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The Judicial Review by General Prosecutors in Criminal Corruption Case

(Study of Constitutional Court Decision Number 33/PUU-XIV/2016)

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Abstract: This study discusses about the legal position of the Constitutional Court Decision Number 33/PUU-XIV/2016 on the authority of the public prosecutor to request approval for a review in corruption cases. The purpose of this study is to find out and explain the legal position of the Constitutional Court Decision Number 33/PUU-XIV/2016 against the authority of the public prosecutor to submit a request for a review in a corruption case. Related to the Constitutional Court Decision Number 33/PPU-XIV/2016 which contains the material test of Article 263 paragraph (1) of the Criminal Procedure Code, the ruling states that Article 263 paragraph (1) contradicts the 1945 Constitution. The Constitutional Court's decision explains that the decision prohibits the existence of Request for Reconsideration by the Public Prosecutor. Reconsideration is a limited right only for the convicted or his heir, not by the Public Prosecutor. The types of legal remedies that are still owned by the Public Prosecutor are the usual legal remedies in the form of appeals and cassation, and extraordinary remedies namely cassation for the benefit of the law.

Keywords: Constitutional Court Decision, Public Prosecutor, Corruption Crime.

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I. INTRODUCTION

Corruption is an act that is not involved by the community, the State, and the emergence of corruption can cause huge losses to the state and damage the development of good governance. The increase in uncontrolled acts of corruption will bring disaster, not only for paid and state life.

The impact on economic life leads to violations of social rights and economic rights of the community, hence the crime of corruption can no longer be classified as an ordinary crime but has become an extraordinary crime.

Corruption as a form of extra ordinary crime stipulated in the International Convention of the United Nations (UN) in Vienna, on October 7, 2013, was committed by someone who is respectable, powerful, has authority and the victims are not obvious. Sociologically, the nature of corruption is a form of violation of trust given by the community. (Marwan Mas, 2012: 02). Corruption is an extraordinary crime (extraordinary crimes), so it is necessary to deal with extraordinary (extra ordinary enforcement) and extraordinary actions (extra ordinary measures). (Lilik Mulyadi, 2013: 08).

There are 4 (four) characteristics and characteristics of corruption as extra ordinary crime. First, corruption is an organized crime that is carried out systematically. Second, corruption is usually done with a difficult modus operandi so that it is not easy to prove it. Third, corruption is always related to power. Fourth, corruption is a crime related to the fate of many people because the state finances that can be harmed are very beneficial for improving people's welfare. These characteristics distinguish corruption from other criminal acts, so it is not only the nature of the crime that gets the predicate of extraordinary crime, but in its response, actions that are extraordinary are needed.

Judgment is the last legal remedy after the appeal, cassation and / or rights of the convicted person or his heirs received or did not receive a decision or demand from the public prosecutor. In a number of decisions the Supreme Court allowed the Public Prosecutor to file a Review, especially in his case Muchtar Pakphan in 1996.

The Public Prosecutor has the right to submit a Review because there is new evidence (novum), the existence of a free or loose decision, and in the decision has a legal force there is still no conviction but there is proven criminal action. The basis of the Supreme Court receives a review from the public prosecutor in this case the Supreme Court to resolve juridical problems, the Supreme Court interprets several laws and regulations relating to the review using extensive interpretation (broadening the wording). (Yading Ariyanto, 2015: 02).

Ideally, the review can be used as an extra ordinary enforcement and extra ordinary measures in resolving cases of corruption that are classified as extraordinary crimes. The development of the justice system

in Indonesia, shows that the Constitutional Court has interpreted Decision No. 33 / PUU-XIV / 2016, states that the Public Prosecutor is not allowed to conduct a Review. The Constitutional Court's ruling overrides the jurisprudence of the Supreme Court regarding the authority of the Public Prosecutor to submit a review, especially in cases of corruption to represent the state and society as victims.

In relation to the problem of victims, this raises the interpretation that victims of criminal acts of corruption are the wider community. If we refer to Article 2 and Article 3 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning Eradication of Corruption, the so-called victims of corruption are the state. So that the state then takes over the process of retaliation (punishment).

According to Syaiful Bakhri, people can become victims of corruption in the form of state losses and the country's economy, quality of life, damage to infrastructure and so on. In general, there are several forms of corruption that are often found in practice, including bribery, embezzlement, speculation, patronage and nepotism, and conflict of interest. (Syaiful Bakhri, 2009: 281).

Victims of criminal acts of corruption can be separated into two namely direct victims and indirect victims. Direct victims are victims explicitly determined in Law No. 31 of 1999 is a country. Whereas indirect victims can be divided into two, namely indirect victims an sich, and victims of reporting about the allegations of someone who commits a criminal act of corruption. The indirect victims of criminal acts of corruption are the community and the people, because the loss of the country's finances or the country's economy, will indirectly harm the interests of the people and the interests of the people. Victims of reporting about the allegations of someone who commits a criminal act of corruption can also be divided into three, namely the person being reported, the public, and the reporter who is reporting. (Jusup Jacobus Styabudhi, 2013: 03).

In cases of corruption that can suffer losses is the wider community. So that the state then takes over the process of retaliation (punishment) to the perpetrators because they are considered to have damaged the fabric of the wider community. It is the state that monopolizes the right of prosecution to the perpetrator (dominus litis) while representing the victim to prosecute the perpetrator. (Wessy Trisna and Ridho Mubarak, 2017: 03).

The decision of the Supreme Court which was used as the basis for the jurisprudence of the authority of the Public Prosecutor conducted a review, in line with Satjipto Rahardjo's opinion as defiance by the court. The legal steps taken by the Supreme Court in the review cases indicate indirectly that the Supreme Court, especially in the case, has applied the type of law enforcement that Satjipto Rahardjo called progressive law enforcement. This type of law enforcement is carried out in order to save law enforcement in Indonesia with modern types of law enforcement that were previously held not to be able to solve large cases such as corruption, where corruptors and their legal fleets are smarter to break the legal steps that will be imposed on them. (Satjipto Raharjdo, 2007: 39). The Supreme Court and the court in general must have the courage to step out of the formal environment by philosophizing realism like that, solely based on reason to build a more just Indonesian law.

As a comparison of the arrangement for the right to submit a judicial review in judicial practice in Indonesia, it can be found in the provisions of Article 248 of Law Number 31 of 1997 concerning Military Courts which shows that in the case of filing a review of criminal cases, it is clearly oditur (Public Prosecutor in military court) has the right to submit a judical review. When compared with the provisions of Article 263 of the Criminal Procedure Code, there are similarities. It's just that in Article 248 of Law Number 31 of 1997 concerning Military Justice, explicitly includes the word "Oditur". The sample provisions above illustrate that granting the right to the Public Prosecutor to submit a review is very possible.

Legal protection for every citizen who has been victimized so far is based on the Criminal Code as a source of material law, using the Criminal Procedure Code as a procedural law. In the Criminal Procedure Code there is more regulation regarding suspects than about victims. The position of the victim in the Criminal Procedure Code does not appear to be optimal compared to the position of the perpetrator. With the Constitutional Court Decision No. 33 / PUU-XIV / 2016 confirms that the Public Prosecutor can no longer represent the victim in filing a legal review. (Parman Soeparman, 2007: 77-78).

The rights of victims according to the Criminal Procedure Code are regulated in Articles 98-101 of the Criminal Procedure Code. This article regulates the only mechanism of compensation carried out by the victim (Article 98 of the Criminal Procedure Code) which is called the merger of the claim for compensation. The merger of this case was carried out through the presiding judge at the request of the victim who was submitted within the stipulated deadline. The decision regarding compensation receives permanent legal force, if the criminal decision also receives permanent legal force. If the victim does not use the Criminal Procedure Code, the provisions of the Civil Procedure Code apply to the claim for compensation as long as the Criminal

Procedure Code does not regulate otherwise. With the receipt of the Public Prosecutor's submission the Judicial Review effort is a legal breakthrough to protect victims of crime.

In resolving corruption cases, the Public Prosecutor has a very important role in the effort to recover state losses caused by corruptors. In resolving corruption cases, the Public Prosecutor is an intermediary between the state and the community as victims who have clearly been harmed by the parties to the criminal act of corruption.

Law No. 31 of 1999 was formed with the aim of saving state finances and creating a just and prosperous society. The application of criminal substitute money and fines is an effort to recover state financial losses. Provisions of Law No. 20 of 2001 in Article 18 paragraph (1) letter b states that an additional criminal offense may be imposed on a criminal offense in the form of payment of compensation in the same amount as the assets obtained from a criminal act of corruption.

Decision of the Constitutional Court No. 33 / PUU-XIV / 2016 regarding the Public Prosecutor is not allowed to conduct a review, looks very forward the protection of the suspect and on the other hand looks to put aside the protection of the victim. So that these conditions do not provide a legal balance between the suspect and the victim in an effort to resolve disputes. Especially in the corruption case it is considered to be very limiting the efforts of the Public Prosecutor in an effort to recover state losses as an objective of the criminal proceedings in corruption.

The Public Prosecutor in submitting a request for Reconsideration is in his capacity as a Public Prosecutor who represents the state and public interest in the process of resolving criminal cases. Therefore this request for reconsideration is not due to the personal interests of the Public Prosecutor and the Prosecutor's Office, but for the public / state interest.

In addition, there is also an explanation in Article 35 letter c of Law number 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia, which explains that what is meant by public interest is the interests of the nation, state and the interests of the wider community.

Based on the descriptions above, it can be seen that there are a lot of problems that arise from the Constitutional Court's decision that does not allow the Public Prosecutor to conduct a review especially on the settlement of corruption cases. The verdict has ruled out the Supreme Court Jurisprudence which is a legal renewal of Judicial Review by the Public Prosecutor to represent victims of crime and does not guarantee the right of victims of crime to file legal remedies. The decision also shows the legal imbalance in achieving equality, individual human rights, truth, obedience and protecting the public in corruption cases.

Based on the background above, the formulation of this writing problem is how the legal position of the Constitutional Court Decision Number 33 / PUU-XIV / 2016 against the authority of the public prosecutor submits a request for reconsideration in a corruption case?

II. LITERATURE REVIEW

Theory of Justice from Aristotle which states that fair can mean according to the law and what is comparable and suggests there are 2 (two) parts of justice namely:

1. Commutative justice, which is justice that gives everyone as much as not remembering the services of individuals in individual relationships with others.
2. Distributive justice, namely appropriateness is a form of "the same" with the principle that the same case should be treated in the same way and different cases treated in different ways. Justice gives each person a ration according to his services, not demanding that each person get the same amount but equality (comparable equality or proportional equality). If the legislators order the judge so that his decision to pay attention to justice is to avoid the use of general rules in specific matters, which is guided by appropriateness (redelijkheid) and good intentions.

Theory of authority is related to the source of authority from the government in carrying out legal actions in relation to public law or in relation to private law. Indroharto, said that there are three types of authority that come from laws and regulations. That authority includes:

1. attribution;
2. delegation; and
3. mandate. (Ridwan HR, 2008: 104)

Attribution is the granting of authority by the legislators themselves to a government organ, both existing and completely new. Legislators who are competent to provide attribution of authority are distinguished between:

1. domiciled as an original legislator at the central level is the People's Consultative Assembly as constitution-maker (constituent) and the House of Representatives together with the government as the birth of a law, and at the regional level is the Regional People's Representative Council and the regional government that gives birth to regulations area;

2. who acts as a delegated legislator, such as a president based on a statutory provision issuing government regulations in which government authorities are created to certain State Administrative Bodies or Offices.

Delegation is the transfer of authority possessed by a government organ to another organ. In the delegation contains a surrender, namely what was originally the authority of the A, henceforth becomes the authority of the B. The authority that has been given by the delegator will then become the responsibility of the recipient of the authority.

Mandate, there is no new authorization nor delegation of authority and one State Administration Agency or Officer to another. Responsibility for authority on the basis of the mandate still rests with the creditor, not turning to the recipient of the mandate.

The authority possessed by governmental organs (institutions) in carrying out real actions (real), making arrangements or issuing decisions is always based on authority obtained from the constitution by attribution, delegation, or mandate. An attribution refers to the original authority on the basis of the constitution (Basic Law). In the authority of the delegation, a delegation of authority to other government organs must be affirmed. In the mandate there is no delegation in the sense of granting authority, however, those who are given the mandate act on behalf of the mandate giver. In granting a mandate, the official who is given the mandate appoints another official to act on behalf of the mandator.

In connection with the concept of attribution, delegation, or mandate, J.G. Brouwer and A.E. Schilder, said:(Brouwer and Schilder, 1998: 16-17)

a. with atribution, power is granted to an administrative authority by an independent legislative body. The power is initial (originair), which is to say that is not derived from a previously existing power. The legislative body creates independent and previously non existent powers and assigns them to an authority.

b. Delegation is a transfer of an acquired atribution of power from one administrative authority to another, so that the delegate (the body that the acquired the power) can exercise power in its own name.

c. With mandate, there is not transfer, but the mandate giver (mandans) assigns power to the body (mandataris) to make decision or take action in its name.

Authority must be based on existing legal provisions (the constitution), so that the authority is a valid authority. Thus, officials (organs) in issuing decisions are supported by the source of authority. Stroink explained that the source of authority can be obtained for officials or organs (institutions) of government by way of attribution, delegation and mandate. The authority of an organ (institution) of the government is an authority that is strengthened by positive law to regulate and maintain it. Without authority a right juridical decision cannot be issued (Abdul Rasyid Thalib, 2006: 219).

III. THE LEGAL POSITION OF THE CONSTITUTIONAL COURT RULING NUMBER 33/ PUU-XIV/2016 ON THE AUTHORITY OF THE PUBLIC PROSECUTOR SUBMITTING REQUESTS FOR JUDICIAL REVIEW IN CORRUPTION CASES

Judicial review is a legal remedy in a criminal procedure with the aim of finding material truth, where the judge before making a decision must really pay attention to the evidence in the previous trial and the new evidence presented in the trial.

The review is categorized as an extraordinary remedy because it has special features, meaning that it can be used to reopen (reveal) a court decision that has permanent legal force.Whereas a court decision which has permanent legal force must be implemented to respect legal certainty. Therefore, the Review Institution is a legal remedy used to withdraw or reject the decision of a judge who has permanent legal force.

Unlike ordinary remedies, the application for extraordinary remedies has certain conditions, namely:

1. Can be submitted and directed against court decisions that have permanent legal force.
2. Can be addressed and submitted in certain circumstances, can not be filed against all court decisions that have permanent legal force. There must be and there are certain conditions as conditions.
3. Can be submitted to the Supreme Court, and examined and decided by the Supreme Court as the first and last agency.

The formal requirements for submitting a Judicial Review are listed in Article 263 paragraph (1) which basically explains that only the convicted person and his heir can submit the Judicial Review, can be submitted against a court decision that has been fixed (inkracht), cannot be filed against a free or loose decision. from all demands.

Whereas the material requirements for submitting a Review are regulated in Article 263 paragraph (2) of the Criminal Procedure Code, namely that the request for a review is carried out on the basis of:

a. If there is a new situation that raises a strong suspicion, that if the condition is already known at the time the trial is still ongoing, the result will be a free verdict or a verdict free from all lawsuits or demands of the public prosecutor can not be accepted or against the case applied lighter criminal provisions .

b. If in various decisions there is a statement that something has been proven, but the thing or condition as the basis and the reason for the decision that has been proven proven, it turns out to have been in conflict with one another.

c. If the decision clearly shows a mistake of the judge or a real mistake.

In connection with "there are new conditions" according to the explanation of Article 24 paragraph (1) of Law Number 48 Year 2009 concerning Judicial Power, that what is meant by "certain things or conditions" includes the discovery of new evidence (novum) and / or there is an error or error of the judge in applying the law.

Remedial remedies after the Constitutional Court Decision Number 34 / PUU-XI / 2013 are the Legal Principles in Article 268 paragraph (3) of the Criminal Procedure Code which is declared to be in conflict with the Constitution, as stated in Article 1 paragraph (3), Article 24 paragraph (1), Article 28C paragraph (1) and Article 28D paragraph (1) of the Constitution and only in accordance with Article 28J paragraph (2) of the Constitution which constitutes an event development in criminal justice which has changed the procedure for filing a Review for a convicted person as a justice seeker. With the invalidation of Article 268 paragraph (3) of the Criminal Procedure Code, the submission of the Judicial Review can be done more than once constituting the application of the principle of justice for the achievement of a sense of justice for the convicted person regarding material truth and maintaining human rights, while the principle of legal certainty is used as a certainty to obtain justice, so that later a case is considered to be endless and contrary to the principle of litest opportunism and for those who litigate will feel uneasy continuously (nemo debet bis vexari) especially cases with death row inmates.

The legal force of the Constitutional Court's ruling is in addition to binding the parties to the litigation as well as all elements of the state both the people and the high state institutions. Ordinary court decisions that only bind the parties. Decisions of the Constitutional Court in the case of judicial review are binding on all components of the nation, both state administrators and citizens or known as erga omnes. Decisions of the Constitutional Court cannot be released from the principle of erga omnes which has a legally binding force on all components of the nation, so all parties must submit to and obey the said decision.

Before Decision of the Constitutional Court No. 33 / PUU-XIV / 2016 concerning the Public Prosecutor is available, the Public Prosecutor can submit a review because the rules in the Criminal Procedure Code do not prohibit the prosecutor from submitting this matter (Review). Komariah revealed that normatively Article 263 paragraph (1) did not contradict the 1945 Constitution and Human Rights. In practice, according to Komariah, the Constitutional Court itself recognizes that the Supreme Court has several times received requests for Reconsideration submitted by the Public Prosecutor. Komariah quotes Mochtar Kusumaatmadja in the theory of development law which says that the ultimate goal of the law is to provide justice.
Decision of the Constitutional Court No. 33 / PUU-XIV / 2016, which states that:

"Judicial remedies are based on the philosophy of returning rights and justice to someone who believes he or she has received unfair treatment by the state based on a judge's decision, therefore positive law in force in Indonesia gives the right to the convict or his heirs to submit extraordinary legal remedies. which is called Reconsideration. In other words, the Review Institution is aimed at the interests of the convicted person to carry out extraordinary legal remedies, not the interests of the state or the interests of the victim. As an extraordinary remedy by a convicted person, the subject entitled to submit a Judicial Review is only the convicted or his heir, while the object of the Reconsideration submission is a decision stating that the alleged act was proven to be proven and convicted of a criminal. Therefore, as a concept of legal remedies for the interests of convicts who are dissatisfied with decisions that have obtained permanent legal force, the verdict is free or free from all legal claims are not included in the object of filing a Review, because the decision is free from all claims the law certainly benefits the convicted person. The Review Institution is adopted solely for the benefit of the convicted or heir and this is the essence of the Review Board. If this essence is removed then the Review Agency will lose its meaning or become meaningless. "

Given the different interpretations of the Review, the Constitutional Court Decision No. 33 / PUU-XIV / 2016 The Court wishes to end the existence of this disagreement through its ruling which states: Article 263 paragraph (1) of Law Number 8 of 1981 concerning Criminal Procedure (State Gazette of the Republic of Indonesia of 1981 Number 76, Supplement to the State Gazette Republic of Indonesia Number 3209) is contradictory to the 1945 Constitution on a conditional basis, as long as it is interpreted other than those explicitly stated in the a quo norm. Article 263 paragraph (1) of Law Number 8 of 1981 concerning Criminal Procedure Law (State Gazette of the Republic of Indonesia of 1981 Number 76, Supplement to the State Gazette of the Republic of Indonesia Number 3209) does not have conditional binding force, that is, as long as it is interpreted other than by explicitly stated in the norm a quo.

As stated in the aforementioned MK ruling, thus Article 263 paragraph (1) of the Criminal Procedure Code if interpreted differently, if interpreted that the Prosecutor can submit a Review will be contrary to the

1945 Constitution. The interpretation or interpretation so far carried out by the Prosecutor as a basis for Review no longer has a strong legal basis. With the Constitutional Court Ruling above, the ruling prohibits the request of a Reconsideration by the Prosecutor. It was reiterated in the decision that the Judicial Review was a limited right only for the convicted or his heir, not the Prosecutor.

Thus, the types of legal remedies that are still owned by the Prosecutor are ordinary remedies in the form of appeals and cassation, and extraordinary remedies namely Cassation for the Purpose of Law. Cassation for the sake of law is regulated in articles 259-262 of the Criminal Procedure Code, especially Article 259 paragraph (1) and paragraph (2) of the Criminal Procedure Code which states that:

(1) In the legal interest of all decisions that have obtained permanent legal force from a court other than the Supreme Court, a one-time appeal request can be submitted by the Attorney General. Then in paragraph (2) it is said that the cassation decision in the interest of the law may not harm the parties concerned. Legal remedies for Cassation in the Interest of Law are indeed different from legal remedies. A very clear difference lies in the provisions of article 259 paragraph (2) which explains that the decision of the Cassation in the Legal Interest must not be detrimental to the interested parties, in this case neither the Prosecutor nor the convicted may be harmed by the appeal for the legal interest by the Prosecutor.

IV. CONCLUSION

Related to Constitutional Court Decision No. 33 / PPU-XIV / 2016 which contains the material test of Article 263 paragraph (1) of the Criminal Procedure Code, the verdict states that Article 263 paragraph (1) is contrary to the 1945 Constitution if interpreted other than those stated in the article. The verdict brought legal consequences that the Judicial Review is the right of the convict or heir, then it is certainly clear that the Public Prosecutor is no longer allowed to file a judicial review. The decision does not harm the Prosecutor because the Prosecutor in carrying out his duties must be based on the law so that whatever the law says will be implemented.

It is hoped to avoid conflicting interpretations regarding the rule of law, the best thing to do is to understand the philosophical foundation of the formation of a law, so that there is little possibility of errors in interpreting. Law enforcers in Indonesia should hold adagium interpretatio cessat in claris, which means that if there is a clear and clear law, it is no longer permissible to interpret it, because the interpretation of words that are very clear will lead to the destruction of interpretations est perversio.

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