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Judicial Review by the Public Prosecutor After Ratification of Prosecutor's Law in 2021

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ABSTRACT

With the ratification of the prosecutor's law in 2021, it finally caused a polemic regarding the authority of the public prosecutor in filing a judicial review. The counter-opinion argues that the framers of the law did not understand the norms in the existing legislation. On the other hand, MK Decision No.33/PUU-XIV / 2016 which states that the review by the Public Prosecutor contrary to the code of Criminal Procedure is final and binding for anyone. Therefore, the prosecutor's authority in applying for judicial review is considered unlawful. But on the other side, the Internal Affairs of the prosecutor's actually took another view and strongly supported the authority for filing a judicial review by the prosecutor's under the new law. Based on this study, which uses normative juridical methods and legislative approaches and conceptual approaches, then with the ratification of the prosecutor's law in 2021, it is considered to provide more legal certainty for the authority of the public prosecutor in filing a judicial review and providing space for "justice" for victims and as an effort to correct and improve in realizing justice.

Keywords: Authority; Judicial Review; Justice;

I. INTRODUCTION

The purpose of law to achieve justice, order and legal certainty can be achieved if law enforcement is running well. Law enforcement can run well if the institutions that serve as law enforcers can carry out all tasks, functions and authorities proportionally in good coordination between Related Agencies. This must also be supported by the existence of a good legal instrument, understanding and good legal culture of citizens and also equipped with adequate facilities and infrastructure.[1]

In general, the institutions that are said to be law enforcement in Indonesia are judges, prosecutors, police and advocates. In addition, there are several institutions that are considered as law enforcement as well, namely the Directorate General of taxes, Directorate General of Customs and Directorate General of Immigration.

Judges as law enforcers have a basic duty in the judicial field that is very dominant and has a high determination in law enforcement efforts by accepting, examining, deciding and resolving fairly and orderly every case submitted to him.

The prosecutor is a law enforcer who has duties and authority in the field of prosecution in law enforcement and justice in the general judicial environment. The position of the prosecutor's Office is often seen as having 2 legs, namely one leg in the Executive field because it is a government institution, but the other leg is in the judicial field because the prosecutor's duties are in the prosecution field. This makes the Attorney General has ambivalence position in law enforcement in Indonesia.[2]

Police as law enforcers have the duty and authority in terms of maintaining security and public order, enforcing the law, providing protection, protection and service to the community. The task of the police in realizing law enforcement in order to maintain security and order can essentially be seen as a living law, because it is in the hands of the police that the law becomes concrete or experiences its manifestation in

[1] Nawawi Arief, Barda. *Masalah Penegakan Hukum Dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan, Cet. Kedua*. Jakarta, Kencana, 2008, p. 25.

[2] Effendy, M. *Kejaksaan RI: posisi dan fungsinya dari perspektif hukum*. Jakarta, Gramedia Pustaka Utama, 2005, p. 25.

society. In this position the police are expected to do much to play a role in law enforcement of the community it serves.[3]

Advocate is an independent profession outside of government institutions that have a role as a companion in the examination of criminal cases before investigators and investigators in the functioning of their role as legal counsel. The role of advocates in the legal system as legal professionals and law enforcers[4] Advocate status as law enforcement, free and independent guaranteed by law and legislation, the position of advocate is equivalent or equivalent to other law enforcement officers.[5]

To maintain the consistency and dignity of each element of Law Enforcement, many laws are made related to the functions, roles, responsibilities of law enforcers, starting from the law related to the power of Justice (Law No.14 of 1970 on the Principles of Judicial Power in the revision into Law No.4 of 2004 and last revised into Law No.48 of 2009 on Judicial Power), law related to the prosecutors (Law No.15 of 1961 on the basic provisions of the prosecutors R.I., revised into Law No.5 of 1991, on the prosecutors R.I, revised into Law No.16 of 2004 on the prosecutors R.I and last revised into Law No.11 of 2021 on changes to Law No.16 of 2004 on the prosecutor), law related to police (Law No.28 of 1997 on the Indonesian State Police, which was revised into Law No.2 of 2002 on the National Police), as well as the law related to advocates (Law No.18 of 2003 on advocates).

Many laws mentioned above, there is a law that is the highlight of the author, namely Law No.11 of 2021 on changes to Law No.16 of 2004 on the new prosecutor's office passed at the end of 2021 yesterday. In principle, there is indeed institutional strengthening related to the duties and authority as a public prosecutor, but there are things that are highlighted in terms of the authority given in the law, namely related to the authority of the public prosecutor to submit a review as confirmed in Article 30c letter h of Law No.11 of 2021:

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[3] Yahya Harahap, M. *Pembahasan Permasalahan dan Penerapan KUHAP: Penyidikan dan penuntutan*. Jakarta, Sinar Grafika, 2006, p. 58.

[4] Zulaiha, Siti, et al. "Enforcement of the Advocate Professional Code of Ethics in Client Assistance in Criminal Cases of Corruption." *Widya Pranata Hukum*, Vol. 5, No. 1, 2023, pp. 33-49, https://doi.org/10.37631/widyapranata.v5i1.815.

[5] Atmasasmita, Romli. *Sistem Peradilan Pidana: Perspektif Eksistensialisme dan Abolisioisme*. Jakarta, Putra A. Bardin, 1996, p. 39.

Article 30C

> "In addition to carrying out the duties and authorities referred to in Article 30, article 30A, and Article 30b Attorney: … h. apply for Judicial Review; and…"

This is of course a separate polemic and is considered contrary to previous legal rules considering the Constitutional Court through its decision No.33/PUU-XIV / 2016 very firmly states that judicial review is an inherent right to the convict or his heirs. The decision of the Constitutional Court is in line with the provisions in the Code of Criminal Procedure (KUHAP). This new prosecutor's law is particularly concerned with the authority of the public prosecutor in filing a judicial review for certain groups, injures the legal certainty of the right to file a judicial review and creates ambiguity in the implementation of judicial review.[6] But on the other side, the latest Prosecutor's law is actually considered for the internal public prosecutor to provide legal certainty so that this rule is considered not wrong. This certainly causes confusion among the public because it will have a negative effect on criminal law enforcement in Indonesia, especially related to Criminal Procedure Law. This is the reason the author is interested in conducting legal research to find a comprehensive answer related to the conflict in question.

The method used in the study is juridical normative while the type of approach through the approach of legislation (statute approach) and conceptual approach. Statutory approach is done by reviewing all laws and regulations related to legal issues that are being addressed, especially related to the prosecutor's authority in filing a judicial review based on the latest prosecutor'S law. The legislative approach opens the opportunity for researchers to study whether there is consistency and conformity between a law and other laws or between laws and Basic Laws or with regulations and laws. Conceptual approach proceeds from the views and doctrines that developed in the science of law. By studying the views and doctrines in the legal Sciences, researchers will find ideas that give birth to legal notions, legal concepts, and legal principles that are relevant to the issues at hand.

[6] Tarigan, Muhammad Ridwanta, et al. "Tinjauan Yuridis Upaya Hukum Peninjauan Kembali Yang Diajukan Oleh Penuntut Umum Dalam Perkara Pidana." *Locus Journal of Academic Literature Review*, Vol. 1, No. 5, 2022, pp. 308–321, https://doi.org/10.56128/ljoalr.v1i6.82.

The legal issues in this paper are (1) What extent is the arrangement for submitting a judicial review based on Indonesian positive and (2) How the provisions of Article 30C letter h of Law No.11 of 2021 related to the authority of the public prosecutor to file a Judicial Review connected with the decision of the Constitutional Court No. 33/PUU-XIV/2016 reviewed in the perspective of legal certainty and Justice?

II. DISCUSSION

1. Arrangements for Submission of Judicial Review Based on Indonesian Positive Law

In the practice of trial, there are often mistakes and errors of the panel of judges in deciding cases that can cause harm to the state, the convict and to the Justice-seeking community both on matters related to legal facts revealed during the trial (feitelijke dwaling) and on the application of the law by the panel of judges (dwaling omtrent het recht).

In the Criminal Procedure Law system, there are 2 known legal remedies, namely ordinary legal remedies and extraordinary legal remedies. Ordinary remedies consist of Appeal and Cassation while for extraordinary remedies consist of Cassation in the interests of Law and judicial review which in Dutch is known as herziening.[7] Herziening or judicial review in the criminal case listed in the code of Criminal Procedure is absorption (absorb or take) from Article 356 to Article 360 Reglement op de Strafvordering (RV).[8]

Legal remedies become something important because it is caused by the judge as a human being is of course also inseparable from an error and/or oversight. With the right granted by law to any person who is litigating in court it is beneficial to: (a) Avoid making mistakes; (b) Avoid judges who are more in favor of one party in a case; (c) Avoiding the arbitrariness of the panel of judges in handling cases; (d) Encourage the

[7] Arfa, Nys, et al. "Pengaturan Peninjauan Kembali Dalam Perspektif Sistem Peradilan Pidana di Indonesia." *Jurnal Sains Sosio Humaniora*, Vol. 4, No. 1, 2020, pp. 102-112, https://repository.unja.ac.id/id/eprint/17731.

[8] Ramiyanto. "Makna "Ahli Waris" Sebagai Subjek Pengajuan Peninjauan Kembali Kajian Putusan Nomor 97 PK/Pid/Sus/2012." *Jurnal Yudisial*, Vol. 9, No. 1, 2016, pp. 51-71, https://doi.org/http://dx.doi.org/10.29123/jy.v9i1.31.

panel of judges to be more objective, fair and wise in deciding cases; (e) The process is simple, fast, and cost-effective; (f) As a last hope for justice seekers; (g) Correct the wrong decision of the judge.[9]

Basically, when the Supreme Court issues a Cassation decision, the decision has permanent legal force, but in law, a person who is still dissatisfied with a Cassation decision, can still apply for a legal remedy known as a review (herziening) as an extraordinary legal remedy.[10]

Judicial review can be said to follow the conception of philosophy and is inseparable from the history of the birth of the principle of legality in the 18th century on the European continent.[11] Judicial review is a concept that was first introduced through Article 15 of Law No.19 of 1964 on the basic provisions of judicial power although in substance, judicial review has existed since the time of the Dutch East Indies government known as Herziening van Arresten en Vonnissen where the herziening institution is the executor of the process in question. This provision is regulated in the Het Reglement op de Strafvordering which was then a reference to the Criminal Procedure Law in force at the Raad van Justitie (RVJ) court during the Dutch East Indies.[12]

In its development, the Judicial review experienced inconsistencies because it was sometimes active and also sometimes inactive. The Judicial review was again echoed after the Sengkon and Karta cases in the 1980s which became public attention at that time.[13] Basically, the case of Sengkon and Karta is related to the murder of a small kiosk keeper with his wife that occurred in Bekasi in 1974. The names Sengkon and

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[9] Meutia, Pityani. "Pembatasan Peninjauan Kembali Perkara Perdata Kajian Putusan Mahkamah Konstitusi Nomor 108/PUU-XIV/2016." *Jurnal Legislasi Indonesia*, Vol. 16, No. 2, 2019, pp. 225-236, https://doi.org/10.54629/jli.v16i2.490.

[10] Ardiansyah, Farangga Harki, et al. "Upaya Hukum Peninjauan Kembali Dalam Perkara Perdata (Studi Putusan Mahkamah Agung Nomor 118/PK/Pdt/2018)." *Journal Of Legal Reserch*, Vol. 2, No. 2, 2020, pp. 289-306, http://journal.uinjkt.ac.id/index.php/jlr.

[11] Lalamentik, Einstein E. "Peninjauan Kembali Oleh Jaksa Dalam Sistem Peradilan Pidana Indonesia." *Lex Administratum*, Vol. VI, No. 3, 2018, pp. 13-19, https://ejournal.unsrat.ac.id/v3/index.php/administratum/article/view/22727.

[12] Yahya Harahap, M. *Upaya Hukum Luar Biasa Pembahasan Permasalahan dan Penerapan KUHAP: Pemeriksaan Sidang Pengadilan, Banding, Kasasi, dan Peninjauan Kembali*. Jakarta, Sinar Grafika, 2000, pp. 644-645.

[13] *Ibid*.

Karta were the last names spoken from the victim's mouth to the witness who took him to the hospital before the victim died.

In Article 263 of the code of Criminal Procedure, very clearly explained that:

"1) against a court decision that has acquired permanent legal force, except for an acquittal or release from any lawsuit, the convict or his heirs may submit a request for judicial review to the Supreme Court.
2) the request for judicial review is made on the basis of:
   (a) if there are new circumstances that give rise to a strong suspicion that if the circumstances have been known at the time of the trial is still ongoing, the result will be an acquittal or release from all lawsuits or claims of the public prosecutor can not be accepted or to the case shall be applied the provisions of a lesser crime;
   (b) when in various decisions there is a statement that something has been proven, but the thing or situation as the basis and reason for the decision stated to have been proven has turned out to be contrary to one another
   (c) when the judgment clearly shows an error of the judge or a manifest error.
3) on the same basis as mentioned in Paragraph (2) against a court decision that has gained legal force can still be submitted a request for review if in that decision an alleged act has been proven but not followed by a conviction."

If observed carefully, then Paragraph (1) of Article 263 of the code of Criminal Procedure very clearly explains 2 very substantive things, namely what cases can be filed for judicial review and who has the right to file a judicial review.[14] The cases that can be filed for judicial review are all cases that have permanent legal force except for free decisions or escape from all lawsuits. On the other hand, in this verse it is also emphasized that those who can make extraordinary legal efforts are the convicts or their heirs. In paragraphs (2) and (3) of Article 263 of the Criminal Procedure Code above, it is very clear the reasons for applying for an extraordinary judicial review.[15]

Arrangements related to judicial review are also expressly regulated in Law No.14 of 1985 on the Supreme Court as amended by Law No.5 of 2004 on amendments to Law No.14 of 1985 on the Supreme Court which is the second time amended by Law No.3 of 2009 on the Second Amendment to Law No.14 of 1985 on the Supreme Court, especially in Article 66, namely:

[14] Silviana and Sonia Yanarika Widyahayu. "Analisis Terhadap Dasar Pengajuan Upaya Hukum Peninjauan Kembali dengan Alasan Adanya Suatu Kekhilafan Hakim atau Suatu Kekeliruan yang Nyata Dalam Perkara Penipuan (Studi Putusan Mahkamah Agung Nomor: 91 PK/Pid/2014)." *Jurnal Verstek*, Vol. 4, No. 2, 2016, pp. 191-199, https://doi.org/10.20961/jv.v4i2.38391.

[15] Prasetyo, R. *Lembaga Peninjauan Kembali (PK) oleh Kejaksaan Agung*. Jakarta, BPHN, 2010, p. 32.

> "(1) Application for judicial review can be submitted only 1 (one) time.
> (2) The application for judicial review does not suspend or stop the execution of the court decision.
> (3) the application for judicial review may be revoked as long as it has not been decided, and in the event that it has been revoked, the application for judicial review cannot be submitted again."

Based on the above provisions are limited, which is very clear that the judicial review can only be filed 1 time only and when it has been revoked before it is decided by the Supreme Court, the judicial review can not be filed again. On the other hand, in Paragraph (2), it is emphasized that judicial review efforts do not suspend or stop the execution of court decisions but in practice in the field,[16] many problems arise in the application of this provision where when judicial review efforts are still being examined by the Supreme Court and court execution is still running, then when the application for judicial review is granted by the Supreme Court, there are problems related to the results of the execution of the court. This has a very pronounced impact, especially related to civil law issues.[17] Therefore, to eliminate legal problems due to the implementation of this provision, the Supreme Court issued a SEMA regarding the temporary suspension of execution if there is a submission for judicial review.

The application for judicial review is submitted not only for dissatisfaction with the Cassation decision, but against any court decision that has acquired permanent legal force, in the sense that the decision of the District Court that is not appealed can be submitted for judicial review, against the decision of the High Court that is not submitted for Cassation can be requested for judicial review. However, judicial review remedies can only be filed once. Therefore, if you still want to make legal efforts, it is already closed. At the time of applying for judicial review, the applicant must have new evidence that has never been presented before or have evidence that the judge has been wrong in applying the law.[18]

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[16] Arfan, Faiz Muhlizi. "Peninjauan Kembali Dalam Perkara Pidana Yang Berkeadilan Dan Berkepastian Hukum Kajian Putusan Mahkamah Konstitusi Nomor 34/PUU-XI/2013." *Jurnal Yudisial*, Vol. 8, No. 2, 2015, pp. 145–166, http://dx.doi.org/10.29123/jy.v8i2.50.

[17] Yahya Harahap, M. *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*. Jakarta, Sinar Grafika, 2007, p. 35.

[18] Marpaung, L. *Perumusan Memori Kasasi & Peninjauan Kembali Perkara Pidana*. Jakarta, Sinar Grafika, 2000, p. 57.

The procedure for filing an application for judicial review may be carried out orally or in writing by a person who has been one of the parties to the dispute to the Supreme Court of the Republic of Indonesia, through the District Court that decides the case in the first instance. The application for judicial review does not suspend or terminate the execution of the court decision. As long as there is no verdict, the application for review, which can only be submitted once, can be revoked. The Supreme Court of the Republic of Indonesia decided the application for judicial review at the first and last instance. It affirms that the application for judicial review is filed only once, and is known a term ' no judicial review above judicial review.

The application for judicial review can be made if the following points are found in the decision regarding the case in question: (a) The existence of a lie, deception, or false evidence, for which all have been declared also by the criminal judge. A judicial review may be filed with a grace period of 180 days from the discovery of lies, deception or false evidence based on the verdict of the criminal judge. (b) The existence of proof letters that are decisive, if the evidence is submitted when the trial process takes place. Such evidence is also called the term novum. A judicial review may be filed with a grace period of 180 days from the discovery or discovery of new evidence (novum). (c) The existence of the fact that the judge's decision granted a thing that is not demanded or more than demanded. A judicial review may be filed within a grace period of 180 days from the moment the judgment has permanent legal force and has been notified to the litigants. (d) The existence of a section regarding a claim in a lawsuit that has not been decided without consideration of the causes. The review is filed with a grace period of 180 days since the decision has permanent legal force and has been notified to the litigants. (e) The existence of conflicting judgments, even if the parties are equal, on the same basis or matter, or to the same degree. The review is intended for a grace period of 180 days since the decision has permanent legal force and has been notified to the litigants. (f) The fact that the decision contains a clear error or error that harms the party concerned. The review can be filed with a grace period of 180 days since the decision has permanent legal force and has been notified to the litigants.

Counting on 14 working days from the moment the head of the District Court examining his case receives the application for judicial review, the registrar is obliged to deliver a copy of the application for judicial review to his opponent. The opposing party

who will submit an answer or request for review, should be submitted within 30 days. If the period is exceeded, the application for judicial review will be sent to the Supreme Court of the Republic of Indonesia.

2. Provisions of Article 30C letter h of Law No.11 of 2021 regarding the authority of the public prosecutor to file a judicial review connected with the decision of the Constitutional Court No. 33 / PUU-XIV/2016 reviewed in the perspective of legal certainty and Justice

2.1. From The Perspective of Legal Certainty

If we refer to the provisions of Article 263 paragraph (1) of the Criminal Procedure Code, then it is very clear that judicial review is the right of the convict or his heirs. For many parties, the provisions of this article do not cause multi-interpretation because it ihas very clear intent and meaning.

This view was ultimately refuted through the jurisprudence of Supreme Court decision No. 55PK/Pid / 1996, dated October 25, 1996 where the main consideration (ratio Decidendi) in the jurisprudence is the absence of a strict prohibition in Article 263 paragraph (1) of the code of Criminal Procedure regarding the filing of judicial review conducted by the Public Prosecutor, so based on legal principles, if it is not expressly prohibited then it is allowed and this is the basis of the public prosecutor to file a judicial review in some cases. According to the judicial review Judge who decided case No. 55PK/Pid / 1996, it is necessary that there is a rule of law that regulates the right of the public prosecutor to carry out judicial review so that the judge of judicial review aquo boldly decides that the Public Prosecutor has the authority to apply for judicial review. This is certainly highlighted by various parties because Indonesia adheres to the continental European legal system (Civil Law) in which the position of jurisprudence is not the main source of law but the law that is the main source of law. Unlike the Anglo-Saxon legal system (Common Law) which places jurisprudence as the main source of law.

In 2016, the Attorney General of Ny. Anna Boentaran, who is the legal wife of Djoko Sugiarto Tjandra (Djoko Tjandra)[19] filed a judicial review of Article 263 paragraph (1) of the Criminal Procedure Code because of a judicial review conducted by the Public Prosecutor related to the case that befell Djoko Tjandra because for the applicant, the actions taken by the public prosecutor to file a judicial review of the court decision related to the case that befell her husband is an arbitrary act and cause unrest and fear and loss of security for the applicant's husband. According to the legal counsel of the applicant, the filing of a review conducted by the public prosecutor is a form of defiance of the provisions of Article 263 paragraph (1) of the Criminal Procedure Code because it contains 2 elements of legal defects, both object defects and subject defects. Object defects related to the application for judicial review of the decision regardless of all lawsuits (onslag van rechtvervolgig) even though it is very firm and clear that Article 263 paragraph (1) of the Criminal Procedure Code does not allow the submission of a judicial review of the decision in question. While the subject's disability is the public prosecutor is not entitled to apply for judicial review because according to Article 263 paragraph (1) of the Criminal Procedure Code, who is entitled to apply for judicial review is the convict or heir.[20]

The decision submitted for judicial review by the public prosecutor in the case in question is Supreme Court decision No. 1688K/Pid/2000 dated June 28, 2001 Jo. South Jakarta District Court Decision No. 156/Pid.B/2000/PN.Jak.Sel dated August 28, 2000 which in essence States the defendant (Djoko Tjandra) is free from all lawsuits. The verdict was finally submitted for review by the public prosecutor based on the Supreme Court case register No. 12PK/Pid.Sus / 2009 dated June 11, 2009 where in its verdict, the panel of judges judicial review sentenced the defendant (Djoko Tjandra) guilty of participating in acts of corruption and sentenced to 2 years imprisonment. Regarding the review decision, there was a dissenting opinion conducted by Judge Prof. Komariah Emong Sapardjaja and Hakim Suwardi, S.H., M.H. According to the two judges, judicial review for the benefit of the defendant and not for the public prosecutor and the

[19] Alamsyah, Afif and M. Taufik Makarao. "Kedudukan Kewarganegaraan Djoko Chandra Dalam Administrasi Kependudukan dan Pembuatan Paspor Republik Indonesia." *Veritas: Jurnal Program Pascasarjana Ilmu Hukum*, Vol. 7, No. 1, 2021, pp. 36-54, https://doi.org/10.34005/veritas.v7i1.1254.

[20] Lubis, Nadia Soleha and Beniharmoni Harefa. "Problematika Peninjauan Kembali Terhadap Terpidana yang Masuk di Dalam Daftar Pencarian Orang." *Gorontalo Law Review*, Vol. 4, No. 1, 2021, pp. 75-87, https://doi.org/10.32662/golrev.v4i1.1326.

decision to release from all lawsuits cannot be submitted for judicial review in accordance with the provisions of Article 263 paragraph (1) of the Criminal Procedure Code. Dissenting Opinion is considered appropriate and in line with due process of law where law enforcement must uphold legal certainty and prevent abuse of power.

The provisions of this article are also reinforced by the decision of the Constitutional Court No. 33/PUU-XIV / 2016. In the decision, it is very clear that the Constitutional Court sees the provisions of Article 263 paragraph (1) of the Criminal Procedure Code must be interpreted explicitly in accordance with what is written in the article so that it is clear that the public prosecutor does not have the right to apply for judicial review.

The basis for the Constitutional Court to decide to explicitly strengthen the provisions in Article 263 paragraph (1) of the Criminal Procedure Code is as follows: (a) An application for judicial review can only be submitted against a judgment that is already Inkracht van gawijsde zaak, (b) The application for review of Kebali cannot be made against an acquittal or escape from all lawsuits, (c) An application for judicial review can be submitted only by the convict or heir, (d) The application for judicial review can only be made against a judgment containing a conviction (condemnation).

If we look at it philosophically, the decision of the Constitutional Court implies that the review is to restore the rights and justice to the convict or heir who was not obtained in a court decision that has permanent legal force.[21] This is a manifestation of the implementation of Human Rights in the criminal system in Indonesia. On the other hand, the prosecutor as a public prosecutor is a representative of the state so that it will deal with citizens who get injustice in a judge's decision. Therefore, the public prosecutor is not considered entitled to apply for judicial review.

If we examine in depth, the decision of the Constitutional Court No. 33/PUU-XIV / 2016 does not make a new law but only confirms and explains the purpose and meaning of Article 263 paragraph (1) of the Criminal Procedure Code so that there is no need for an interpretation of the right or not of the public prosecutor to file a judicial

[21] Suhariyanto, Budi. "Aspek Hukum Peninjauan Kembali Lebih Dari Satu Kali Dalam Perkara Pidana (Perspektif Penegakan Keadilan, Kepastian Dan Kemanfaatan Hukum)." *Jurnal Hukum dan Peradilan*, Vol. 4, No. 2, 2015, pp. 335-350, http://dx.doi.org/10.25216/jhp.4.2.2015.335-350.

review. Thus, the provisions of Article 263 paragraph (1) of the Criminal Procedure Code limit the authority of the public prosecutor to file a judicial review.

In 2021, the government passed Law No.11 of 2021 on changes to Law No.16 of 2004 concerning the prosecutor's office where in Article 30c letter H it is confirmed that the Public Prosecutor has the right to apply for judicial review. This of course causes debate among academics and legal practitioners because they view this article as contrary to the decision of the Constitutional Court No.33/PUU-XIV / 2016 which affirms the provisions in Article 263 paragraph (1) of the Criminal Procedure Code, whereas the decision of the Constitutional Court is final and binding. In addition, the decision of the Constitutional Court is also erga omnes, meaning that this decision is not only binding for the applicant and respondent, but also binding on each party who has to do with this issue.[22]

Regarding Article 30C letter H of the prosecutor'S office law regarding the authority to file a judicial review by the public prosecutor has been submitted to the Constitutional Court by Ricki Martin Sidauruk, where in her application, Ricki Martin Sidauruk argues that Article 30c letter h of the prosecutor's office law remains valid, it will be an unfavorable precedent where in this case, the decision of the Constitutional Court which is final and binding can be distorted. Besides that, the authority of the public prosecutor to propose a review is also contrary to constitutional rights and violates the principle of legal certainty within the framework of law enforcement.[23]

In principle, the author has different opinions with Ricki Martin Sidauruk and with those who agree with Ricki Martin Sidauruk. The author assumes that the Public Prosecutor should have the authority to file a judicial review as well as the convict and his heirs. As Article 30C letter H of the prosecutor's law is not a defiance of legal certainty, precisely according to the author, precisely with the presence of Article 30c letter h of the prosecutor's law provides legal certainty for the public prosecutor in filing a judicial review.

The author also disagrees with the statement of the circles stating that Article 30C letter H of the prosecutor's law is contrary to Article 263 paragraph (1) of the

[22] Arfan, Faiz Muhlizi. *Op.Cit*.
[23] Tarigan, Muhammad Ridwanta, et al. *Op.Cit*.

Criminal Procedure Code. To study the conflict between laws and regulations, in law, we know 3 principles, namely:

(1) Principle of Lex superior inferiority complex. According to this principle, the rules below should not conflict with the rules above. It is related to 2 different rules according to the hierarchy of legislation. In Article 7 Paragraph (1) of Law 12 of 2011 on the drafting of laws and regulations, the hierarchy of laws and regulations in Indonesia is: (a) the Constitution of the Republic of Indonesia year 1945; (b) resolution of the people's Consultative Assembly; (c) Law / Government Regulation in lieu of law; (d) Government Regulation; (e) The President's rule; (f) the provincial regulations; and (g) district/city regulations. If we associate with the object of this study, namely Article 30C letter H of the prosecutor'S office law with the decision of the Constitutional Court No. 33 / PUU-XIV / 2016 which confirms the provisions in Article 263 paragraph (1) of the Criminal Procedure Code, then we can conclude that the conflict is the provisions of the prosecutor'S office and the provisions of the Criminal Procedure Code (Law No.8 of 1981) where these two rules are equal in position in the hierarchy of legislation so that this principle is not appropriate to test the conflict in question.

(2) Principle of lex specialis derogat legi generali. According to this principle, more specific rules override those of a more general nature. If it is associated with the object of research, then we can conclude that when compared with the Criminal Procedure Code, the Criminal Procedure Law is more specific because the prosecutor'S law is more focused on the rights and authority of the Public Prosecutor while if we talk about the Criminal Procedure Code (Law No.8 of 1981), the Criminal Procedure Code is more generalist because the Criminal Procedure Code regulates the procedure for handling criminal dispute resolution which includes the rights and obligations of law enforcement including the Public Prosecutor. Therefore, based on this principle, the author saves, the provisions of Article 30C letter H of the prosecutor's office law can at least “set aside” the contents of the provisions of Article 263 paragraph (1) of the Criminal Procedure Code which is confirmed by the decision of the Constitutional Court No. 33 / PUU-XIV/2016.

(3) Principle of Lex posterior principle derogates legi a priori. According to this principle, new rules can override old ones. Of course, it must be understood that the

rules in question must be at one level in the hierarchy of legislation. If it is associated with the object of research, the prosecutor's law is the latest rule compared to the Criminal Procedure Code (Law No.8 of 1981) so it is very clear and undisputed provisions of Article 30C letter H of the prosecutor's law contains substance that can not be ruled out by Article 263 paragraph (1) of the Criminal Procedure Code which is confirmed by the decision of the Constitutional Court No. 33/PUU-XIV / 2016, so that under the provisions of Article 30c letter H of the prosecutor'S office law, the Public Prosecutor has the right to apply for reconsideration just like the authority possessed by the convict or heir in accordance with the provisions of Article 263 paragraph (1) of the Criminal Procedure Code.

Thus, according to the author, there is no need for debate regarding the right of the public prosecutor to file a judicial review because the provisions of Article 30C letter H of the prosecutors law have become a clear legal basis as intended in the jurisprudence of the Supreme Court decision No. 55PK/Pid/1996 which in essence affirms that there must be rules that expressly regulate the right of the public prosecutor to file a judicial review that is not provided for in Article 263 paragraph(1) of the Criminal Procedure Code.

2.2. From The Perspective of Justice

Basically, the decision of the Constitutional Court No. 33/PUU-XIV / 2016 only confirms the contents of Article 263 paragraph (1) of the Criminal Procedure Code so that there is no longer a different interpretation of whether the public prosecutor can submit a judicial review or not because based on the decision of the Constitutional Court, it is confirmed that the review is only for convicts or their heirs. It has been mentioned earlier that in essence, judicial review is a means specially prepared for convicts or heirs who feel that injustice against a court decision is not in the interests of the state or the victim.

The court as the main pillar in law enforcement and the source of Justice places the judge as the main actor or central figure in the judicial process which is always required to sharpen the sensitivity of conscience, maintain integrity, moral intelligence

and improve professionalism in upholding law and justice for the people.[24] The judiciary is an extension of the purpose of the establishment of law, that is, as a tool to find justice.[25]

If we examine in depth, and see the reality that exists, apart from corruption cases where the "victim" is the state as a subject of law, then in non-corruption cases or criminal cases generally where the victim is a human being, it is often the victim who gets injustice from the existence of a court decision either because of pure oversight of the panel of Judges or the "X factor" outside the oversight of the judge who influenced the decision. The Supreme Court through various breakthroughs and policies has made various efforts to restore the purity of the judiciary so that it is independent of the judicial mafia. The judicial Mafia is the main dilapidated law enforcement in Indonesia. Judicial Mafia occurs due to the existence of an illicit relationship between law enforcers that exists for a specific purpose that benefits one party. The illicit relationship was based on financial transactions and bargaining that ultimately occurred engineering the justice system. On the other hand, in addition to financial problems, the base of the judicial mafia is the eroding ethics and morals of law enforcers.

An inevitability if in a law enforcement, it is the victim is the victim itself where the rights and justice to be obtained through the judicial process can not be owned. The conspiracy of the panel of judges with legal advisors who want to free the perpetrator actually makes the victim more intimidated. This is according to the author one of the reasons or entrances that a judicial review can be filed by the public prosecutor to re-establish honor and justice for the victim. If the public prosecutor is not given the authority to file a judicial review, while the court decision actually harms the interests of the victim because of the interference of the judicial mafia, then where Will the victim seek justice? Where do the victims claim their rights?

If we look closely, then there are two concepts that should get the same attention, namely the protection and recovery of victims and the protection and human

[24] Bola, Mustafa, et al. "Korelasi Putusan Hakim Tingkat Pertama, Tingkat Banding, dan Tingkat Kasasi (Suatu Studi Tentang Aliran Pemikiran Hukum)." *Hasanudin Law Review*, Vol. 1, No. 1, 2015, pp. 27-46, http://dx.doi.org/10.20956/halrev.v1i1.38.

[25] Syahrial, Ismail Eka. "Kesesuaian Alasan Peninjauan Kembali Dalam Tindak Pidana Penipuan Dengan Ketentuan KUHAP (Studi Kasus Putusan Mahkamah Agung Nomor 36 PK/Pid/2013)." *Jurnal Verstek*, Vol. 5, No. 2, 2017, pp. 96-109, https://doi.org/10.20961/jv.v5i2.33472.

rights of perpetrators of crimes. Sometimes, attention to the protection and constitutional rights of the perpetrator of the crime gets a bigger portion than the recovery and rights of the victim. Victim involvement is only seen as "nothing more than a piece of evidence" where it is not a priority and has an interest in a system (insider) and often outside the system.[26] According to William F. McDonald, victims sometimes experience secondary victimization (secondary victimization) that comes from the actions of the perpetrators of crimes and also comes from the criminal justice system itself.[27]

On the other side, there is a peculiarity of the relationship between the victim and the police/investigator/prosecutor compared to the relationship between the perpetrator of the crime and his legal advisor where the victim does not have more power over the relationship with the police/investigator/prosecutor while the perpetrator of the crime has more power where the perpetrator can replace his legal advisor if the perpetrator of the crime considers that his legal advisor does not provide maximum services to absolve him of the actions he has done.[28]

Criminal justice has been prioritizing the protection of the interests of offenders (offender centered) motivated by the view that the criminal justice system is organized to prosecute suspects and not to serve the interests of victims of crime. According To William F. McDonald's:

> "Crime is regarded as an offence against the state. The damage to the individual victim is incidental and its redress is no longer regarded as a function of the criminal justice process. The victim is told that if he wants to recover his losses he should hire a lawyer and sue in civil court. The Criminal Justice System is failing not for its benefit but for the community's. Its purposes are to deter crime, rehabilitate criminals, punish criminals, and do justice, but not to restore victims to their wholeness or to vindicate them."[29]

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[26] Reiff, Robert. *The Invisible Victim*. New York, Basic Books Inc. Publishers, 1979, p. 76.
[27] William F. McDonald. "The Role of the Victim in America" di dalam Barnett, Randy E. and John Hegel III, *Assessing The Criminal: Restitution, Retribution, and the Legal Process*. Cambridge, Ballinger Publishing Company, 1977, pp. 290-296.
[28] Mudzakkir. "Kedudukan Korban Tindak Pidana Dalam Sistem Peradilan Pidana Indonesia Berdasarkan KUHP dan RUU KUHP." *Jurnal Ilmu Hukum*, Vol. 14, No. 1, 2011, pp. 28-62, http://hdl.handle.net/11617/4190.
[29] William F. McDonald. *Op.Cit*.

It is very clear in the case of the murder of human rights activist Munir where the defendant Pollycarpus Budihari Priyanto was charged with murder to Munir. Through the decision of PN Jakpus, Pollycarpus was sentenced to 14 (fourteen) years in prison, which was reinforced by the decision of PT Jakarta. Upon the verdict, Pollycarpus filed a cassation appeal to the Supreme Court and based on the Supreme Court's Cassation decision, Pollycarpus was found not guilty of murdering Munir but only of falsifying a letter so that he was only sentenced to 2(two) years in prison. Based on the Cassation verdict, the Public Prosecutor filed a judicial review and the judicial review verdict sentenced Pollycarpus Budihari Priyanto to 20 (twenty) years in prison on January 25, 2008.[30]

Therefore, it should be between the public prosecutor and the convicted/heirs who have the same and balanced rights in filing a judicial review.

III. CONCLUSION

In practice, there are 2 groups of conflicting opinions regarding the authority for filing a judicial review by the Public Prosecutor. The counter-group argues that the formers of the law do not understand the norms in the existing legislation. On the other hand, MK Decision No.33/PUU-XIV / 2016 is final and binding for anyone including prosecutors who should obey the decision of the Constitutional Court. On the other side, groups that are pro on the authority of the Public Prosecutor filed a review of the opinion that this can be interpreted as the duties and responsibilities of the prosecutor representing the interests of the state and “justice” for the victim as well as an effort to correct and improve in realizing justice. The norm should place the position of the prosecutor in a proportionate and balanced manner in the legal effort for filing a judicial review.

[30] Ramdan, Ajie. “Kewenangan Penuntut Umum Mengajukan Peninjauan Kembali Pasca Putusan Mahkamah Konstitusi No.33/Puu-Xiv/2016.” *JIKH*, Vol. 11, No. 2, 2017, pp. 181-192, http://dx.doi.org/10.30641/kebijakan.2017.V11.181-192.

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