

Decision of the Constitutional Court of the Republic of Indonesia regarding Criminal Procedure Law in Criminal Law Enforcement in the City of Kediri

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Abstract

Several decisions of the MK formulated new arrangements regarding criminal procedural law in Indonesia. However, the legislature has yet to follow up. Therefore, this study focuses on describing and providing prescriptions regarding MK decisions which were followed up by criminal law enforcement officers in Kediri City along with the embodiment of the principle of legal certainty. Legal research (which is certainly normative) uses statutes, case and conceptual approaches. This research was conducted in the City of Kediri by collecting primary, secondary, and non-legal legal materials using library research, interviews, and focus group discussion techniques. Analysis in research is prescriptive to find the truth of coherence. As a result, first, the decisions of the MK that changed several articles in the criminal procedural law in Indonesia have been followed up by criminal law enforcement officials in the City of Kediri through the centralized policies of each institution. Second, several policies following up on the MK decision have guaranteed the realization of the principle of legal certainty, except for the issuance of a circular letter from the MA which confirms that a request for review is only 1 (one) time. However, these follow-up actions are not actually within the authority of each institution and are still partial in nature, giving rise to relatively one-sided interpretations and disparities in the handling of criminal cases.

1. Introduction

The presence of Law of the Republic of Indonesia Number 8 of 1981 concerning Criminal Procedure Law (KUHAP) considered to be able to fulfill the legal needs of society in accordance with Pancasila and The 1945 Constitution of the Republic of Indonesia (hereinafter referred to UUD NRI 1945).¹ The birth of the KUHAP also seems to liberate the Indonesian people and nation from the pressure of law enforcement treatment required by the Dutch colonial regime which brought many groans of past injustice under the rules of the *Herziene Inlands Reglement* (HIR).²

Compared to HIR, KUHAP has brought many actual and fundamental changes. The KUHAP “legalization of human rights” for suspects or defendants to defend their legal interests before examination by law enforcement officials by granting them legal rights, for example, regarding legal aid, for example, in Articles 69 to Article 74 of the KUHAP. Likewise regarding coercive measures which are limited in nature for all agencies at every level of investigation, for example, regarding arrest and detention.³

In its later development, over a period of almost 4 (four) decades, the KUHAP has been judicial review several times before the Panel of Constitutional Judges at the MK. From the

¹ Andi Hamzah, *Hukum Acara Pidana Indonesia* (Jakarta: Sinar Grafika, 2011), 60.

² M. Yahya Harahap, *Pembahasan Permasalahan Dan Penerapan KUHAP: Penyidikan Dan Penuntutan* (Jakarta: Sinar Grafika, 2015), 3-4.

³ Harahap, 4.

results of this examination, there were several articles in the KUHAP which were declared unconstitutional and did not have binding legal force. Several articles in the KUHAP are seen as no longer meeting the legal needs of Indonesian society. Until the end of 2022, there were 14 (fourteen) MK decisions stating that several articles in the KUHAP were contrary to the UUD NRI 1945 (unconstitutional) and had no binding legal force. The articles in question are Article 1 number 26, Article 83 paragraph (2), Article 197 paragraph (2), Article 80, Article 244, Article 18 paragraph (3), Article 268, Article 197 paragraph (2), Article 77 letter a, Article 82 paragraph (1) letter d, Article 109 paragraph (1), Article 263, Article 197 paragraph (1), and Article 43 paragraph (3) of the KUHAP.

These decisions are intended to show the public, one of them, the presence of an institution that is more related to the court of law institution, namely the MK.⁴ The birth of the MK cannot be separated from constitutional developments in Indonesia which began with Amendment IV to the UUD NRI 1945.⁵ The presence of the MK has changed the configuration of judicial power in Indonesia.⁶ The MK was designed to be the guardian and interpreter of the UUD NRI 1945 through its decisions.⁷ His presence is also considered to change the doctrine of parliamentary supremacy into constitutional supremacy.⁸

In accordance with Article 10 paragraph (1) of Law of the Republic of Indonesia Number 24 of 2003 concerning the Constitutional Court (hereinafter referred to Law No.24/2003), the MK decision is final. Thus, the MK decision which stated several articles in the KUHAP were unconstitutional and had no legal force immediately acquired permanent legal force and no legal action could be taken. Because the MK decision is categorized as a declaratory-constitutive decision, this decision automatically creates a new legal situation.⁹ The problem then is, does there need to be a follow-up to the MK decisions?

Research by Aninditya Eka Bintari brings up discussions that the People's Representative Council of the Republic of Indonesia (DPR) must immediately implement changes to laws that have been annulled by the MK. If the DPR does not immediately follow up as a positive legislator, there will be a legal vacuum. Automatically, if a law changes, the implementing rules also change. This is because the MK decision is self-executing, final and binding. Apart from that, the follow-up by the DPR is a manifestation of the principle of checks and balances.¹⁰

Widayati also stated that the reality is that sometimes MK decisions are not followed up or ignored by law-forming institutions, so there are obstacles to the implementation of MK decisions. The MK decision should be obeyed and followed up, because it is a legal obligation for law-forming institutions. This follow-up is also an effort to fulfill the constitutional rights of citizens provided by the UUD NRI 1945. Therefore, to maintain legal order with the principle that laws and regulations that are lower in hierarchy must not conflict with existing

⁴ Jimly Asshiddiqie, "Mahkamah Konstitusi Dan Pengujian Undang-Undang," *Jurnal Hukum* 11, no. 27 (2004): 1-6.

⁵ Mutiara Hikmah, "Mahkamah Konstitusi Dan Penegakan Hukum Dan HAM Di Indonesia," *Jurnal Hukum Dan Pembangunan* 35, no. 2 (2005): 131.

⁶ Zeny Wulan Ayu W.P. and Haidar Adam, "Putusan Ultra Petita Mahkamah Konstitusi Dalam Pekara Pengujian Konstitusionalitas Undang-Undang," *Yuridika* 29, no. 2 (2014): 169.

⁷ Amrizal J. Prang, "Implikasi Hukum Putusan Mahkamah Konstitusi," *Kanun* 53, no. 13 (2011): 78.

⁸ Mariyadi Faqih, "Nilai-Nilai Filosofi Putusan Mahkamah Konstitusi Yang Final Dan Mengikat," *Jurnal Konstitusi* 7, no. 3 (2016): 97.

⁹ Maruarar Siahaan, "Peran Mahkamah Konstitusi Dalam Penegakan Hukum," *Jurnal Hukum* 16, no. 3 (2009): 197-99.

¹⁰ Aninditya Eka Bintari, "Mahkamah Konstitusi Sebagai Negative Legislator Dalam Penegakan Hukum Tata Negara," *Pandecta* 8, no. 1 (2013): 87-89.

laws and regulations. higher, then when the MK decides that a material content in the law is declared unconstitutional, it must be immediately obeyed and followed up by changing the law to adapt the MK decision.¹¹

Mohammad Agus Maulidi stated that the MK decision was not fully implemented consistently by the institutions affected by the decision, especially those related to judicial review. In this case, other branches of power, both legislative, executive and judicial, play an important role in implementing the MK decisions. The reasons are: (1) MK is only a negative legislature; (2) the absence of special enforcement agencies; (3) there is no deadline for implementing the decision; and (4) there are no juridical consequences for ignoring the decision.¹²

Regarding agreement with the MK decision, the Supreme Court of the Republic of Indonesia (MA) issued MA Circular Letter Number 7 of 2014 concerning Submission of Applications for Judicial Review in Criminal Cases (hereinafter referred to SEMA No.7/2014). The circular, which is administrative in nature and only applies within MA, is in accordance with MK Decision Number 34/PUU-XI/2013. In various studies, SEMA No.7/2014 creates distortions in the hierarchy of laws and regulations in Indonesia.¹³ In connection with the research on SEMA No.7/2014, the MK decision in the case of judicial review actually binds all components of the nation, both state administrators and citizens, so that all parties must submit and obey to implement it. This is what is often referred to as the principle of erga omnes in the MK decision.¹⁴

On the other hand, in the judiciary tradition which has developed for a long time, a decision must have binding power, because the absolute authority of the judiciary is to carry out judgment. *Mutatis-mutandis*, this decision has excutorial power.¹⁵ In terms of being related to the decision of the MK, Maruarar Siahaan once said, MK judges are legislators and their decisions apply as law, but do not require changes to be made with amendments to laws which in certain parts are declared unconstitutional and have no binding legal force.¹⁶

¹¹ Widayati, "Problem Ketidakpatuhan Terhadap Putusan Mahkamah Konstitusi Tentang Pengujian Undang-Undang," *Jurnal Pembaharuan Hukum* 4, no. 1 (2017): 10-12.

¹² Look, among other, Mohammad Agus Maulidi, "Problematika Hukum Implementasi Putusan Final Dan Mengikat Mahkamah Konstitusi Perspektif Negara Hukum," *Ius Quia Iustum* 24, no. 4 (2017): 535-54; Denny Indrayana and Zainal Arifin Mochtar, "Komparasi Sifat Mengikat Putusan Judicial Review Mahkamah Konstitusi Dan Pengadilan Tata Usaha Negara," *Mimbar Hukum* 19, no. 3 (2007): 441-42; Topane Gayus Lumbuun, "Tindak Lanjut Putusan Mahkamah Konstitusi Oleh DPR RI," *Jurnal Legislasi Indonesia* 6, no. 3 (2009): 77-94.

¹³ Look, among other, Seno Wibowo Gumbira, "Problematika Peninjauan Kembali Dalam Sistem Peradilan Pidana Pasca Putusan Mahkamah Konstitusi Dan Pasca SEMA RI No. 7 Tahun 2014 (Suatu Analisa Yuridis Dan Asas-Asas Dalam Hukum Peradilan Pidana)," *Jurnal Hukum Dan Pembangunan* 46, no. 1 (2016): 117; Fajri Yandi, Emilda Firdaus, and Mexsasai Indra, "Analisis Yuridis Tindak Lanjut Putusan Mahkamah Konstitusi Nomor 34/PUU-XI/2013 Dengan Surat Edaran Mahkamah Agung Nomor 7 Tahun 2014 Tentang Peninjauan Kembali," *Jurnal Online Mahasiswa Fakultas Hukum Universitas Riau* 4, no. 2 (2017): 1-14; Nadia Yurisa Adila, Nyoman Serikat Putra Jaya, and Sukinta, "Implementasi Upaya Hukum Peninjauan Kembali Dalam Perkara Pidana Setelah Putusan Mahkamah Konstitusi Nomor 34/PUU-XI/2013," *Diponegoro Law Journal* 5, no. 2 (2016): 1-21.

¹⁴ Gumbira, "Problematika Peninjauan Kembali Dalam Sistem Peradilan Pidana Pasca Putusan Mahkamah Konstitusi Dan Pasca SEMA RI No. 7 Tahun 2014 (Suatu Analisa Yuridis Dan Asas-Asas Dalam Hukum Peradilan Pidana)," 116; Syukri Asy'ari, Meyrinda Rahmawaty Hilipito, and Mohammad Mahrus Ali, "Model Dan Implementasi Putusan Mahkamah Konstitusi Dalam Pengujian Undang-Undang (Studi Putusan Tahun 2003-2012)," *Jurnal Konstitusi* 10, no. 4 (2013): 679.

¹⁵ Prang, "Implikasi Hukum Putusan Mahkamah Konstitusi," 87.

¹⁶ Maruar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia* (Jakarta: Konstitusi Press, 2005), 210-11.

In line with what Maruarar Siahaan wrote, research conducted by Mohammad Mahrus Ali, Meyrinda Rahmawaty Hilipito, and Syukri Asy'ari found that there were no provisions regarding the time that had to be met to immediately follow up on the MK decision. Apart from that, there is no clarity and certainty about which institution should play a role in following up on the MK decision. As for the findings of follow-up to the MK decision, the choice of legal form by the address of the MK decision was very diverse.¹⁷

In previous research relevant to the topic of this article, firstly, by Topane Gayus Lumbuun entitled "Follow-up to the MK Decision by the DPR", it was found that, in practice, the DPR did not immediately follow up on the MK decision, so that the execution of the MK decision was not easy.¹⁸ Second, in research Widayati's entitled "The Problem of Non-Compliance with the MK Decision on Judicial Review", in reality, the MK decision was ignored and not followed up by the DPR and the President as legislators, considering that there were no sanctions.¹⁹ Third, research by Seno Wibowo Gumbira entitled "Problems of Judicial Review in the Criminal Justice System Post-MK Decision and Post-SEMA RI No.7/2014 (A Juridical Analysis and Principles in Criminal Justice Law)" concluded that the follow-up to the MK decision, for example by the MA through SEMA No.7/2014, actually creates a distortion of the hierarchy of laws and regulations in Indonesia.²⁰ Fourth, research by Mohammad Mahrus Ali entitled "Follow-up to the MK Decision which is Conditionally Constitutional and Contains New Norms" also emphasized that the diversity of legal forms of follow-up to MK decisions has the potential to cause disharmony in statutory regulations, both vertically and horizontally.²¹

These four previous studies have similarities with this research, as far as the follow-up to the Constitutional Court's decision is concerned. In Mohammad Mahrus Ali's research, for example, findings regarding disharmony in statutory regulations were not followed up by providing prescriptions based on a particular legal principle. Thus, the difference is that the four of them do not focus on the Criminal Procedure Code and, of course, have not provided a prescription regarding the absence of follow-up to the Constitutional Court's decision from the perspective of the principle of legal certainty. Therefore, the researcher chose to focus on connecting the follow-up to the Constitutional Court's decision regarding criminal procedural law with the realization of the principle of legal certainty.

The starting point for choosing the focus of this research is based on the MK decisions regarding criminal procedural law, which in its considerations, conclusions, and rulings contain conditions and formulate new norms, both which have not yet been or have been followed up by the legislators, thus potentially ignoring the principle of certainty law in criminal law enforcement in Indonesia. This is because criminal procedural law is a series of legal rules that directly involve restrictions and temporary revocation of some human rights.

The results of the problem identification above are formulated as follows: (1) Has the MK decision regarding criminal procedural law been followed up by criminal law

¹⁷ Mohammad Mahrus Ali, Meyrinda Rahmawaty Hilipito, and Syukri Asy'ari, "Tindak Lanjut Putusan Mahkamah Konstitusi Yang Bersifat Konstitusional Bersyarat Serta Memuat Norma Baru," *Jurnal Konstitusi* 12, no. 3 (2015): 631-62.

¹⁸ Lumbuun, "Tindak Lanjut Putusan Mahkamah Konstitusi Oleh DPR RI," 77-94.

¹⁹ Widayati, "Problem Ketidapatuhan Terhadap Putusan Mahkamah Konstitusi Tentang Pengujian Undang-Undang," 1-14.

²⁰ Gumbira, "Problematika Peninjauan Kembali Dalam Sistem Peradilan Pidana Pasca Putusan Mahkamah Konstitusi Dan Pasca SEMA RI No. 7 Tahun 2014 (Suatu Analisa Yuridis Dan Asas-Asas Dalam Hukum Peradilan Pidana)," 106-19.

²¹ Ali, Hilipito, and Asy'ari, "Tindak Lanjut Putusan Mahkamah Konstitusi Yang Bersifat Konstitusional Bersyarat Serta Memuat Norma Baru," 631-62.

enforcement officials in Kediri City?; and (2) Does the implementation of the MK decision regarding criminal procedural law in enforcing criminal law in Kediri City guarantee the realization of the principle of legal certainty? This research aims to: (1) describe and provide a prescription for the MK decision regarding criminal procedural law which has been followed up by criminal law enforcement officials in Kediri City; and (2) describe and provide a prescription for the MK decision regarding criminal procedural law in enforcing criminal law in the City of Kediri which guarantees the realization of the principle of legal certainty.

2. Methods

This legal research (which is definitely normative) uses statutes, case and conceptual approaches. This research was conducted in Kediri City by collecting primary, secondary, and non-legal legal materials using literature study techniques, interviews, and focus group discussions. Analysis in research is prescriptive to find the truth of coherence. This means that legal research will answer legal problems, for example, are there legal rules in accordance with legal norms and are there norms in the form of orders or prohibitions in accordance with legal principles, as well as whether a person's actions are in accordance with legal norms or legal principles.²²

3. Results and Discussion

In accordance with Article 10 paragraph (2) of Law of the Republic of Indonesia Number 12 of 2011 concerning the Formation of Legislative Regulations (hereinafter referred to Law No.12/2011) determines that the follow-up to the MK decision shall be carried out by the DPR or the president. The follow-up in question is the content of the content material which must be regulated by law. This is due to the MK authority to review laws that are alleged to be in conflict with the UUD NRI 1945.

From the above arrangements, first, some or all of the material contained in a law which is declared unconstitutional and no longer has binding force by the MK must be followed up by the DPR or the president, of course through law. Second, apart from the DPR or the president, other state institutions do not have the authority to follow up. In the context of the MK decision regarding changes to several norms in criminal procedural law in Indonesia, in fact the DPR or the president did not follow up by revising the KUHAP. In fact, a follow-up to the MK decision was necessary.

In fact, the follow-up action was carried out by an institution that did not have the authority based on Article 10 paragraph (2) of Law No.12/2011, which then adds to the problem. Take, for example, the publication of SEMA No.7/2014 to respond to the MK Decision Number 34/PUU-XI/2013, dated March 6, 2014. This problem has a serious impact on the aspect of legal certainty for justice seekers in criminal justice practice in Indonesia.

Because the DPR or the president did not follow up on the MK decision regarding criminal procedural law, but instead it was followed up by an institution that was not authorized, for example MA, researchers need to carry out further investigation into the institutional structure. This is intended so that researchers get a complete description of the patterns and patterns of follow-up to the MK decision referred to in this research.

First, in terms of institutional structure, the Kediri City District Court (PN Kota Kediri) cannot be separated from the MA as one of the highest judicial authorities in Indonesia. According to Article 2 of Law of the Republic of Indonesia Number 14 of 1985 concerning the Supreme Court (hereinafter referred to Law No.14/1985) confirms, MA is the highest state court of all judicial environments in Indonesia.

²² Peter Mahmud Marzuki, *Penelitian Hukum (Edisi Revisi)* (Jakarta: Kencana, 2019), 47.

These structural conditions influence the policies that need to be issued in order, for example, to follow up on MK decisions regarding changing norms in criminal procedural law, especially in the KUHAP. The PN Kota Kediri does not have the authority to issue it, except that judges at the PN Kota Kediri need to carry out legal discovery (*rechtvindind*) in certain cases that are affected by law enforcement due to the MK decision. Thus, to ensure the follow-up to the MK decision regarding criminal procedural law by the PN Kota Kediri, it can be seen in the policies issued by MA.

First, in relation to MK Decision Number: 34/PUU-XI/2013, dated March 6, 2014, MA issued SEMA No.7/2014. Through this circular letter, MA emphasized that the MK Decision Number: 34/PUU-XI/2013, dated March 6, 2014, does not necessarily abolish the legal norms governing requests for "*peninjauan kembali*" as regulated in Article 24 paragraph (2) Law of the Republic of Indonesia Number 28 of 2009 concerning Judicial Power and Article 66 paragraph (1) of Law No.14/1985 as amended by Law of the Republic of Indonesia Number 5 of 2004 concerning Amendments to Law Number 14 of 1985 concerning the Supreme Court and Law of the Republic of Indonesia Number 3 of 2009 concerning the Second Amendment to Law Number 14 of 1985 concerning the Supreme Court (hereinafter referred to Law No.5/2004 jo Law No.3/2009).

Via SEMA No.7/2014, MA is of the opinion that "*peninjauan kembali*" applications in criminal cases are limited to only 1 (one) time. In fact, MA emphasized that "*peninjauan kembali*" applications that are not in accordance with SEMA No.7/2014 to be declared inadmissible through the determination of the head of the court of first instance and the case files do not need to be sent to MA. This opinion and assertion by MA is in fact not in accordance with the MK Decision Number: 34/PUU-XI/2013, dated March 6, 2014.

Second, the issuance of Regulation of the Supreme Court of the Republic of Indonesia Number 4 of 2016 concerning the Prohibition of Judicial Review of Pretrial Decisions (hereinafter referred to PERMA No.4/2016) which was stipulated on April 19, 2016, and promulgated on April 20, 2016. In consideration "*Menimbang*", PERMA No.4/2016 states that there is MK Decision Number: 21/PUU-XII/2014, dated April 28, 2015, which expands pre-trial authority and MK Decision Number: 65/PUU-IX/2011, dated May 1, 2012, which essentially decides the decision pre-trial appeals can no longer be submitted.

Article 1 PERMA No.4/2016 emphasizes, this regulation regulates the prohibition of filing for judicial review of pretrial decisions. Article 3 PERMA No.4/2016 which contains 3 (three) paragraphs also successively confirms this, namely: "(1) pretrial decisions cannot be submitted for judicial review; (2) the request for review of the Pretrial is declared inadmissible by the decision of the Chairman of the District Court and the case files are not sent to the MA); and (3) the decision of the Chairman of the District Court as intended in paragraph (1) cannot be submitted to legal action)".

Confirmation as in Article 1 and Article 3 PERMA No.4/2016 above is in accordance with the MK Decision Number: 65/PUU-IX/2011, dated May 1, 2012. According to the MK, because of the philosophy of holding a pretrial institution as a fast trial in order to provide equal treatment to suspects or defendants and investigators as well as the public prosecutor, then granting the right of appeal to investigators and public prosecutors which is declared to be contrary to the UUD NRI 1945.

Article 2 paragraph (1) letter a PERMA No.4/2016 determines that the object of pretrial is whether the arrest, detention, termination of investigation or prosecution, determination of suspect, confiscation, and search are valid or not. These provisions are in accordance with MK Decision Number: 21/PUU-XII/2014, dated April 28, 2015, which expands pre-trial authority.

Article 2 paragraph (2) PERMA No.4/2016 stipulates, pretrial examination of applications regarding the invalidity of the suspect's determination only assesses formal

aspects, namely whether there are at least 2 (two) valid pieces of evidence and does not enter into the case material. Also, in Article 2 paragraph (3) PERMA No.4/2016 stipulates, the pre-trial decision granting the request regarding the invalidity of determining a suspect does not invalidate the investigator's authority to determine the person concerned as a suspect again after providing at least two new pieces of valid evidence, different from the previous evidence related to the case material. These two arrangements, apart from being in accordance with the MK Decision Number: 21/PUU-XII/2014, dated April 28, 2015, which expands pre-trial authority, are also related to the meaning of the MK regarding "at least 2 (two) valid pieces of evidence", namely the minimum 2 (two) pieces of evidence contained in Article 184 of the KUHAP.

Third, Regulation of the Supreme Court of the Republic of Indonesia Number 9 of 2017 concerning Format (Template) and Guidelines for Writing Supreme Court Decisions/Determinations (hereinafter referred to PERMA No.9/2017) which was stipulated on December 19, 2017, and promulgated on December 29, 2017. In the consideration section "Menimbang" letter "b" PERMA No.9/2017 stated, according to the MK Decision Number: 103/PUU-XIV/2016, dated October 10, 2017, the provisions of Article 197 paragraph (1) of the KUHAP only apply to courts of first instance, so there is a vacuum in legal norms that regulate matters that must be contained in criminal case decisions at the appeal, cassation and judicial review levels.

Previously, in accordance with the MK Decision Number: 103/PUU-XIV/2016, dated October 10, 2017, the MK decided that Article 197 paragraphs (1) of the KUHAP were conditionally contradictory to the UUD NRI 1945 and did not have binding legal force, as long as they were not interpreted as "decision letters punishment in the court of first instance contains". This MK decision was then followed up by MA with the issuance of PERMA No.9/2017.

Fourth, Regulation of the Supreme Court of the Republic of Indonesia Number 7 of 2018 concerning Procedures for Submitting Applications for Review of Tax Court Decisions (hereinafter referred to PERMA No.7/2018). PERMA No.7/2018 was stipulated and promulgated on December 4, 2018. In this policy, MA views that the previous regulations, still have shortcomings and cannot accommodate developments. needs in the process of examining requests for review of tax court decisions at the MA, so they need to be refined again.

Article 3 paragraph (2) PERMA No.7/2018 confirms, a request for reconsideration is submitted 1 (one) time to the Supreme Court through the Tax Court. It is clear that MA policy is still related to the MK Decision Number: 34/PUU-XI/2013, dated March 6, 2014, which allows "*peninjauan kembali*" more than 1 (one) time and is of course in line with SEMA No.7/2014 which confirms the opposite. Through this circular letter, MA emphasized that MK Decision Number: 34/PUU-XI/2013, dated March 6, 2014, does not immediately abolish the legal norms governing "*peninjauan kembali*" applications as regulated in Article 24 paragraph (2) of Law No.14/1985 *jo* Law No.5/2004 *jo* Law No.3/2009, so that requests for "*peninjauan kembali*" in criminal cases are limited to only 1 (one) time.

Article 4 PERMA No.7/2018 stipulates, requests for judicial review are submitted in writing by the applicant, heirs, or legal representatives specially appointed for this purpose, stating the reasons and attaching evidence. This provision is in accordance with the MK Decision Number: 33/PUU-XIV/2016, dated May 12, 2016. In this decision the MK considers it important to reaffirm that the norm of Article 263 paragraph (1) of the KUHAP is a constitutional norm as long as it is not interpreted other than that of review Returns can only be submitted by the convict or his heirs, and may not be submitted against a decision of acquittal and release from all legal demands. Different interpretations of these norms will give rise to legal uncertainty and injustice which will actually make them unconstitutional. For this

reason, the MK needs to emphasize that for the sake of fair legal certainty the norm of Article 263 paragraph (1) of the KUHAP becomes unconstitutional if interpreted differently.

Fifth, Circular Letter of the Supreme Court of the Republic of Indonesia Number 4 of 2021 concerning the Implementation of Several Provisions in Handling Criminal Acts in the Tax Sector (hereinafter referred to SEMA No.4/2021). Although SEMA No.4/2021 does not directly mention it as a policy that will follow up on the MK decision, but there is a related regulatory formulation. In fact, it can relatively address the legal vacuum regarding the MK decision which has not been followed up by the DPR or the President, but specifically in handling criminal acts in the field of taxation.

The setting referred to above is number 2 SEMA No.4/2021 which formulates, pre-trial related to criminal acts in the field of taxation shall be tried by the district court in the jurisdiction where the investigator is located or the position of the public prosecutor in the event of a request to dismiss the prosecution. At the very least, this arrangement can be interpreted to fill the legal vacuum resulting from the MK Decision Number: 21/PUU-XII/2014, dated April 28, 2015, which expands the provisions of Article 77 letter a of the KUHAP regarding pretrial. However, this follow-up is specifically in handling criminal acts in the field of taxation.

On the other hand, in terms of institutional structure, the Kediri City District Prosecutor's Office (Kejari Kota Kediri) cannot be separated from the Attorney General's Office of the Republic of Indonesia (Kejagung) as the highest prosecutorial institution in Indonesia. According to Article 5 of Law of the Republic of Indonesia Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia (hereinafter referred to Law No.16/2004), it states that there is a "Kejaksaan Tinggi" and a "Kejaksaan Negeri" after "Kejagung". This means that this arrangement confirms that the Kejagung is the highest prosecutorial institution in Indonesia.

These structural conditions influence the policies that need to be issued in order, for example, to follow up on MK decisions regarding changing norms in criminal procedural law, especially in the KUHAP. Therefore, the Kejari Kota Kediri has no authority to publish it. Thus, to ensure follow-up to the MK decision regarding criminal procedural law by the Kejari Kota Kediri, it can be seen in the policy issued by the Kejagung.

Throughout the researcher's search on relevant legal documentation and information network pages, the Kejagung did not issue regulations specifically intended to follow up on MK decisions regarding criminal procedural law in Indonesia, especially in the KUHAP. In fact, in several regulations issued by the Kejagung after several MK decisions which stated several articles in the KUHAP were unconstitutional and did not have binding legal force, they also never mentioned it in the "Menimbang" section of the considerations, as is often done by MA, both in PERMA or SEMA.

Furthermore, in terms of institutional structure, the Kediri City Police Department (Polres Kota Kediri) cannot be separated from the National Police of the Republic of Indonesia (Polri) as the highest police institution in Indonesia. According to Article 8 paragraph (2) of Law of the Republic of Indonesia Number 2 of 2002 concerning the National Police of the Republic of Indonesia (hereinafter referred to Law No.2/2002) determines that the police institution is led by a chief with the title "Kapolri". Kapolri, as stated in Article 9 paragraph (1) of Law No.2/2002 has the authority to determine, implement and control police technical policies. This provision emphasizes that the highest policy in the Polri is the authority of the Kapolri, so that the Polri is the highest police institution in Indonesia.

These structural conditions influence the policies that need to be issued in order, for example, to follow up on MK decisions regarding changing norms in criminal procedural law, especially in the KUHAP. Therefore, the Polres Kota Kediri have no authority to publish it.

Thus, to ensure the follow-up to the MK decision regarding criminal procedural law by the Polres Kediri, it can be seen in the policy issued by the Polri.

Several regulations in the Regulation of the Chief of the National Police of the Republic of Indonesia Number 6 of 2019 concerning Investigation of Criminal Acts (hereinafter referred to PerKap No.6/2019) seek to follow up on MK decisions regarding criminal procedural law. The intended follow-up is for the Polri to adjust several arrangements in PerKap No.6/2019 which was stipulated on October 4, 2019, is in accordance with several MK decisions which changed several articles in the KUHAP.

First, Article 1 number 9 PerKap No.6/2019 formulates, a suspect is someone who, because of his actions or circumstances, based on 2 (two) valid pieces of evidence supported by evidence, is reasonably suspected of being the perpetrator of a criminal act. Such a formulation is also confirmed in Article 25 paragraph (1) of PerKap No.6/2019, the determination of a suspect is based on at least 2 (two) pieces of evidence supported by evidence. The use of the phrase "based on 2 (two) valid pieces of evidence" is in accordance with the MK Decision Number: 21/PUU-XII/2014, dated April 28, 2015.

Second, Article 10 number 9 PerKap No.6/2019 formulates, a witness is a person who can provide information in the context of investigation, prosecution and trial of a criminal act that he himself heard, saw for himself and experienced for himself, including those that he did not always hear for himself, saw for himself and experienced for himself. The formulation of *de auditu* witnesses is in accordance with the MK Decision Number: 65/PUU-VIII/2010, dated August 18, 2011.

However, the use of "*de auditu*" witnesses cannot be applied directly as the strongest evidence, so their strength is independent, that is, it depends on the judge's judgment and belief. If "*de auditu*" witnesses are to be used as evidence, they must be part of the indicative evidence. This is in view of the provisions of Article 188 paragraph (1) of the KUHAP which provides limitations regarding indicative evidence. Referring to the concept of "*de auditu*" witnesses and linked to the provisions of Article 188 paragraph (1) of the KUHAP, *de auditu* witnesses can only be used as evidence during trials, not investigations.

Third, Article 21 paragraph (3) PerKap No.6/2019 stipulates, in the event of an illegal confiscation based on a pre-trial decision, the confiscated items must be immediately returned from the moment the decision is read or a copy of the decision is received. This formulation confirms that confiscation is included as one of the pretrial objects following the MK Decision Number: 21/PUU-XII/2014, dated April 28, 2015.

Fourth, Article 14 paragraph (1) PerKap No.6/2019 stipulates, notification letter for commencement of investigation (SPDP) as intended in Article 13 paragraph (3) is sent to the public prosecutor, reporter/victim, and reported party no later than 7 (seven) days after the Investigation Order Letter is issued. Such formulation is in accordance with MK Decision Number: 130/PUU-XIII/2015, dated January 11, 2017.

Follow-up by the Polri through several arrangements in PerKap No.6/2019 is in fact in accordance with several MK decisions which changed several articles in the KUHAP. However, this initiative actually violates Article 10 paragraph (2) of Law No.12/2011, because those who have the authority to follow up are the DPR or the president. In addition, considering that what has changed is the formulation of regulations in a law, the follow-up action should be through changes to the law, not internal institutional regulations.

Overall, the follow-up to the MK decision regarding criminal procedural law in Indonesia was in fact not followed up through changes to the law, but through internal institutional arrangements. Considering that criminal law enforcement contains constitutional considerations between individual freedom and the state's right to punish, it is appropriate that regulations regarding penal measures be regulated by law, not sectorally, which can give

rise to problems of one-sided interpretation and disparities in the handling of criminal cases. On the other hand, concerns about transactional practices are not excessive.

Meanwhile, taking into account several MK decisions regarding criminal procedural law, the MK has created new legal arrangements in criminal procedural law without going through the legislative process. Take, for example, MK Decision Number: 21/PUU-XII/2014, dated April 28, 2015, which expands pretrial authority²³. Applicants in pre-trial applications regarding whether or not the suspect's determination is valid can directly refer to the decision as the legal basis for their application, because the decision that changes the provisions of Article 77 letter a of the KUHAP is at the same level as the law.

The implementation of the MK Decision Number: 21/PUU-XII/2014, April 28, 2015, in the enforcement of criminal law in the City of Kediri can be found, for example, in several pretrial criminal cases that were received, examined and decided at the PN Kota Kediri. As of February 17, 2023, it was recorded that there were 3 (three) pretrial criminal cases related to whether or not the determination of the suspect was valid, namely in cases with registration numbers 3/Pid.Pra/2018/PN.KDR, 5/Pid.Pra/2018/PN.KDR, and 1/Pid.Pra/2023/PN.Kdr.²⁴

By using the original intent approach through the original meaning theory, it can be seen that the MK formulators were faced with the reality that case resolution had to be carried out quickly. Valina Singka Subekti stated that the atmosphere during the formulation of the MK was the basis for the MK decision to be placed at the first and last level.²⁵ However, the MK is often seen as having changed its role from *negative legislature* to *positive legislature*. The MK makes itself the third chamber in the legislative process which can influence the legislative body.²⁶

According to Pattaniari Siahaan, the formulation of 9 (nine) constitutional judges was also in line with the atmosphere during the formulation of the MK which emphasized that the resolution of cases in the MK could take place quickly, but representatively.²⁷ Because the MK was formulated as an interpreter of the constitution, it is appropriate that the interpretation is only carried out 1 (one) time and then becomes binding.²⁸ From the beginning to the end of the discussion there was no detailed debate regarding the nature of the MK decision, so that

²³ Through the MK Decision Number: 98/PUU-X/2012, dated 21 May 2013, the MK interpreted the phrase "*pihak ketiga yang berkepentingan*" in the formulation of Article 80 of the KUHAP, witnesses, victims or reporters, non-governmental organizations or community organizations are included. See related research, among others, in Pratiwi Rhiyany Siar, "Politik Hukum Praperadilan Dalam Rangka Penegakan Hukum Pasca Keluarnya Putusan Mahkamah Konstitusi No. 98/PUU-X/2012," *Lex Administratum* 7, no. 1 (2019): 82-83.; and Dita Aditya, Otto Yudianto, and Erny Herlin Setyorini, "Kedudukan Pihak Ketiga Terhadap Permohonan Praperadilan," *PAJOUUL (Pakuan Justice Journal of Law)* 1, no. 1 (2020): 67-69.

²⁴ Pengadilan Negeri Kediri, "Daftar Perkara Pidana Praperadilan," Sistem Informasi Penelusuran Perkara Pengadilan Negeri Kediri, 2023, http://sipp.pn-kediri.go.id/list_perkara/type/c1J0UkNaUnN6ZkZ0RzBsVEMwOEt5eGJBSitBV1E5RUFzRWFUejN3T2V0Z3JCaWtsSExqYVd1TjFYMFZuQ2NpNnBrM1RjNFJGT1U0L3pTQWdheGNGU2c9PQ==.

²⁵ Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia: Buku VI Kekuasaan Kehakiman (Edisi Revisi)* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, 2010), 472.

²⁶ Asy'ari, Hilipito, and Ali, "Model Dan Implementasi Putusan Mahkamah Konstitusi Dalam Pengujian Undang-Undang (Studi Putusan Tahun 2003-2012)," 633-34.

²⁷ Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia: Buku VI Kekuasaan Kehakiman (Edisi Revisi)*, 534.

²⁸ Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, 484.

according to the UUD NRI 1945, Amendment III, the MK decision was the first and last level decision which was final.²⁹

Ahmad Syahrizal is of the opinion that the articulation of the final decision cannot be compared. The normative consequence is that the decision must be binding³⁰ and cannot be repeated³¹. Fajar Laksono Soeroso emphasized that the meaning of binding was implied in the final decision. This means that no further legal action can be taken. Therefore, the decision directly has permanent legal force and has binding legal force to be implemented.³²

The MK Decision Number 129/PUU-VII/2009 and the MK Decision Number 36/PUU-IX/2011, according to Maruarar Siahaan, have clearly demonstrated that the decisions issued by the MK are clearly non-negotiable and are final and binding³³, so that the MK decision is both the first resort and the last resort for *justitiabelen*³⁴. The measure, firstly, can be seen from the existence or not of a body authorized by law to carry out a review of the court decision. Second, it can be seen from whether or not there is a mechanism according to procedural law regarding who and how the review will be carried out.³⁵

The final and binding nature of the MK decision shows, firstly, that the MK decision directly has legal force.³⁶ Second, there are no other legal remedies that can be taken against the MK decision. Such a decision means that it has permanent and binding legal force, so that it can provide legal certainty quickly in accordance with the principles of fast and simple justice.³⁷ Third, the MK decision has legal consequences for all parties related to the decision, both state officials and citizens, so that the MK decision is *erga omnes* (addressed to everyone).³⁸

Then, legal certainty is a characteristic that cannot be separated from law, especially for written legal norms. Laws without the value of legal certainty will lose meaning, because they can no longer be used as guidelines for behavior for everyone.³⁹ Clarity of norms due to the presence of the principle of legal certainty can be used as a guide for society as subjects subject to the law. This is intended to avoid causing many misinterpretations.⁴⁰ In the context of legal practice, legal certainty is one of the conditions that must be fulfilled, namely that it is justifiable against arbitrary actions, which means that a person will be able to obtain something that is expected in certain circumstances.⁴¹

²⁹ Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, 595.

³⁰ Ahmad Syahrizal, "Problem Implementasi Putusan MK," *Jurnal Konstitusi* 4, no. 1 (2007): 115.

³¹ Dahlan Thaib, *Ketatanegaraan Indonesia Perspektif Konstitusional* (Yogyakarta: Total Media, 2009), 256.

³² Fajar Laksono Soeroso, "Implikasi Dan Implementasi Putusan Mahkamah Konstitusi Nomor 5/PUU-X/2012 Tentang SBI Atau RSBI," *Jurnal Konstitusi* 10, no. 4 (2013): 739. See also, Eddi Maulizar, Dahlan Ali, and M. Jafar, "Implementasi Putusan Mahkamah Konstitusi Nomor 130/PUU-XIII/2015 Tanggal 11 Januari 2017 Oleh Penyidik Dan Jaksa Terkait Surat Pemberitahuan Dimulainya Penyidikan (SPDP) Di Wilayah Hukum Pengadilan Negeri Banda Aceh," *Syiah Kuala Law Journal* 3, no. 1 (2019): 67.

³³ Look, Maulidi, "Problematika Hukum Implementasi Putusan Final Dan Mengikat Mahkamah Konstitusi Perspektif Negara Hukum," 545.

³⁴ Bambang Sutiyoso, *Hukum Acara Mahkamah Konstitusi Republik Indonesia* (Bandung: PT Citra Aditya Bakti, 2006), 160.

³⁵ Siahaan, "Peran Mahkamah Konstitusi Dalam Penegakan Hukum," 275.

³⁶ Fajar Laksono Soeroso, "Aspek Keadilan Dalam Sifat Final Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 11, no. 1 (2014): 65.

³⁷ Soeroso, 78.

³⁸ Siahaan, "Peran Mahkamah Konstitusi Dalam Penegakan Hukum," 208-9.

³⁹ Fence M. Wantu, "Antinomi Dalam Penegakan Hukum Oleh Hakim," *Mimbar Hukum* 19, no. 3 (2007): 388.

⁴⁰ Tata Wijayanta, "Asas Kepastian Hukum, Keadilan, Dan Kemanfaatan Dalam Kaitannya Dengan Putusan Kepailitan Pengadilan Niaga," *Dinamika Hukum* 14, no. 2 (2014): 219.

⁴¹ Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar)* (Yogyakarta: Maha Karya Pustaka, 2020), 160.

Legal certainty contains 2 (two) meanings. First, the existence of general rules makes individuals know what actions they can or cannot do. Second, legal certainty is in the form of legal security for individuals from government arbitrariness because with the existence of general rules, individuals can know what the state can impose or do on individuals. Strictly speaking, legal certainty is not only in the form of articles in the law, but also consistency in judges' decisions between one judge's decision and another judge's decision for similar cases that have been decided.⁴²

Normatively, legal certainty is when a regulation is created and promulgated with certainty because it regulates clearly and logically. Clear in the sense that it does not give rise to doubt (multiple interpretations) and logical in the sense that it forms a system of norms with other norms, so that it does not clash or give rise to norm conflicts.⁴³ On the other hand, according to Maria S.W. Sumardjono, empirically, the existence of statutory regulations needs to be implemented consistently and consistently by supporting human resources.⁴⁴

Jan Michiel Otto expanded the definition of legal certainty into 5 (five) aspects, namely: (1) the availability of clear, consistent and easily accessible rules; (2) applied consistently by the governing body; (3) accepted by most members of society by adjusting their behavior; (4) applied by judges in dispute resolution; and (5) concrete implementation of court decisions.⁴⁵ Shidarta emphasized that legal certainty refers to the application of clear, permanent, consistent and consequent laws whose implementation cannot be influenced by subjective circumstances. Certainty and justice are not just moral demands, but factually characterize the law. A law that is uncertain and unwilling to be fair is not just a bad law, it is not a law at all. These two characteristics include understanding the law itself (*den begriff des rechts*).⁴⁶

When viewed from the perspective of the principle of legal certainty, it is necessary to follow up on the MK decision by the DPR or the President by forming a revision of the law. Referring back to several conceptions regarding the principle of legal certainty above, at least citizens know exactly what kind of legal regulations apply and receive legal protection for the application of these legal regulations to prevent arbitrariness by the authorities.

In the debate regarding the publication of SEMA No.7/2014 which determines that "*peninjauan kembali*" applications in criminal cases are limited to only 1 (one) time, MA emphasized that "*peninjauan kembali*" applications that are not in accordance with SEMA No.7/2014 to be declared inadmissible through the determination of the head of the court of first instance and the case files do not need to be sent to MA. This opinion and assertion by MA actually contradicts the MK Decision Number: 34/PUU-XI/2013, dated March 6, 2014. Muhammad Fatahillah Akbar called it a policy that deviated from the MK decision.⁴⁷ Such policies give rise to controversy, so that the principle of legal certainty is set aside.

However, if we look at the implementation of several MK decisions related to criminal procedural law, especially several articles in the KUHAP which were declared

⁴² Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Jakarta: Kencana, 2018), 137. Look also, Peter Mahmud Marzuki, *Teori Hukum* (Jakarta: Kencana, 2020), 125.

⁴³ Moch Choirul Rizal, *Kajian-Kajian Tentang Pembaruan Hukum Pidana Di Indonesia* (Cirebon: LovRinz Publishing, 2015), 43.

⁴⁴ Maria S.W. Sumardjono, "Kepastian Hukum Dalam Pendaftaran Tanah Dan Manfaatnya Bagi Bisnis Perbankan Dan Properti" (Jakarta, 1997), 1.

⁴⁵ Jan Michiel Otto, *Kepastian Hukum Di Negara Berkembang* (Jakarta: Komisi Hukum Nasional, 2003), 5.

⁴⁶ Shidarta, *Moralitas Profesi Hukum: Suatu Tawaran Kerangka Berfikir* (Bandung: PT Refika Aditama, 2006), 79-80.

⁴⁷ Muhammad Fatahillah Akbar, "Pengaruh Putusan Mahkamah Konstitusi Di Bidang Pengujian Undang-Undang Terhadap Sistem Peradilan Pidana Indonesia Dengan Perubahan KUHAP," *Jurnal Konstitusi* 16, no. 3 (2019): 466.

unconstitutional and do not have binding legal force on others, in the enforcement of criminal law in the City of Kediri, the realization of the principle of legal certainty has been guaranteed through policy. in each centralized law enforcement agency. Although later the criticism was that this policy was still partial and could lead to one-sided interpretations and disparities in the handling of criminal cases.

4. Conclusions

The MK decision regarding criminal procedural law was not followed up by amending the KUHAP, but by internal regulations of criminal law enforcement institutions in Indonesia. An example is the publication of SEMA No.7/2014 which confirms that “*peninjauan kembali*” in criminal cases can only be carried out once. These internal regulations actually conflict with the MK Decision Number: 34/PUU-XI/2013, dated March 6, 2014. However, the PN Kota Kediri actually follows SEMA No.7/2014, because in its institutional structure it is under the MA. Thus, the follow-up to several MK decisions regarding criminal procedural law in enforcing criminal law in Kediri City has realized the principle of legal certainty, except for law enforcement which is based on SEMA No.7/2014. Therefore, the DPR together with the President need to follow up on several MK decisions regarding criminal procedural law, especially several articles in the KUHAP which were declared unconstitutional and do not have binding legal force, by immediately revising the KUHAP.

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