutor because it is clearly stated in the legal procedure. The judges might also have no understanding on the law itself. The pros and cons of submitting a review by the Public Prosecutor will be discussed further in this study by providing conclusions that are recommendations for law enforcement in Indonesia.

Research Methodology

This study applies normative research methodology that relies on 'black-letter law' approach to use extensively court judgements and the law to address the problems of the research (Scott, 1999). In this study, two problem formulations are presented: what is the legal basis of submitting a judicial review before the Court? And do the public prosecutors have the chance to request the judicial review before the Court? Therefore, this study also uses two research approaches: the statutory approach and the conceptual approach. The statutory approach is applied to determine the current statutory laws including the courts' decision to analyse the legal basis of the judicial review under Indonesian procedural law. The conceptual approach is used to propose the possible legal way for the public prosecutor to submit a judicial review before the Court.

Review (Herziening)

The concept of a review comes from the French term 'request civile' in civil cases and criminal cases termed 'herziening' in Dutch. According to Soediryo, a review is a legal effort that is used to

obtain a withdrawal or a change in a judge's decision which is generally inviolable (Muhammad, 2007).

Marpaung (2005) provides a definition of judicial review as a legal remedy that can be taken by the convict (the person who is subject to punishment) in a case against a court decision that has permanent legal force in the justice system in Indonesia. Court decisions that are said to have permanent legal force are decisions of the District Court which are not filed for appeal, decisions of the High Court that are not filed for cassation as legal remedies at the Supreme Court level, or cassation decisions of the Supreme Court. A judicial review cannot be taken against a court decision which has permanent legal force if the decision states that the defendant is acquitted.

The Black's Law dictionary provides a definition of a judicial review as a court's review of a lower court or an administrative body's factual or legal findings (Garner, 2004). Harahap (2013) defined that a judicial review could not be taken if there has been no final and binding decision of the Court (*inkracht*). Thus, ordinary legal remedies can only be taken in the form of appeal or cassation for decision of the Court which is not final (*inkracht*) yet. The legal remedies for judicial review only opened after the usual legal remedies (in the form of appeals and cassations) has been closed. The legal action for judicial review must not go beyond the legal remedies for appeal and cassation. Hence from this explanation, it can be seen that the decision submitted by the judicial review must be a decision that has permanent legal force. The request to be carried out by the judicial review is precisely because the decision has permanent legal force and an appeal or cassation is no longer possible.

All of those seem to represent enough of the many definitions that exist because the reference to the procedure rules in the Indonesian Criminal Procedure Code (KUHAP) does not provide a definite definition of Judicial Review.

Legal Basis of Judicial Review

In Indonesia, the procedural law that regulates the judicial review mechanism is based on the *Reglement op de Strafvordering* (RSV), Chapter 18, Article 356 to 360. RSV regulated the provisions of the criminal procedure law for European communities and their equivalents during colonialisation. This also in line with yang sesuai dengan *Wetboek van Strafvordering* (WvS) Chapter 18, Article 457 to 481. WvS or the Criminal Code formally implemented in Indonesian territory with Act No. 1 of 1946 jo. Act No. 73 of 1958.

The Criminal Procedure Code in article 263 paragraph 1 states that "against a court ruling that has permanent legal force, unless the decision is free or free from all lawsuits, the convict or heir may

submit a request for review to the Supreme Court (Indonesian Criminal Procedure Code, art. 263 (1))." This article can be drawn by two meanings, namely, first, it cannot be attempted to review the decision that is free from all legal claims. Second, a review is a legal effort aimed at protecting the interests of the convicted person so that only the convicted person or his heirs are entitled to apply.

There are three bases that can be used as an excuse for submission, namely, first, if there is a new condition that is strongly suspected that if the situation is known at the time the trial is still ongoing and the results will be in the form of a free verdict, an independent decision from all lawsuits, or the prosecutors' demands cannot be accepted or the case applies to lighter criminal provisions. Secondly, if in various decisions there is a statement that something has been proven, the matter or condition as the basis or reason for the decision that has been proven has turned out to have contradicted one another. Third, if the decision clearly shows a judge's mistake or a real mistake (Indonesian Criminal Procedure Code, art.263 (2)). The three bases of article 263 paragraph 2 of the Criminal Procedure Code provide limitation for submission of judicial review which is freely submitted because of its character as a "remarkable" legal effort.

Through the provisions of Article 264 paragraph (3) of the Criminal Procedure Code and Article 268 paragraph (1) and paragraph (3) Criminal Procedure Code, it can be concluded that a judicial review of court decisions that have obtained permanent legal force, the scope of which includes: (Mulyadi, 2014):

1. Judicial review of court decisions that have obtained permanent legal force may be carried out by the convict or his heirs.
2. Judicial review of court decisions that have obtained permanent legal force can only be carried out against decisions of district courts, high courts and the Supreme Court which impose crimes and have obtained permanent legal force. Regarding the acquittal / *vrijspraak* decision and the release of all lawsuits / *onslag van alle rechtsvervolging*, a review cannot be filed.
3. Request for review is not limited to a period of time. A request for review of a decision does not postpone or stop the implementation of the decision and can only be made once.

Under the name of justice, the Constitutional Court cancelled the implementation of Article 268 paragraph (3) of the Criminal Procedure Code, which limited the PK submission to only one time, which former Commission Eradication Committee (KPK)'s chairman Antasari Azhar and his family requested. The Court is of the opinion that the extraordinary legal remedy for the judicial review historically-philosophically is a legal attempt that was born to protect the interests of the convicted person (Constitutional Court Decision Number: 34 / PUU-XI / 2013).

Jurisprudence

Legal review efforts began with the *Sengkon-Karta* case in the 1970s. In this case, the state has wrongly applied the law by convicting innocent people, so what happens is a deviant judicial process (*rechterlijke dwaling*). This case also one of the key reasons of the promulgation of the Supreme Court Regulation No. 1 of 1980 on Judicial Review of Decisions that have Obtained Permanent Legal Force. *Herziening* then became a necessity to be included in the provision draft or draft KUHAP that was being discussed at that time. The Criminal Procedure Code regulates the judicial review on the Chapter XVIII Article 263 to Article 269.

Several decisions of the Supreme Court were used as a basis for the Prosecutor in filing a review. The Supreme Court of Justice had previously received a review with defendant Mochtar Pakpahan in 1996. The legal experts took turns expressing opinions which generally did not agree with the Supreme Court's decision because the judicial review was filed at the request of the prosecutor / public prosecutor against a decision that was acquitted by the Supreme Court. If formulated by the Criminal Procedure Code, the decision of the Supreme Court No. 55Pk / Pid / 1996 indeed is not in accordance with what is regulated by Criminal Procedure Code because the judicial review request by the prosecutor / public prosecutor or the victim has not been regulated by the law.

Then in 2001, the Supreme Court also received a review with defendant Ram Gulumal. In 2006, the Supreme Court also received a review with Defendant Soetyawati. In 2007, the submission of a review by the Public Prosecutor with Defendant Pollicarpus was accepted by the Supreme Court by basing one of the reasons for consistency of the court decision.

Application for a Judicial Review

Based on the Judge's consideration in the case of Mochtar Pakpahan, the reasons for the Public Prosecutor to file a judicial review are as follows (Supreme Court Decision No. 55 PK/PID/1996):

1. The law is formed, among other things, through judges' decisions, as in the case of petition for cassation. Article 244 of the Criminal Procedure Code states "With regard to the verdict of a criminal case given at the last level by a court other than the Supreme Court, the defendant or public prosecutor can file an appeal to the Supreme Court except for an acquittal". Confirming that applications for cassation against a court decision, except for an acquittal can be filed for cassation, or in other words an acquittal cannot expressly be filed for cassation.
2. Through the interpretation of Article 244 of the Criminal Procedure Code, the Judge determines that there are 2 (two) types of acquittal, namely pure acquittal and impure

acquittal; pure acquittal decisions cannot be appealed, while impure acquittals can be appealed. The interpretation of the Judge's decision gradually became permanent jurisprudence.

3. According to article 21 of Law no. 14 of 1970, "If there are matters or circumstances that are determined by law, a court decision that has obtained legal force can still be requested for reconsideration to the Supreme Court, in civil and criminal cases by interested parties". In a criminal case there are 2 (two) interested parties, namely the first is the Defendant and the other is the Public Prosecutor who represents the public / State interests.
4. In article 263 paragraph (1) of the Criminal Procedure Code explains "With respect to a court decision that has obtained permanent legal force, unless the decision is acquitted or acquitted of all legal claims, the convict or his heir can submit a request for reconsideration to the Supreme Court". This means that a court decision that is not an acquittal or exempt from lawsuits can be filed for a review by the convict or his heirs, while the decision to be acquitted of the lawsuit is not explicitly determined or not regulated; in other words there is no prohibition on being asked for a review by the prosecutor.
5. Therefore Article 263 paragraph (1) of the Criminal Procedure Code is addressed to the convicted person or their heirs. Meanwhile, Article 263 paragraph (3) of the Criminal Procedure Code determines that "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 decision an act accused has been declared proven but not followed by a conviction ". This article is aimed at the Public Prosecutor because as the party with the most interest, the Public Prosecutor who has succeeded in proving his indictment before the trial and the Judge, stated in his decision that the Defendant was guilty of the act that was accused of him, but was followed by conviction in the Judge's decision, as determined by law; the Public Prosecutor has the most interest in the court's decision being changed so that the verdict containing the statement of the defendant's guilt is followed by the conviction of the convicted person.

There are several things that need to be considered in reading the juridical polemic from the request of the Public Prosecutor's review, namely, first, the editorial of a number of laws and regulations that have been written clearly and firmly so that they are no longer open to interpretation that is contrary to the essential meaning of the rule (better known as the principle of *adess cessat in claris*). The referral of several prosecutors to the existing rules will actually change the true meaning of legal remedies, such as Article 23 (1) of the Judicial Power Law states that "against a court decision that has obtained permanent legal force, the parties concerned can apply back ... " (Law No. 4 Year 2004, art.23 (1)). The interpretation of "the parties concerned" into parties in criminal cases, namely the defendant and the Public Prosecutor, will change the real definition of the review. Submission of judicial review as stated in article 263 of the Criminal Procedure Code

should refer to a legal logic in which those who demand that must prove. The Public Prosecutor should start from investigation, until the Supreme Court is obliged to prove whether the defendant is guilty or not. So, if the process fails, then it is impossible for the Prosecutor to submit a review. His insistence on the Prosecutor in submitting a review will clearly lead to the destruction of the meaning of the rule of law that is clear and clearly written (*interpretation est perversio*).

Second, the inclusion of the limitation of the request for a review provides clarity that the review is only intended to protect the convicted person from the misuse of the law. This is reinforced in the standard of punishment that must be applied to convicts.

Finally, according to the principle that a court decision in a criminal case that has a permanent force, it is impossible to change it again. If the verdict of the cassation judge expressly states that a person is exempt from all claims of the Public Prosecutor is amended, it will result in the freedom of the convicted person to be lost / taken back so that it will have an impact on legal uncertainty. Submission of a review in accordance with article 268 paragraph 3 is only permitted once, which only applies to convicts or their heirs. If the Public Prosecutor has submitted a one-time review and if the convicted person will also exercise his rights according to the Criminal Procedure Code then this will clearly violate the principle of *nebis in idem* (Indonesian Criminal Procedure Code, art.76 (1); Heriyanto and Gui, 2016).

Conclusion

Judges are required to create a law if there is no law as the basis of their decision (*ius curia novit*). However, what if the rules are clear, is it justified for the Judges to use several possibilities? The rules for the application for a review and its limitation are clearly stated in the Criminal Procedure Code so that it is possible to justify the Supreme Court's use of the possibilities that deviate from the meaning implied in the Criminal Procedure Code.

The Criminal Procedure Code has provided clear rules regarding procedures for submitting requests for judicial review and their limitations. Law enforcers should refer to the formal rules. If it is felt that a legal breakthrough is needed regarding the need for a formulation of a review that may be submitted by the Public Prosecutor, then more detailed rules are needed, and they must contain elements of justice and legal certainty for litigants.

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