



## DECISION

Number 114/PUU-X/2012

**FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD  
THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA**

[1.1] Hearing constitutional cases at the first and final levels, has passed a decision in the case of petition for Judicial Review of Law Number 8 Year 1981 concerning the Criminal Procedure (Criminal Procedure Code) against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] Name : **Dr. H. Idrus, M. Kes**  
Occupation : Retired Civil Servant  
Address : Jalan Ahmad Yani, Number 10, Lubuksikaping,  
West Sumatera

Hereinafter referred to as -----**the  
Petitioner;**

[1.3] Having read the petition of the Petitioner;

Having heard the statements of the Petitioner;

Having examined the evidence of the Petitioner;

Having heard and read the statements of the Government;

Having read the written statements of the People's Legislative Assembly;

Having read the conclusion of the Petitioner;

## **2. FACTS OF THE CASE**

**[2.1]** Considering whereas the Petitioner has filed a petition dated October 31, 2012, received at the Registrar's Office of the Constitutional Court (hereinafter referred to as the Registrar's Office of the Court) on November 1, 2012, based on Deed of Petition File Receipt Number 416/PAN.MK/2012 and recorded in the Registry of Constitutional Cases on November 19, 2012, under Number 114/PUU-X/2012, which has been revised and received at the Registrar's Office of the Court on December 4, 2012, and which substantially states the following matters:

### **A. Authority of the Constitutional Court**

1. Whereas the Petitioner requested the Constitutional Court to review Article 244 of Law Number 8 Year 1981 concerning the Criminal Procedure Code, which completely reads: “With regard to a criminal case decision rendered at the final level by a court other than the Supreme Court, an accused or the Public Prosecutor may lodge a request for cassation appeal examination to the Supreme Court **except with regard to an acquittal**” against:
  - Article 1 paragraph (3) of the 1945 Constitution which reads *“The State of Indonesia is a state based on Law”*.
  - Article 27 paragraph (1) of the 1945 Constitution which reads *“All citizens shall have an equal position before the law and government and shall be obligated to uphold the law and government without exception”*.
  - Article 28D paragraph (1) of the 1945 Constitution which reads *“Every person shall have the right to the recognition, guarantee, protection and legal certainty of just laws as well as equal treatment before the law”*.
2. Whereas Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945

Constitution) states that, “Judicial power shall be exercised by a Supreme Court and its inferior courts in the jurisdiction of general courts, the state administration courts, and by a Constitutional Court”.

3. Whereas the provision of Article 24C paragraph (1) of the 1945 Constitution states that the Constitutional Court has the authority to hear cases at the first and final levels, the decision of which shall be final, to review Laws against the Constitution. Article 10 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 concerning the Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (hereinafter referred to as the Constitutional Court Law) confirms the same, namely by stating that the Constitutional Court shall have authority to hear cases at the first and final levels, the decision of which shall be final, among other things “review Law Number 48 Year 2009 concerning General Court which states that: “The Constitutional Court shall have authority to hear cases at the first and final level, the decision of which shall be final,” among other things to “review Laws against the 1945 Constitution of the State of the Republic of Indonesia”;
4. Whereas Article 7 paragraphs (1) and (2) *juncto* Article paragraph

(1) of Law Number 12 Year 2011 concerning the Formulation of Laws and Regulations states that: "In the event of any law alleged to be inconsistent with the 1945 Constitution of the State of the Republic of Indonesia, the review shall be **conducted by the Constitutional Court.**

5. Based on the explanation in points 1, 2, 3, and 4 above, the Petitioner is totally convinced (*haqqul yaqien*) that the Constitutional Court has authority to hear the judicial review petition.

#### **B. Legal Standing of the Petitioner**

1. The Petitioner is an individual Indonesian citizen considering that his constitutional rights and/or authority are impaired by the coming into effect of Article 244 of the Criminal Procedure Code
2. Whereas in filing this petition, the Petitioner acts in personal capacity or qualification as an Indonesian citizen holding Indonesian citizen's Identity Card and therefore he can act on his own behalf without any permission and without being able to be considered representing other categories except as individual.
3. Whereas as an Indonesian citizen, the Petitioner has constitutional

rights granted by the 1945 Constitution, namely the rights as stated in Article 28D paragraph (1) of the 1945 Constitution which reads: ***“Every person shall have the right to the recognition, guarantee, protection and legal certainty of just laws as well as equal treatment before the law”***.

4. Whereas the permanent Jurisprudence of the Constitutional Court, as set forth in Decision Number 006/PUU-III/2005 *juncto* Decision Number 11/PUU-V/2007 and the subsequent decisions, has provided a cumulative interpretation and definition of what is intended with “constitutional impairment” due to the coming into effect of a Law norm, namely:
  - a. the existence of constitutional rights of the Petitioner granted by the 1945 Constitution of the State of the Republic of Indonesia.
  - b. the Petitioner considers that such constitutional rights have been impaired by the Law petitioned for review.
  - c. the intended constitutional impairment of the Petitioner is specific (special) and actual, or at least potential in nature which, pursuant to logical reasoning, can be assured of

occurring.

- d. there is a causal relationship (*causal verband*) between such impairment and the coming into effect of the Law petitioned for review.
  - e. there is a possibility that with the granting of the petition, such constitutional impairment will not or will no longer occur.
5. **Whereas with regard to the above-mentioned requirement in number 4 letter (a) concerning the existence of the Petitioner's Constitutional Rights granted by the 1945 Constitution, the Petitioner confirms** that his Constitutional Rights are in the form of the right to the recognition, guarantee, protection, legal certainty of just laws and equal treatment before the law as provided for in Article 28D paragraph (1) of the 1945 Constitution as a consequence of Indonesia's being a State based on Law [article 3 paragraph (1) of the 1945 Constitution].
6. **Whereas with regard to the above-mentioned requirement in number 4 letter (b), the Petitioner's Constitutional Rights have been impaired by the Law under review.** Meanwhile, Article 244

of the Criminal Procedure Code contains a norm with very explicit formulation of words causing the Petitioner to lose the guarantee to obtain “legal certainty of just law”. The norm contained in the phrase “**except with regard to an acquittal**” does not provide any express prohibition for a Public Prosecutor to file a cassation appeal, and therefore it puts the Petitioner in the position of not obtaining legal certainty of just laws. It means that based on such formulation of words, there is no certainty for the Petitioner regarding whether a Public Prosecutor **may** or **may not** file a cassation appeal to the Supreme Court.

7. **Whereas with regard to the requirement in number 5 letter (c) the impairment is specific or special and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring.** Whereas on June 19, 2008, the Lubuk Sikaping District Court, through the registration of case Number 55/PID/2007/PN.Lbs, specifically and actually passed a decision on the Petitioner which stated that the Petitioner was not legally and convincingly proven to have committed the criminal act he was charged with, therefore the Lubuk Sikaping district court has released the Petitioner from all accusations of the Public Prosecutor. Based on this fact, the Petitioner, who initially obtained

the certainty based on Article 244 of the Criminal Procedure Code, namely that the Public Prosecutor may not file a cassation appeal, became impaired when, based on the same article, the Public Prosecutor filed a cassation appeal to the Supreme Court on July 9, 2008. He is impaired because initially he was certain to be released but then he was in a position of UNCERTAIN TO BE RELEASED. When the Public Prosecutor filed a cassation appeal on July 9, 2008, the impairment in the form of the lost guarantee or certainty would occur because **pursuant to logical reasoning, it could be assured of** that the Supreme Court would accept the cassation appeal filed by the Public Prosecutor.

8. **Whereas with regard to the requirement in number 4 letter (d), there is a causal relationship (*causal verband*) between such impairment and the coming into effect of the Law petitioned for review.** The Petitioner's impairment is in the form of the lost guarantee of legal certainty due to the inexplicit formulation of Article 244 of the Criminal Procedure Code. If the formulation of Article 244 of the Criminal Procedure Code explicitly determines: ***for any reason whatsoever and howsoever with regard to an acquittal***, a Public Prosecutor is PROHIBITED to file a cassation appeal, and the Petitioner will not be impaired by such "certain"

formulation.

9. **Whereas with regard to the requirement of number 5 letter (e), with the granting of the petition, such constitutional impairment argued will not or will no longer occur.** Whereas the Petitioner petitions for enforcement of the Petitioner's constitutional rights in the form of the recognition, guarantee, protection, legal certainty of just laws and equal treatment before the law. The words "of just laws" here is in the form of certainty, although the form of such "certainty" allows a Public Prosecutor to file a cassation appeal against all acquittals, but the Petitioner considers it just because it is based on a certainty. If it can be assured from the beginning that based on Article 244 of the Criminal Procedure Code, a Public Prosecutor may indeed file a cassation appeal; the Petitioner will not feel impaired. Therefore, if the phrase "except with regard to an acquittal" is omitted from Article 244 of the Criminal Procedure Code, Article 244 will become certain in nature, and if it becomes "certain", the Petitioner's Constitutional Rights **argued will not or will no longer occur** because the Petitioner will consider it just, since it is understood as a certainty which constitutes the Public Prosecutor's right to be allowed to file a cassation appeal.

10. Whereas based on the arguments explained above, the Petitioner has fulfilled the provisions of Article 51 paragraph (1) of the Constitutional Court Law and has fulfilled the requirements as set forth in Decision Number 006/PUU-III/2005; therefore, the Petitioner has legal standing to act as the Petitioner in this petition for judicial review.

### **Additional Arguments**

1. Whereas law exists for justice seekers, and with such paradigm, if justice seekers face a legal issue, it is not **“the justice seekers who are to be blamed” but law enforcers must do something in relation to the existing law, including reviewing the applicable principles/norms, doctrines, substance and procedures.**
2. Whereas law exists among the community to be implemented not only according to the letter of the regulations, but also according to the spirit and the very meaning of Laws or law. The law is implemented not only by using spiritual intelligence. The law must be implemented with determination, empathy, dedication, commitment to the nation's suffering to dare to seek other ways in order to achieve the truth, justice, and legal certainty for justice

seekers.

3. Stipulation of the People's Consultative Assembly of the Republic of Indonesia Number III Year 2000 has stipulated legal sources and hierarchy of laws and regulations as sources of legal order applicable in Indonesia, namely:
  - 1) The 1945 Constitution.
  - 2) Stipulation of the People's Consultative Assembly.
  - 3) Law.
  - 4) Government Regulation in Lieu of Law.
  - 5) Government Regulation.
  - 6) Presidential Decree which is regulatory in nature.
  - 7) Regional Regulation.
4. Drs. M. Sofyan Lubis S.H,

Article 244 of Law Number 8 Year 1981 concerning the Criminal Procedure Code does not recognize **Conditional acquittal**.

Whereas with regard to the reasons of District Attorneys/Public Prosecutors who continue to file a cassation appeal against a unconditional acquittal, they will always provide the arguments, among other things, that 1) the District Court or the High Court (*judexfactie*) has incorrectly applied the law of proof as intended in Article 185 paragraphs (3) and (6) of the Criminal Procedure Code; 2) the hearing method implemented by *judexfactie* is not in accordance with the provisions of Law; 3) the Decision of *Judexfactie* is not a unconditional acquittal (*vrijspraak*), but an “conditional acquittal”.

Meanwhile, the legal argument used by District Attorneys/Public Prosecutors in filing a cassation appeal against an acquittal is always the same, namely by referring to Decree of the Minister of Justice Number M.14-PW.07.03 Year 1983 dated December 10, 1983 concerning Supplement to the Implementing Guidelines of the Criminal Procedure Code, in which the 19<sup>th</sup> point thereof explains, “An appeal cannot be filed against an acquittal; however, based on situation and condition, for the sake of law, justice and truth, a cassation appeal can be filed against an acquittal.” This is based on the jurisprudence.

Essentially, this Supplement to Implementing Guidelines of the Criminal Procedure Code confirms the necessity for the Jurisprudence which serves as reference to file a Ministry of Justice an acquittal. Therefore, if there is a question of what are the criteria of the Supplement to Implementing Guidelines of the Criminal Procedure Code with regard to the sentence "...based on situation and condition, for the sake of law, justice and truth, a cassation appeal can be filed against an acquittal", the Supplement to Implementing Guidelines of the Criminal Procedure Code does not provide explicit criteria in addition to being merely based on the unilateral interpretation of District Attorneys/Public Prosecutors. Meanwhile, actually, we really know that the Supplement to Implementing Guidelines of the Criminal Procedure Code is Decree of the Minister of Justice Number M.14.PW.07.03 Year 1983 concerning Supplement to Implementing Guidelines of the Criminal Procedure Code, and the level of such Decree of the Minister of Justice is far below the Law, in this case Law Number 8 Year 1981 concerning the Criminal Procedure Code which is a legislative and executive product. Therefore, the content of the relevant Supplement to Implementing Guidelines of the Criminal Procedure Code is inconsistent with the Criminal Procedure Code itself, so that the legal effort made by Public Prosecutors against an acquittal

is legally defective and cannot be tolerated.

It can be legally ascertained that the Supplement to Implementing Guidelines of the Criminal Procedure Code and the Jurisprudence are not strong enough or can no longer serve as legal argument for District Attorneys/Public Prosecutors to file a cassation appeal against an acquittal as intended in the aforementioned Article 244 of the Criminal Procedure Code because the Supplement to Implementing Guidelines of the Criminal Procedure Code, which is a product of Decree of the Minister of Justice and the Judge's Decision with permanent legal force which has become Jurisprudence since 2000 is not a source of legal order applicable in Indonesia.

The jurisprudence in an acquittal cannot serve as legal argument for District Attorneys/Public Prosecutor, especially considering that many Judges, in deciding a case, adhere to the "opportunity" principle which in turn leads to inexplicitness as to whether or not a Jurisprudence can serve as legal source. This happens because on the one hand, they (the Judges) follow the doctrine of legism in deciding upon a case, for the reason that they may not deviate from what has been regulated in Laws, while on the other hand, they follow the doctrine of "*Rechtsvinding*" for the

reason of harmonizing the Laws with the demands of this era. In fact, it is not seldom that it occurs in the practice that the “Opportunity” principle gives birth to a tendency which is based on the personal interest of the Judge concerned, and therefore, it is time for the position of “Jurisprudence” to be returned to its initial purpose, namely that Jurisprudence can only serve as a reference and is useful to fill in legal vacuum when, in a case or legal effort, there are no legal rules or laws and regulations which regulate it explicitly.

The explicitness of the legal argument used by Public Prosecutors as the ground to always file a cassation appeal against an “Acquittal”, in addition to being inconsistent with Stipulation of the People’s Consultative Assembly of the Republic of Indonesia Number III Year 2000 concerning the legal order applicable in Indonesia, is also inconsistent with the Universal legal principle of *Lex Superior derogat legi inferiori* (the principle which confirms that a hierarchically higher law supersedes a hierarchically lower law.

5. Wise men say that it is better to release 1,000 (one thousand) guilty men than to punish 1 (one) innocent man.
6. Letter of Annisa’ verse 135 in the Qur’an

“O ye who believe, be ye upholders of justice on earth, bearing witness for Allah, even against yourselves or against your Father and Mother and relatives, if he is rich or poor, Allah knows better about his benefit. Therefore, do not follow your own desires and deviate from the truth, if ye distort (words) or decline to be a witness for the sake of justice, then know that Allah knows best against all that ye do”.

7. It is highly illogical that the Public Prosecutor accused the Petitioner of having committed corruption by enriching himself in the amount of Rp. 1,200,000.- (one million two hundred thousand rupiah) with the primary accusation of imprisonment of 4 years and a pecuniary sanction of Rp. 200,000,000.- (two hundred million rupiah), with the subsidiary imprisonment of 1.5 years, while actually it should have been appropriately known that at that time, the Petitioner was a 2<sup>nd</sup> Echelon structural official and the Petitioner's Wife was a 3<sup>rd</sup> Echelon Structural official.

It is also highly illogical that the Supreme Court of the Republic of Indonesia, in responding to the request for examination of cassation from the Public Prosecutor, has not made a decision for the Petitioner for more than 4 years until now, so that the

Petitioner is anxious and depressed due to the uncertainty of the legal process itself.

8. The Petitioner agrees that Indonesia is actively eradicating corruption; however, do not force a person, who does not commit any corruption, to be involved in corruption, in which the Public Prosecutor has evidently told a 90% lie in the his memorandum of cassation without any single institution supervising the truth of the memorandum of cassation of the Public Prosecutor.

### **C. Reasons for the Petition**

Meanwhile, the Petitioner's reasons are as follows:

1. Whereas the Petitioner argues that the Petitioner's Constitutional Right guaranteed by Article 28D paragraph (1) of the 1945 Constitution has been impaired because the formulation of norm provided for in Article 244 of the Criminal Procedure Code is multi-interpretable in nature. The content of the formulation of Article 244 of the Criminal Procedure Code is: "*With regard to a criminal case decision rendered at the final level by a court other than the Supreme Court, an accused or the Public Prosecutor may lodge a request for cassation appeal examination to the Supreme Court*

*except with regard to an acquittal.”*

2. Whereas initially, when the Lubuk Sikaping District Court passed a decision which released the Petitioner on June 19, 2008, the Petitioner believed that the decision was final, because based on the provision of Article 244 of the Criminal Procedure Code, the Public Prosecutor could not exercise the legal remedy of cassation appeal. However, in reality the Public Prosecutor exercised the remedy of cassation appeal based on Article 244 of the Criminal Procedure Code, because according to the Public Prosecutor, the word “acquittal” in this article was divided into two categories, namely “**unconditional acquittal**” and “**conditional acquittal**”.
  
3. Whereas the Public Prosecutor subsequently made an interpretation that if the Accused was decided to be released, while in his opinion such acquittal was **not an unconditional acquittal**, the Public Prosecutor had the right to file a cassation appeal to the Supreme Court based on the provision of Article 244 of the Criminal Procedure Code. Therefore, the provision of Article 244 of the Criminal Procedure Code has two different interpretations. From the point of view of the accused, the Public Prosecutor **may not file any cassation appeal** while from the Public Prosecutor’s point of view, he **may file a cassation appeal**.

4. Whereas therefore, **the norm of Article 244 of the Criminal Procedure Code has caused uncertainty for the Petitioner and such uncertainty has impaired his Constitutional Rights as provided for in Article 28D paragraph (1) of the 1945 Constitution.**
5. Whereas as a consequence of Indonesia's being a State based on Law [Article 1 paragraph (3) of the 1945 Constitution], the law must certainly be enforced and the good citizens must uphold the law [Article 27 paragraph (1) of the 1945 Constitution], both as an accused and especially as a Public Prosecutor.
6. Whereas in the Petitioner's opinion, the phrase "*except with regard to an acquittal*" contained in Article 244 of the Criminal Procedure Code is a source of legal uncertainty. Therefore, if the phrase is omitted from the provision of Article 244 of the Criminal Procedure Code, it will provide legal certainty, because in that way, it will lead to the certainty of just laws, for both the accused and the Public Prosecutor since it is certain that both of them may file a cassation appeal, not depending on the result of the court's decision. Cassation appeal may be filed whether the court's decision is in the form of one which punishes the accused, or an unconditional or

conditional acquittal.

**C. *Petitum***

Whereas based on the legal grounds described above, the Petitioner requests that the Constitutional Court may grant the following matters:

1. To grant the Petitioner's petition in its entirety.
2. To declare that the phrase "*acquittal*" in Article 244 of Law Number 8 Year 1981 concerning the Criminal Procedure Code means unconditional acquittal or it also includes conditional acquittal;
3. To declare that the phrase "except with regard to an acquittal" in Article 244 of Law Number 8 Year 1981 concerning the Criminal Procedure Code is meaningless and has no binding legal force because it is inconsistent with the 1945 Constitution;

**or**

4. To declare that the phrase "except with regard to an acquittal" in Article 244 of Law Number 8 Year 1981 concerning the Criminal Procedure Code is conditionally meaningless (conditionally unconstitutional) except if it is interpreted as explicitly prohibiting

the Public Prosecutor from filing any memorandum of cassation appeal to the Supreme Court against an acquittal for any reason whatsoever including the reason of unconditional or conditional acquittal.

5. To order the promulgation of this decision properly in the Official Gazette of the Republic of Indonesia. Or, if the panel of justices of the Constitutional Court is of a different opinion, the decision is requested to be passed by principles of what is fair and just (*ex aequo et bono*).

**[2.2]** Whereas in order to prove his arguments, the Petitioner has presented documentary/written evidence marked as Exhibit P-1 up to and including P-8 as follows:

1. Exhibit P-1 Photocopy of the 1945 Constitution of the State of the Republic of Indonesia;
2. Exhibit P-2 Photocopy of Law Number 8 Year 1981 concerning the Criminal Procedure;
3. Exhibit P-3 Photocopy of Decision Number 55/PID.B/2007/PN.LBS;

4. Exhibit P-4 Photocopy of Letter from the Director General of Social Assistance and Security to the Regent of Agam concerning the Implementation of Cow Fattening Program, dated November 8, 2004;
5. Exhibit P-5 Photocopy of Cooperation Agreements between the Department of Social Affairs of the Republic of Indonesia and the Government of Agam Regency Number 53/HUK/2004 and Number 9 Year 2004 concerning the Integrated Program for Handling Poor People through the Fattening of Beef Cattle by Using Beef Cattle Waste;
6. Exhibit P-6 Photocopy of Memorandum of Cassation Appeal of the District Attorney Office of Lubuk Sikaping, dated July 9, 2008;
7. Exhibit P-7 Photocopy of Counter-Memorandum of Cassation Appeal against the Memorandum of Cassation Appeal in the Criminal Case Decided Upon with the Decision of the Court of Lubuk Sikaping dated June 19, 2008, with Registration Number 55/Pid.B/2007 PN-LBS;
8. Exhibit P-8 Photocopy of Article with entitled "The Criminal Procedure

Code does not recognize Conditional acquittal”

**[2.3]** Whereas with regard to the Petitioner’s petition, the Government has provided its statements during the court session on February 13, 2013, as follows:

### **Legal Standing of the Petitioners**

With regard to the legal standing of the Petitioners, the Government leaves it entirely to the Panel of Justices to examine and decide upon it;

### **Substance of the Petition**

With regard to the petition for review filed by the Petitioner, the Law *a quo* has been petitioned for review and decided upon by the Constitutional Court, among other things through Decision Number 17/PUU-VIII/2010, decision Number 56/PUU-IX/2011, and Decision Number 85/PUU-IX/2011. Some of the decisions declared that the Petitioners did not qualify and the decision was that the Petitioners’ petitions could not be accepted. The Constitutional Court’s consideration with regard to the previous three petitions is that Article 244 of the Criminal Procedure Code does not fall under the authority of the Constitutional Court, because it is related to the application in the law enforcement itself.

The Government is aware that some of the aforementioned Constitutional Court decisions have not examined the substance of the case. Therefore, the Government leaves it entirely to the Constitutional Court to decide upon it;

Article 60 of the Constitutional Court Law and Article 42 of the Constitutional Court Regulation regulated that against the material, content, paragraph, article, and/or part of a law petitioned for review, another review cannot be petitioned for except for other or different reasons. However, having carefully observed the Petitioner's petition, it turns out that what is petitioned for review is the same article and the articles which serves as the touchstone are also the same, namely Article 1 paragraph (3) and Article 28D paragraph (1) of the 1945 Constitution which are, among other things, related to justice and legal certainty. Therefore, in the Government's opinion, although the Constitutional Court's Decision with regard to the previous three decisions has been declared unacceptable, the Government remains on its standpoint that the petition cannot be filed with the Constitutional Court; in other words, the petition currently being filed by the Petitioner seems different or appears to be different indeed but basically there is similarity in purpose and objective. Therefore, it is appropriate that the Panel of Justices passes the decision that the Petitioner does not qualify as Petitioner with legal standing as provided for in Article 51 of Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 concerning the Amendment to Law Number 24 Year 2003 concerning the

Constitutional Court.

Whereas with regard to the material of the petition, the article petitioned for review is contained in the Draft Criminal Procedure Code Law, only the location is changed but the norm remains the same. It means that the Government is of the opinion that the norm has been appropriate and it is not inconsistent with the 1945 Constitution of the State of the Republic of Indonesia because it remains necessary in the context of providing the balance or sense of justice to the community itself. Therefore, to prevent the Government from being trapped in providing its statements, in the Government's opinion, the statements presented in the previous court sessions, and those presented by the experts, are, *mutatis mutandis*, also applicable to respond to the judicial review petition filed by the Petitioner;

**[2.4]** Whereas with regard to the Petitioner's petition, the People's Legislative Assembly presented its written statements which were received at the Registrar's Office of the Court on February 21, 2013, which explain as follows:

**A. The Provision of the Criminal Procedure Code Law Petitioned for Review against the 1945 Constitution of the State of the Republic of Indonesia**

In his petition, the Petitioner petitions for review of Article 244 of the

Criminal Procedure Code Law which reads as follows:

**Article 244 of the Criminal Procedure Code Law**

*“With regard to a criminal case decision rendered at the final level by a court other than the Supreme Court, an accused or the Public Prosecutor may lodge a request for cassation appeal examination to the Supreme Court except with regard to an acquittal.”*

The Petitioner considers the provision of Article 244 of the Criminal Procedure Code Law inconsistent with Article 18 paragraphs (1), (2), and (5), Article 27 paragraph (1), Article 28C paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia.

**B. The Constitutional Rights and/or Authority Considered by the Petitioner as Having Been Impaired by the Coming into Effect of the Criminal Procedure Code Law**

In the petition *a quo*, the Petitioner conveys that his constitutional right has been impaired and violated by the coming into effect of Article 244 of the Criminal Procedure Code which substantially is as follows:

I. Case Number 114/PUU-X/2012

a. Whereas the Petitioner is of the opinion that the Article *a quo*

contains a norm with inexplicit formulation of words, therefore causing the Petitioner to lose the guarantee for obtaining legal certainty of just laws as guaranteed by Article 28D paragraph (1) of the 1945 Constitution. Whereas the phrase “except with regard to an acquittal” in the provision of Article 244 of the Criminal Procedure Code Law does not provide an explicit prohibition for Public Prosecutors from filing a cassation appeal.

- b. Whereas in the Petitioner’s opinion, based on the decision of Padang District Court upon case Number 25/Pid.B/TPK/2011/PN.PDG, the Petitioner is declared not legally and convincingly proven guilty of committing a criminal act of corruption, but on June 8, 2012, the Public Prosecutor filed a cassation appeal to the Supreme Court. Such filing of cassation appeal prevents the fulfillment of the guarantee of certainty to be released for the Petitioner.

**C. Statements of the People’s Representative Assembly of the Republic of Indonesia**

With regard to the Petitioner’ arguments as explained in the Petition *a quo*, the People’s Representative Assembly has presented its statements as

follows:

**1. Legal Standing of the Petitioner**

The qualification which must be fulfilled by the Petitioner as a Party has been regulated in the provision of Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 (hereinafter abbreviated as the Constitutional Court Law), which states that “the Petitioners shall be the parties considering that their constitutional rights and/or authority are impaired by the coming into effect of a law, namely:

- a. individual Indonesian citizens;
- b. customary law community groups insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of Republic of Indonesia as regulated in law;
- c. public or private legal entities; or
- d. state institutions.

The constitutional rights and/or authority intended in the aforementioned provision of Article 51 paragraph (1) are confirmed in the elucidation thereof that “referred to as “constitutional rights” shall be rights regulated in the 1945 Constitution of the State of the Republic of Indonesia.” The provision of the Elucidation of Article 51 paragraph (1) confirms that only the rights explicitly regulated in the 1945 Constitution are categorized as “constitutional rights”.

Therefore, according to the Constitutional Court Law, for the persons or parties to be eligible as Petitioners having legal standing in a petition for judicial review of Law against the 1945 Constitution, they must first explain and substantiate:

- a. Their qualification as Petitioners in the petition *a quo* as intended in Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court;
- b. Their constitutional rights and/or authority as intended in the “Elucidation of Article 51 paragraph (1)” they consider to have been impaired by the coming into effect of the Law.

With regard to the parameters of constitutional impairment, the Constitutional Court has provided a definition and limitations of

constitutional impairment due to the coming into effect of Law, which must meet 5 (five) requirements (*vide* Decisions Number 006/PUU-III/2005 and Number 011/PUU-V/2007), namely as follows:

- a. the existence of constitutional rights/authority of the Petitioners granted by the 1945 Constitution;
- b. the Petitioners consider that such constitutional rights and/or authority have been impaired by the Law being reviewed;
- c. whereas the relevant Petitioners' impairment of such constitutional rights and/or authority is specific (special) and actual, or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
- d. the existence of causal relationship (*causal verband*) between the impairment and the coming into effect of the Law petitioned for review;
- e. the possibility that with the granting of the petition, the argued impairment of such constitutional rights and/or authority will not or will no longer occur.

If the aforementioned five requirements are not satisfied by the Petitioner in the case of judicial review of the Law *a quo*, then the Petitioner does not have the qualification of legal standing as Petitioner.

In response to the Petitioner's petition *a quo*, the People's Legislative Assembly views that the Petitioner must be able to prove first whether he is truly the party considering that his constitutional rights and/or authority have been impaired by the coming into effect of the provision being petitioned for review, particularly in construing the existence of impairment of his constitutional rights and/or authority as an impact of the coming into effect of the provision petitioned for review.

With respect to such legal standing, the People's Legislative Assembly leaves it entirely to the honorable Chief Justice/Panel of Justices of the Constitutional Court to consider and judge whether or not the Petitioner has legal standing as regulated in Article 51 paragraph (1) of the Constitutional Court Law and based on the Constitutional Court's Decisions Number 006/PUU-III/2005 and Number 011/PUU-V/ 2007. The People's Legislative Assembly leaves it entirely to the honorable Chief Justice/Panel of Justices of

the Constitutional Court to consider and judge whether or not the Petitioner has legal standing as regulated in Article 51 paragraph (1) of the Constitutional Court Law and based on the Constitutional Court's Decisions Number 006/PUU-III/2005 and Number 011/PUU-V/ 2007.

## **2. Substantive Review of the Criminal Procedure Code Law**

With regard to the petition for substantive review of Article 244 of the Criminal Procedure Code Law, the People's Legislative Assembly has presented its statements as follows:

- (1) Whereas it is necessary for the People's Legislative Assembly to convey that the provision of Article 244 of the Criminal Procedure Code Law regulates the legal remedy of cassation appeal which can be made by the parties having direct legal interest, namely the accused and the Public Prosecutor. The regulation of the provision *a quo* has been consistent with the definition of "legal remedy" as regulated in Article 1 sub-article 12 of the Criminal Procedure Code which states that "*Legal remedy shall be the right of the accused or public prosecutor not to accept the court's decision in the form of contest or appeal or cassation appeal*

*or the right of a convicted person to file a request for review in matters and by means regulated in this Law.”*

- (2) Whereas with regard to the Petitioner’s opinion that the provision *a quo* does not provide an explicit prohibition for Public Prosecutors from filing a cassation appeal, the People’s Legislative Assembly is of the opinion that the provision of Article 244 of the Criminal Procedure Code in fact provides legal protection, equal treatment before the law and legal certainty for all the accused persons declared to be released based on the court’s decision (*vrijspraak*), and therefore, this has been consistent with the provision of Article 28D paragraph (1) of the 1945 Constitution which reads “*Every person shall have the right to the recognition, guarantee, protection and legal certainty of just laws as well as equal treatment before the law.*”
- (3) Whereas based on the statement of expert Dr. Mudzakir in case Number 17/PUU-VIII/2010 on May 18, 2010, it was conveyed that in the implementation, there are two categories of acquittal, namely unconditional acquittal and conditional acquittal. Unconditional acquittal is granted when the action of the accused is not legally and convincingly

proven, meaning that no evidence supports the accusation charged by the District Attorney. Meanwhile, conditional acquittal decision can be seen from 3 (three) indications, namely (1) there is difference in implementing legal interpretation, (2) there is difference in the assessment of evidence submitted during the court hearing, and (3) there is a possibility of difference in the assessment of the interpretation of the application of law with regard to the evidence submitted during the court hearing. The three differences should be reasonably and appropriately settled by the Supreme Court.

- (4) Whereas the two categories of acquittal are practically made possible with the Decision of the Minister of Justice Number M.14-PW.07.03 Year 1983 dated December 10, 1983 concerning Supplement to Implementing Guidelines of the Criminal Procedure Code which, in its 19<sup>th</sup> point, states that “An appeal cannot be filed against an acquittal; however, based on situation and condition, for the sake of law, justice and truth, a cassation can be filed against an acquittal.” This is consistent with the Petitioner’s opinion that in its implementation, the legal ground used by the Public

Prosecutor to file the cassation appeal to the Supreme Court is Decree of the Minister of Justice Number M.14-PW.07.03 Year 1983 dated December 10, 1983 concerning Supplement to Implementing Guidelines of the Criminal Procedure Code.

- (5) Based on the explanation above, the People's Legislative Assembly is of the opinion that the implementation of a norm/provision of a Law does not fall under the Constitutional Court's authority to examine and decide upon, considering that the Constitutional Court's authority is to review Laws against the 1945 Constitution.
- (6) Therefore, in the People's Legislative Assembly's opinion, the provision of Article 24 of the Criminal Procedure Code Law is not inconsistent with Article 28D paragraph (1) of the 1945 Constitution.

Hence we have conveyed the statements of the People's Legislative to become the material for consideration of the Honorable Panel of Justices of the Constitutional Court in order to examine, hear, and decide upon the case *a quo* and to be able to pass the following decision:

1. To accept the Statement of the People's Legislative Assembly in its entirety;
2. To declare the provision of Article 244 of the Criminal Procedure Code Law not inconsistent with Article 28D paragraph (1) of the 1945 Constitution;
3. To declare that the provision of Article 244 of the Criminal Procedure Code Law still have binding legal force.

**[2.5]** Whereas the Petitioner has submitted written conclusions received at the Registrar's Office of the Court on February 14, 2013, principally stating that the Petitioner remains to his standpoint;

**[2.6]** Whereas the Government has submitted written statements and conclusions received at the Registrar's Office of the Court on March 21, 2012, principally stating that the Government remains with its standpoint;

**[2.7]** Whereas to shorten the explanation in this decision, all which happened during the hearing shall sufficiently be indicated in the minutes of hearing, which constitutes an inseparable part of this decision;

### **3. LEGAL CONSIDERATIONS**

**[3.1]** Whereas the purpose and objective of the Petitioner's petition is to request for the review of the constitutionality of Article 244 of Law Number 8 Year 1981 concerning the Criminal Procedure (State Gazette of the Republic of Indonesia Year 1981 Number 76, Supplement to the State Gazette of the Republic Indonesia Number 3209, hereinafter referred to as the Criminal Procedure Code) against Article 1 paragraph (3), Article 27 paragraph (1), and Article 28D paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

**[3.2]** Whereas prior to examining the substance of the petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider:

- a. the authority of the Court to examine, hear and decide upon the petition *a quo*; and
- b. the legal standing of the Petitioner;

With respect to the aforementioned two matters, the Court is of the following opinion:

### **Authorities of the Court**

**[3.3]** Whereas based on Article 24C paragraph (1) of the 1945 Constitution, Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003

concerning the Constitutional Court as amended by Law Number 8 Year 2011 concerning the Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereinafter abbreviated as the Constitutional Court Law), and Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076), one of the Court's constitutional authorities is to hear cases at the first and final levels, the decision of which shall be final, to review Laws against the Constitution;

**[3.4]** Whereas since the Petitioner's petition concerns the review of the constitutionality of Law *in casu* Article 244 of the Criminal Procedure Code against Article 1 paragraph (3), Article 27 paragraph (1), and Article 28D paragraph (1) of the 1945 Constitution, the Court has authority to examine, hear and decide upon the petition *a quo*;

#### **Legal Standing of the Petitioner**

**[3.5]** Whereas pursuant to Article 51 paragraph (1) of the Constitutional Court Law, the parties eligible to file a petition for review of Laws against the 1945 Constitution shall be those considering that their constitutional rights and/or

authority granted by the 1945 Constitution are impaired by the coming into effect of a Law, namely:

- a. individual Indonesian citizens (including groups of people having a common interest);
- b. customary law community groups insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of Republic of Indonesia as regulated in Law;
- c. public or private legal entities; or
- d. state institutions;

Hence, in the review of a Law against the 1945 Constitution, the Petitioner must first explain and substantiate:

- a. his standing as Petitioner as intended in Article 51 paragraph (1) of the Constitutional Court Law;
- b. the impairment of constitutional rights and/or authority granted by the 1945 Constitution due to the coming into effect of the Law petitioned for review;

**[3.6]** Considering also whereas, following its Decision Number 006/PUU-

III/2005, dated May 31, 2005 and the Constitutional Court's Decision Number 11/PUU-V/2007, dated September 20, 2007, as well as subsequent decisions, the Court has the standpoint that the impairment of constitutional rights and/or authority as intended in Article 51 paragraph (1) of the Constitutional Court Law must fulfill five requirements, namely:

- a. the existence of constitutional rights and/or authority of the Petitioner granted by the 1945 Constitution;
- b. the Petitioner considers that such constitutional rights and/or authority have been impaired by the coming into effect of the Law petitioned for review;
- c. such constitutional impairment must be specific (special) and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
- d. there is a causal relationship (*causal verband*) between such impairment and the coming into effect of the Law petitioned for review;
- e. there is a possibility that with the granting of the petition, such constitutional impairment as argued will not or will no longer occur;

**[3.7]** Whereas the Petitioner is an individual citizen of the Republic of

Indonesia who substantially argues to have constitutional rights regulated in Article 28D paragraph (1) which states that, “*Every person shall have the right to the recognition, guarantee, protection, and legal certainty of just laws as well as equal treatment before the law*”. According to the Petitioner, such constitutional rights have been impaired by the coming into effect of Article 244 of the Criminal Procedure Code which states that, “*With regard to a criminal case decision rendered at the final level by a court other than the Supreme Court, an accused or the Public Prosecutor may lodge a request for cassation appeal examination to the Supreme Court except with regard to an acquittal*”, principally for the following reasons:

1. Whereas the phrase, “*except with regard to a legal decision*” (*sic*), which should have been “*except with regard to an acquittal*”, in Article 244 of the Criminal Procedure Code does not provide an explicit prohibition for public prosecutors from filing a cassation appeal, therefore placing the Petitioner in a position of not obtaining the legal certainty of just law.
2. Whereas Lubuk Sikaping District Court has released the Petitioner from all accusations of the public prosecutor (*vide* exhibit P-3). However, against such acquittal, the public prosecutor filed a cassation appeal to the Supreme Court based on Article 244 of the Criminal Procedure Code. With respect to the filing of cassation appeal by the public prosecutor based on Article 244 of the Criminal Procedure Code, the Petitioner, who

has obtained legal certainty, namely having been declared not guilty and released from the accusation of the public prosecutor by Lubuk Sikaping District Court, now has lost such certainty;

**[3.8]** Whereas based on the abovementioned arguments of the Petitioner, in the Court's opinion, the Petitioner fulfills the qualification as an individual citizen of the Republic of Indonesia who has constitutional rights, and whose constitutional rights are impaired by the coming into effect of Article 244 of the Criminal Procedure Code. Therefore, the Petitioner has legal standing to file the petition *a quo*;

**[3.9]** Whereas since the Court has the authority to examine, hear and decide upon the petition *a quo* and the Petitioner has legal standing to file the petition, the Court shall subsequently consider the substance of the petition;

### **Substance of the Petition**

**[3.10]** Whereas the substance of the Petitioner's petition is to request for a constitutionality review of Article 244 of the Criminal Procedure Code which states that, "*With regard to a criminal case decision rendered at the final level by a court other than the Supreme Court, an accused or the Public Prosecutor may lodge a request for cassation appeal examination to the Supreme Court except with regard to an acquittal*". In the Petitioner's opinion, Article 244 of the Criminal

Procedure Code is inconsistent with Article 1 paragraph (3), Article 27 paragraph (1), and Article 28D paragraph (1) of the 1945 Constitution which states:

1. Article 1 paragraph (3):

*The State of Indonesia is a state based on Law.*

2. Article 27 paragraph (1):

*All citizens shall have equal position before the law and government and shall be obligated to uphold the law and government without exception.*

3. Article 28D paragraph (1):

*Every person shall have the right to the recognition, guarantee, protection and legal certainty of just laws as well as equal treatment before the law.*

The Petitioner substantially argues as follows:

1. Whereas the formulation of Article 244 of the Criminal Procedure Code which states that, "*With regard to a criminal case decision rendered at the final level by a court other than the Supreme Court, an accused or the Public Prosecutor may lodge a request for cassation appeal examination to the Supreme Court except with regard to an acquittal*", is multi-

interpretable in nature so as to cause legal uncertainty and impair the Petitioner's constitutional rights which are guaranteed by the 1945 Constitution. Whereas based on the provision *a quo*, the Petitioner has believed to have obtained an acquittal from Lubuk Sikaping District Court which is final, but the public prosecutor took a legal remedy of cassation appeal based on the article *a quo* in which according to the public prosecutor, the word "**acquittal**" in the Article *a quo* is divided into two categories namely "**unconditional acquittal**" and "**conditional acquittal**". The decision which released the Petitioner, according to the public prosecutor, is categorized as conditional acquittal, and therefore, the public prosecutor has the right to file a cassation appeal to the Supreme Court based on the aforementioned provision of Article 244 of the Criminal Procedure Code.

2. Whereas if the phrase "*except with regard to an acquittal*" in Article 244 of the Criminal Procedure Code is omitted, it will provide legal certainty of just law, for both the accused and the public prosecutor because they both can file a cassation appeal with certainty, not depending on the result of the court's decision, whether the court's decision is in the form of decision which punishes the accused, or a unconditional or conditional acquittal, all can be filed for a cassation.

### **Opinion of the Court**

**[3.11]** Whereas after carefully examining the Petitioner's petition and evidences, hearing the statements of the Government and reading the written statements of the Government, as well as reading the written statements of the People's Legislative Assembly, the Court is of the following opinion:

**[3.12]** Whereas the constitutionality review of Article 244 of the Criminal Procedure Code, either the entire article or only the phrase, "*except with regard to an acquittal*", has been petitioned for review for four times, and has been decided upon by the Court with a decision stating that the petition of the Petitioner(s) cannot be accepted;

**[3.12.1]** Whereas in the Court's decision Number 17/PUU-VIII/2010, dated July 25, 2011, in paragraph [3.12], page 51, the Court considers, among other things, that, "*The Petitioners' arguments in this petition question their constitutional impairment in performing the profession of advocate more than as persons directly impaired by the coming into effect of the norm of the Law a quo. Therefore, in the Court's opinion, there is no constitutional impairment of the Petitioner by the coming into effect of the Law a quo.*"

**[3.12.2]** Whereas in the Court's decision Number 56/PUU-IX/2010, dated March 15, 2012, in paragraph [3.3], page 57, the Court considers, among other things, that, "... *Article 24C paragraph (1) of the 1945 Constitution determines*

*that one of the Court's authorities is to hear cases at the first and final levels, the decision of which is final, to review Laws against the Constitution. The Court is of the opinion that, with respect to the provision of Article 24C paragraph (1) of the 1945 Constitution, it must be construed that what may become the object of review of the Court is the substance of a paragraph, article, and/or part of the Law which is inconsistent with the 1945 Constitution. This is further elaborated by the provision of the Law that the Petitioner must clearly explain "the substance of a paragraph, article, and/or part of the law considered inconsistent with the 1945 Constitution of the State of the Republic of Indonesia" [vide Article 51 paragraph (3) sub-paragraph b of the Constitutional Court Law. The substance of a paragraph, article, and/or part of the Law which has been legally promulgated and which the Petitioner has argued to be consistent with the 1945 Constitution is not an object of judicial review.]*

**[3.12.3]** Whereas in the Court's Decision Number 85/PUU-IX/2011, dated March 27, 2012, in paragraph [3.3.1], pages 46-47, the Court considers, among other things, that, "... with regard to the petitum of the Petitioner's Petition for the Court to declare the phrase "... except with regard to an acquittal" in Article 244 of the Criminal Procedure Code not inconsistent with the 1945 Constitution and having binding legal force, the Court, as in the consideration of Decision Number 56/PUU-IX/2011 dated March 15, 2012 considers among other things that, "the Court is of the opinion that the provision of Article 24C paragraph (1) of the 1945

*Constitution must be construed in such a way that what may become the object of review of the Court is the substance of a paragraph, article, and/or part of the Law which is inconsistent with the 1945 Constitution. This is further elaborated by the provision of the Law that the Petitioner must clearly explain “the substance of a paragraph, article, and/or part of the law which is considered inconsistent with the 1945 Constitution of the State of the Republic of Indonesia” [vide Article 51 paragraph (3) sub-paragraph b of the Constitutional Court Law. The substance of a paragraph, article, and/or part of the Law which has been legally promulgated and which the Petitioner argues to be consistent with the 1945 Constitution is not an object of judicial review of Law. All Laws which have been legally promulgated by the competent authority must be considered consistent with the 1945 Constitution until it is revoked by the Legislator or declared unconstitutional by a Court’s decision based on the petition filed with the argument that the provision is inconsistent with the 1945 Constitution”. All considerations and injunctions of the Court’s decision related to the review of the constitutionality of Article 244 of the Criminal Procedure Code in Decision Number 56/PUU-IX/2011 dated March 15, 2012, mutatis mutandis, become a consideration in the decision a quo, and therefore, the Court has no authority to hear the petition a quo;”*

**[3.12.4]** Whereas in the Court’s decision Number 71/PUU-X/2012, dated October 23, 2012, which is petitioned by the same Petitioner as the petition a quo, in paragraph [3.6], the Court considers, among other things, that, “... *in the*

*Court's opinion, there are inconsistencies in the Petitioner's petition, both among the arguments in the posita as well as between the posita and the petitum. On the one hand, the Petitioner argues that the aforementioned Article 244 of the Criminal Procedure Code has no meaning, while on the other hand, the Petitioner argues that Article 244 of the Criminal Procedure Code has a meaning, each with a consequence as explained above. In addition to that, if the argument in the posita is related to the petitum, there is also an inconsistency between the argument and the petitum. Moreover, the Petitioner requests for the Decision of Lubuk Sikaping District Court on the Petitioner's case to have permanent legal force. Based on the inconsistencies between the arguments in the posita and the petitum, in the Court's opinion, the petition a quo is obscure (obscur libel). Therefore, it is not necessary for the Court to further consider the authority of the Court, legal standing of the Petitioner, and the substance of the petition;"*

**[3.13]** Whereas since the review of Article 244 of the Criminal Procedure Code, either in its entirety or for a specific phrase in the article, the substance of the petition has never been considered, the substance of the petition for constitutionality review of constitutionality in the petition a quo will be considered as follows:

**[3.13.1]** Whereas Article 24 paragraph (2) of the 1945 Constitution provides for that, *"Judicial power shall be exercised by a Supreme Court and its inferior courts in the jurisdiction of general courts, the religious courts, the military courts, the*

*state administration courts, and by a Constitutional Court*". Based on the aforementioned provision, it is clear that the Supreme Court is the highest state court of the four jurisdictions of court under it. As the highest state court of the four jurisdictions of court, it is absolute that the Supreme Court has authority at the cassation appeal level to hear the decisions coming from the four jurisdictions of courts under it. However, the legislator has limited such authority by providing for, among other things in Article 67 of the Criminal Procedure Code that, "*An accused or public prosecutor shall have the right to appeal a decision of a court of first instance except against an acquittal and release from all legal charges related to the issue of inappropriate application of law and a court's decision under a speedy trial*", and in Article 244 which confirms that, "*With regard to a criminal case decision rendered at the final level by a court other than the Supreme Court, an accused or the Public Prosecutor may lodge a request for cassation appeal examination to the Supreme Court except with regard to an acquittal*". If Article 67 of the Criminal Procedure Code provides for an exception to request for an examination of appeal against the decision of the first level which grants an acquittal and release from all legal charges related to the issue of the inappropriate application of law and a court's decision under a speedy trial, Article 244 of the Criminal Procedure Code excludes the request for examination of appeal against such acquittal. Both provisions do not provide any regular legal remedy at all against an acquittal, which means that the Supreme Court's function as the court of cassation appeal against the acquittal passed by its

inferior court is completely omitted;

**[3.13.2]** Whereas without any intention to make an assessment on the Supreme Court's decisions, so far the reality shows that against some acquittals passed by a Supreme Court's inferior court, no request for appeal is filed [*vide* Article 67 of the Criminal Procedure Code], but a cassation appeal is filed and the Supreme Court hears it. Meanwhile, in accordance with the provision of Article 244 of the Criminal Procedure Code, the legal remedy of cassation appeal may not be filed against an acquittal. This causes legal uncertainty in the practice because there is contradiction in the implementation of the aforementioned article. On the one hand, the article prohibits the legal remedy of cassation appeal, while on the other hand, the Supreme Court in the practice accepts and hears the request for cassation appeal against an acquittal passed by its inferior court. Therefore, in order to guarantee legal certainty of just laws and equal treatment before the law, it is necessary for the Court to provide for the constitutionality of Article 244 of the Criminal Procedure Code, particularly the phrase "*except with regard to an acquittal*";

**[3.13.3]** Whereas based on Article 47 of the Constitutional Court Law, the Court's decision obtains permanent legal force since it has been pronounced completely in the plenary session which is open for the public. It means that the decision is not retroactive. However, in the previous decisions of the Supreme Court in relation to the application of Article 244 of the Criminal Procedure Code,

it is necessary for the Court to confirm that the Court has no authority to review a court's decision, in this case the Supreme Court's decision, which has come into effect and which is binding as law. It means that this Court's decision does not make a new legal status of the Supreme Court's decision already decided upon previously. In addition to that, different from a state administration's decision which uses the clause, "*Should it be found out later that there is a mistake in this decision, a remedy will be taken properly*", which means that a state administration's decision can be changed by the party issuing it, a court's decision can only be changed by a decision of a competent court;

**[3.13.4]** Whereas Article 24 paragraph (1) of the 1945 Constitution provides that, "*The judicial power shall be an independent power to organize the judicature in order to uphold the law and justice*". In the enforcement of the law and justice, it also means that the truth must be declared true, and the untruthfulness must be declared wrong. In this connection, the acquittal passed by an inferior court of the Supreme Court, against which a cassation appeal is filed, cannot be construed in such a way that the Supreme Court will certainly declare the accused guilty and impose a punishment. It is possible that the Supreme Court is of the same opinion with its inferior court. It means that the accused remains released in the decision of cassation appeal. In this situation, it means that the Supreme Court's function as the highest state court continues to be implemented, and the law and justice continue to be upheld.

**[3.14]** Whereas based on all of the considerations above, in the Court's opinion, the petition of the Petitioner has legal ground in part. Meanwhile, the other and the remaining arguments of the Petitioner's petition, in the Court's decision, have no legal ground.

#### **4. CONCLUSION**

Based on the examination of facts and laws as explained above, the Court has concluded that:

**[4.1]** The Court has authority to examine, hear, and decide upon the petition *a quo*;

**[4.2]** The Petitioner has legal standing to file the petition *a quo*;

**[4.3]** The substance of the petition of the Petitioner has legal ground in part.

Based on the 1945 Constitution of the State of the Republic of Indonesia, Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 concerning the Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226), and Law Number 48 Year 2009

regarding Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076).

## 5. INJUNCTION OF DECISIONS

### Passing the Decision,

#### To declare:

1. To grant the Petitioners' petition in part;
  - 1.1. To declare the phrase, "*except with regard to an acquittal*" in Article 244 of Law Number 8 Year 1981 concerning the Criminal Procedure (State Gazette of the Republic of Indonesia Year 1981 Number 76, Supplement to the State Gazette of the Republic of Indonesia Number 3209) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;
  - 1.2. To declare that the phrase, "*except with regard to an acquittal*" in Article 244 of Law Number 8 Year 1981 concerning the Criminal Procedure (State Gazette of the Republic of Indonesia Year 1981 Number 76, Supplement to the State Gazette of the Republic of Indonesia Number 3209) has no binding legal force;

2. To order the promulgation of this decision properly in the Official Gazette of the Republic of Indonesia;
3. To reject the other and the remaining parts of the petition of the Petitioner;

Hence this decision was made in the Consultative Meeting of Justices attended by nine Constitutional Court Justices, namely Moh. Mahfud MD as the Chief Justice and concurrent Member, Achmad Sodiki, Muhammad Alim, Hamdan Zoelva, Anwar Usman, M. Akil Mochtar, Harjono, Ahmad Fadlil Sumadi, and Maria Farida Indrati, respectively as Members, on **Wednesday the twenty-sixth of March two thousand and thirteen**, and was pronounced in the plenary session of the Constitutional Court which was open for the public on **Thursday, the twenty-eighth of March two thousand and thirteen**, and the pronouncement was completed at on 11.40 West Indonesia Time, by nine Constitutional Court Justices, namely Moh. Mahfud MD as the Chief Justice and concurrent Member, Achmad Sodiki, Muhammad Alim, Hamdan Zoelva, Anwar Usman, M. Akil Mochtar, Harjono, Ahmad Fadlil Sumadi, and Maria Farida Indrati, respectively as Members, assisted by Saiful Anwar as the Substitute Registrar, in the presence of the People's Legislative Assembly or its representative, the Government or its representative, in the absence of the Petitioner/his attorney. With regard to this Court's decision, the Constitutional Justice Harjono has a dissenting opinion;

**CHIEF JUSTICE,**

**Sgd.**

**Moh. Mahfud MD.**

**JUSTICES,**

**Sgd.**

**Achmad Sodiki**

**Sgd.**

**Hamdam Zoelva**

**Sgd.**

**M. Akil Mochtar**

**Sgd.**

**Ahmad Fadlil Sumadi**

**Sgd.**

**Muhammad Alim**

**Sgd.**

**Anwar Usman**

**Sgd.**

**Harjono**

**Sgd.**

**Maria Farida Indrati**

## **6. DISSENTING OPINION**

With regard to this Court's decision, the Constitutional Justice Harjono has a

dissenting opinion, as follows:

The Petitioner in substance questions Article 244 of the Criminal Procedure Code which states that:

*“With regard to a criminal case decision rendered at the final level by a court other than the Supreme Court, an accused or the Public Prosecutor may lodge a request for cassation appeal examination to the Supreme Court except with regard to an acquittal.”*

In the article *a quo*, what becomes the legal issue is the phrase “except with regard to an acquittal”.

The existence of the article *a quo* cannot be separated from the other articles in the Criminal Procedure Code, even from the comprehensive system of the Criminal Procedure Code. Law Number 8 Year 1981 replaced *Het Herziene Inlandsch Reglement (Staatblad Year 1941 Number 44)* known as HIR, in relation to the Emergency Law Number 1 Year 1951 (State Gazette Year 1951, Supplement to the State Gazette Number 81) which, in letter (d) of the *considering* consideration section, states that it “needs to be revoked because it is no longer in accordance with the goal of the national law”.

Whereas the article petitioned by the petitioner is related, among other things, to Article 191 of the Criminal Procedure Code which states in paragraph

(1) that: *“if the court is of the opinion that based the results of examination at the trial, the accused is not legally and convincingly proven guilty of the act charged to him, the accused shall be declared acquitted.”* Meanwhile, paragraph (2) states that: *“if the court is of the opinion that the act of which the accused has been accused has been proven, but such act does not constitute a criminal act, all charges against the accused shall be dismissed.”*

Therefore, it is evident that the Criminal Procedure Code differentiates between these two matters. Article 191 paragraph (1) is related to the proof in trial which cannot prove that the accused has committed the act he is accused of, while in paragraph (2) it is proven in the trial that the accused has committed the act but the act is not a criminal act. The core of the difference is related to two matters; the first one is a question of fact, while the second one is a question of law. Such difference is correct and reasonable. The question of fact originates from evidence examination trial, and therefore the judge's belief becomes important, while the question of law is related to the judge's opinion on the event which has occurred. Accountability in criminal law is only relevant if it has been proven based on the trial examination that there is a legal fact of the relationship between a person who commits an act and the act being accused of him. If, during the trial, such legal fact cannot be proven, it is appropriate and reasonable if the accused is released. It is no other than the judge examining the substantiation in the hearing who should be able to determine whether or not

there is a legal fact of the relationship between a person and a specific criminal act. Those (the accused) who have undergone a trial examination, whose human rights must be prejudiced due to the status as the accused, against whom an arrest can be performed, while it turns out that no legal fact can be found during the legal court session that they (the accused) are the ones committing the act they are being accused of, deserve to have their rights and must be protected for the sake of legal certainty. If their rights are not protected, there will be questions about the meaning of the trial they have undergone, while actually the trial is legally valid, and therefore its decision must be respected. The accused in a trial is facing institutions, namely the public prosecutor and the judge rather than facing persons. Such protection is in accordance with the guarantee of human rights.

Therefore, the exception for the filing of cassation appeal against an acquittal as regulated by Article 244 of the Criminal Procedure Code constitutes a protection of human rights for those whose rights have been violated due to their status as the accused, after the issuance of a valid court's decision.

The Criminal Procedure Code regulates comprehensively about how to protect a person who has been acquitted. Article 67 of the Criminal Procedure Code states that an appeal cannot be filed against an acquittal, so is the dismissal of all legal accusations. Protection of a person who has been acquitted is conducted not only by prohibiting the filing of any appeal against the acquittal,

even the accused has the right to claim for compensation as stated in Article 68 *juncto* Article 95 if the accused is brought to trial while it turns out that he is the wrong person. If an accused is brought on trial but it turns out that he is the wrong person, it is appropriate that the person is subsequently acquitted and the law even grants the right to demand compensation. That is the way the Criminal Procedure Code protects a person's human rights. Cassation appeal is not the way for the Supreme Court to supervise the judges of its inferior courts. Cassation appeal is a regular legal remedy. As a legal remedy, cassation appeal is intended to provide protection to the parties requiring it. An accused who has been acquitted by a court whose trial process is valid or not legally defective must receive protection, only the method is different, namely not by granting the right to file a cassation appeal but in fact by making the not subject to any cassation appeal. In this way, there is a meaning of the trial process the person has undergone. An acquittal is not a judge's mercy for the accused, but the right of the accused if it turns out that the public prosecutor cannot prove that there is a legal fact of relationship between the accused and the criminal event the person is accused of. The public prosecutor has been granted the right by the Criminal Procedure Code to prejudice the freedom of the accused, even since the investigation phase, the right of the accused has been prejudiced. Therefore, it is reasonable that when it turns out later, in the period up to the substantiation before the trial, proof of involvement of the accused is not found, the accused must enjoy his/her freedom again as an innocent person. This is very logical. The

decision of a court with a valid and not legally defective process is the keyword for the respect of the decision; even the law must uphold such decision, which is included in the meaning or definition of a state based on law. Is it possible that a court's decision is made in an invalid process and therefore such decision is legally defective? It is highly possible and the Criminal Procedure Code has protected the parties involved in such trial process by opening up an opportunity to be corrected, namely by filing a cassation appeal as a legal remedy. Once more, the cassation appeal is granted to the parties, not as the facility for the Supreme Court to supervise its inferior courts. Since the legal remedy of cassation appeal is intended as a legal remedy for protecting the parties involved in the trial process, only one party is granted such right. When does a legally defective trial process occur? In relation to cassation appeal, the process occurs if the court has: (a) applied a legal rule improperly, namely in an incorrect manner, or even has not applied the legal rule which should have been applied, (b) examined, heard and made a decision not in a correct way according to the law, (c) exceeded its authority (*vide* Article 253 of the Criminal Procedure Code).

The core question is whether the protection of the accused, which is regulated in such a logical and comprehensive manner, is inconsistent with the constitution, in which one of the protections is Article 244 of the Criminal Procedure Code. Which article in the constitution has been violated by the provision? The accused must receive legal protection, including that they must

be deemed not guilty, his/her right to be heard using the due process of law and not legally defective court process. Once the accused has been brought to trial using the correct process, the rights of the accused must be safeguarded based on the decision, since if it is not, the trial process he has undergone has no meaning and there is no legal certainty for both the trial process and for the accused himself/herself.

The omission of the phrase “except with regard to an acquittal” in Article 244 of the Criminal Code Procedure has fundamentally demolished the Criminal Code Procedure system, the implication of which will make many other articles of the Criminal Code Procedure unproductive, while actually such omission has no constitutional ground. The practice is not a reference to declare a law inconsistent with the Constitution, and judicial review of law is often intended to make corrections, whether the applicable practice has been in accordance with the constitution; therefore, not seldom the Court decides with a conditional constitutionality ruling to correct such incorrect practice and not the other way round.

**SUBSTITUTE REGISTRAR,**

**Sgd.**

**Saiful Anwar**