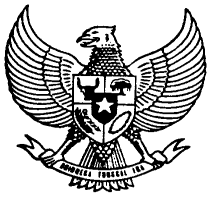

DECISION

Number 16/PUU-VI/2008

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing and deciding upon constitutional cases at the first and final level has passed a decision in a case of petition for Judicial Review of the Law Number 04 Year 2004 regarding Judicial Authorities against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] **POLLYCARPUS BUDIHARI PRIYANTO**, place/date of birth Solo**,** January 26, 1961, 47 years old, Protestant, Pilot, Indonesian citizen, having his address at Jalan Pamulang Permai I Blok B Number 1 Neighborhood Ward 01/Neighborhood Block 22 Pamulang Barat, Tangerang Banten. By virtue of a Power of Attorney dated May 2, 2008, authorizing Idrus Mony, S.H., and Mohammad Tohir, S.H., Advocates/Legal Consultants from the Law Firm of Indonesian Law Reform Institution , having its address at Jalan Prof. Dr. Satrio Number 8 South Jakarta, in this matter either individually or jointly acting for and on behalf of the authorizer;

Hereinafter referred to as **Petitioner**;

[1.3] Having read the petition of the Petitioner;

Having heard the statements of the Petitioner;

Having heard and examined the statement of the Government;

Having heard and read the statements of People's Legislative Assembly;

Having heard and read the statements of Experts presented by the Petitioner;

Having examined the evidences;

Having read the conclusion of the Petitioner;

3. **LEGAL CONSIDERATIONS**

[3.1] Considering whereas the purpose and objective of the Petitioner's petition are regarding judicial review of Article 23 paragraph (1) of Law Number 4 Year 2004 regarding Judicial Authorities (State Gazette of the Republic of Indonesia Year 2004 Number 8, Supplement to State Gazette of the Republic of Indonesia Number 4358, hereinafter referred to as Law 4/2004).

[3.2] Considering whereas prior to entering into the Principal Issue of the petition, the Constitutional Court (hereinafter referred to as the Court) shall first take the following matters into account:

a. whether or not the Court has the authority to examine, hear and decide upon the *a quo* case*;*

b. whether or not the Petitioner has the legal standing to file the *a quo* petition.

Authority of the Court

[3.3] Considering whereas based on Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), which is reaffirmed by Article 10 Paragraph (1) Sub-Paragraph a of Law Number 24 Year 2004 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the Constitutional Court Law), the Court has the authority to adjudicate at the first and final level, the decision of which shall be final, including, among other things, to conduct judicial review of laws against the 1945 Constitution;

[3.4] Considering whereas the *a quo* petition is concerned with the judicial review of a law against the 1945 Constitution, and therefore the Court has the authority to examine, hear and decide upon the said petition;

Legal Standing of the Petitioner

[3.5] Considering whereas pursuant to Article 51 Paragraph (1) of the CC Law along with the Elucidation of such article, the parties allowed to file a petition for judicial review of a law against the 1945 Constitution shall be those

who deem that their constitutional right/authority granted by the 1945 Constitution has been impaired by the coming into effect of the law, namely:

a. individual Indonesian citizens (including a group of people with similar interest);

b. units of customary law community insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia as regulated in law;

c. public or private legal entities; or

d. state institutions;

Thereby, with respect to the judicial review of law against the 1945 Constitution the Petitioner shall first explain and prove the following matters:

a. His position as the Petitioner as intended in Article 51 Paragraph (1) of the CC Law;

b. The impairment of constitutional right and/or authority granted by the 1945 Constitution caused by the coming into effect of a law petitioned for review;

[3.6] Considering also whereas following the issuance of Decision Number 006/PUU-III/2005 dated May 31, 2005 and Decision Number 11/PUU-V/2007 dated September 20, 2007, as well as following decisions, the Court is of the opinion that the impairment of constitutional right and/or authority as intended in Article 51 Paragraph (1) of the CC Law must meet the following 5 (five) requirements, namely:

a. the Petitioner must have constitutional rights and/or authorities granted by the 1945 Constitution;

b. such constitutional rights and/or authorities are deemed to have been impaired by the coming into effect of the law petitioned for review;

c. the constitutional rights and/or authorities impairment of the Petitioner shall be specific and actual or at least potential in nature which, pursuant to logical reasoning, will take place for sure;

d. there is a causal relationship (*causal verband*) between the impairment concerned and the coming into effect of the law petitioned for review;

e. If the petition is granted, it is expected that the constitutional impairment as argued will not or cease to occur;

[3.7] Considering whereas the Petitioner is an individual Indonesian citizen who becomes a defendant and recently has been subject to a penal sanction by virtue of Decision of Judicial Review of the Supreme Court of the Republic of Indonesia Number 109 PK/Pid/2007, the judicial review of which was filed by the Public Prosecutor and accepted by the Supreme Court pursuant to Article 23 Paragraph (1) of Law 4/2004, whereas according to the Petitioner, such Review should be based on Article 263 of Law Number 8 Year 1981 regarding Criminal Procedure Code (KUHAP), because of which the Petitioner meets the requirement as the legal subject in the judicial review of Article 23 Paragraph (1) of Law 4/2004 against the 1945 Constitution.

[3.8] Considering whereas despite the suggestions and advice given by the Council of Justices in the preliminary examination, the Petitioner only argued in general about the constitutional rights of the Petitioner granted by the 1945 Constitution concerning legal certainty and legality, which are described in principal as follows:

- Whereas the basic consideration of the Supreme Court in Decision Number 109 PK/Pid/2007 to grant the petition of the Public Prosecutor is the extensive interpretation of Article 23 paragraph (1) of Law 4/2004 which reads: *" With regard to the Court's decision which has obtained permanent legal force, the related parties may file a petition for judicial review to the Supreme Court, in the event there are particular matters or situations provided by law";*

- Whereas Article 263 paragraph (1) of KUHAP which has clearly, explicitly, and limitedly regulated the Judicial Review proceeding is not used as a basic legal consideration correctly, precisely, and seriously in the decision of Judicial Review of the Supreme Court based on *lex specialis derogat legi generali* principle*;*

- Whereas the extensive interpretation of Article 23 Paragraph (1) of Law 4/2004 by the Supreme Court according to the Petitioner is not true and disregards the principle of legality and legal certainty;

- Whereas the coming into effect of Article 23 Paragraph (1) of Law 4/2004 has also resulted in the impairment of the Petitioner's constitutional right

and interest in the form of: the obstruction and/or disturbance of the Petitioner's economy; (b) disgrace suffered by the Petitioner, his wife, his children, and big family; (c) suffering from psychological pressure; (d) the collapse of several business endeavors; and (e) disgrace and damage to the Petitioner's reputation.

[3.9] Considering whereas even though the Petitioner only described in general the constitutional rights impaired by the coming into effect of and the application of Article 23 Paragraph (1) of Law 4/2004 as a basis to accept the petition for review filed by the Public Prosecutor rather than referring to Article 263 Paragraph (1) of KUHAP, which according to the Petitioner has violated the guarantee of legal certainty, the Petitioner actually argued about personal losses which are economic, moral, and psychological in nature. However, the Court is of the opinion that all requirements regarding legal standing as described above, have been met in *prima facie* way, and therefore, the Petitioner is deemed to have the legal standing to file the petition for judicial review in the *a quo* law*;*

[3.10] Considering whereas because the Petitioner is deemed to have the legal standing to file a petition for judicial review of the *a quo* law, the Court shall further consider the principal issue of the petition.

The Principal Issue of the Petition

[3.11] Considering whereas in the principal issue of the petition, the Petitioner has filed a petition in order that Article 23 Paragraph (1) of Law 4/2004

which reads, *" With regard to the Court's decision which has obtained permanent legal force, the related parties may file a petition for judicial review to the Supreme Court, in the event there are particular matters or situations provided by law",* be declared contradictory to the 1945 Constitution and declared as having no binding legal effect, as described below:

- Whereas the Petitioner has become a convict based on Decision of Judicial Review of the Supreme Court Number 109 PK/Pid/2007, which accepts the petition for judicial review filed by the Public Prosecutor;

- Whereas the basic consideration used by the Supreme Court in the *a quo* decision is the interpretation of the phrase "the related parties" used in Article 23 Paragraph (1) Law No. 4/2004*,* as the parties entitled to file a petition for judicial review against a court's decision which has had permanent legal force, but it is unclear who are being referred to in the aforementioned article, hence it is contradictory to Article 28D Paragraph (1) of the 1945 Constitution, which reads, "*Every person shall have the right to recognition, guarantee, protection and legal certainty of just laws as well as equal treatment before the law"*;

- Whereas the State of the Republic of Indonesia as a Constitutional State, like other democratic countries, should reasonably provide guarantee and protection of legal certainty in the context of implementing due process of law for its citizens;

- Whereas Article 10 Paragraph (1) of the Supreme Court Regulation Number 1 Year 1980 which reads, "*The petition for review of a criminal decision which has obtained permanent legal force must be submitted by the Attorney General, the convicted, or relevant parties ",* which also used as one of the considerations in Decision of Judicial Review Number 109 PK/Pid/2007 is not valid, because the aforementioned Supreme Court Regulation has been revoked since the Judicial Review on criminal cases has been regulated in KUHAP;

[3.12] Considering whereas to support the arguments, the Petitioner has filed written evidence (Exhibit P-1 through P-10). In addition to that, the Petitioner has also presented an expert whose statements have been heard under oath in the Plenary Meeting on July 17, 2008, whose statements have been included completely in the description regarding the Principal Issue of the Case, which in principal are as follows:

The Statements of Expert presented by the Petitioner, Dr. Etty Utju Ruhayati S.H.

- Whereas in relation to the parties entitled to file petition for Judicial Review of Article 23 Paragraph (1) of Law 4/2004, the said particular matters or circumstances shall be provided by law, which in this matter certainly refers to KUHAP. It has been clearly and limitedly stipulated in Article 263 Paragraph (1) of KUHAP that petitions for Judicial Review may only be filed to the Supreme Court by defendants or their heirs;

- Whereas it is clear that the 1945 Constitution explicitly provides guarantee for legal certainty and protection for every citizen. Law 4/2004 is regarding Judicial Authorities, which constitutes a general law, while the applicable Criminal Procedural law is KUHAP. Therefore, according to the principle of *lex specialis derogat legi generali,* it is clear that Article 236 Paragraph (1) on the parties entitled to file Judicial Review shall apply;

[3.13] Considering whereas the Government represented by the Minister of Law and Human Rights and the Attorney General of the Republic of Indonesia gave verbal statements in the Plenary Meeting on July 1, 2008, which were subsequently followed by written statements of the Government, and are completely included in the description regarding the Principal Issue of the Decision, which are in principal as follows:

- Whereas according to the Government, the phrase “the relevant parties” used in Article 23 Paragraph (1) of Law 4/2004 has provided fair guarantee, protection, and legal certainty as well as equal treatment before the law as mandated by the Provision of Article 28D of the 1945 Constitution;

- Whereas the *a quo* provision has guaranteed fair legal certainty and equal treatment before the law since pursuant to such provision the Public Prosecutor is entitled to file petition for Judicial Review against any defendant who has been acquitted by a Court’s decision which has had permanent legal force, if there is a new evident showing that the

defendant actually committed a criminal act, in order to re-examine and re-adjudicate or re-open the decision that has had permanent legal force and/or re-prosecute the case for the reversal of the decision and imposition of punishment on the defendant;

- Whereas the Government is of the opinion that Law 4/2004 does not have any relation whatsoever to the issue of constitutionality of the coming into effect of such law because the *a quo* provision only regulates and fulfills the rights of the parties to a certain case to file petition for Judicial Review upon a binding decision. If there is any legislative disharmony with other laws, it is not the duty of the Constitutional Court, but it is rather an issue of *legislative review*, which is the duty of the Parliament and the Government;

- Whereas according to the Government, in relation to the provisions on Judicial Review, Law 4/2004 has provided legal certainty and equal treatment before the law as mandated by the 1945 Constitution;

[3.14] Considering whereas the People's Legislative Assembly (DPR) represented by its Attorney-in-Fact Nursyamsi Nurlan S.H., gave verbal and written statements in the Plenary Meeting on July 17, 2008, which are completely included in the description regarding the Principal Issue of the Decision, which in principal are as follows:

- Whereas the formulation of Article 23 Paragraph (1) of Law 4/2004 regarding judicial review, is a provision which opens the possibility for

making correction to decisions that wrongfully applied the law in order to provide justice and legal certainty for the relevant parties. Thereby, legal action of judicial review in a judicial system is basically intended to revise decisions having permanent legal force which have been made due to negligence of the relevant judges or misapplication of the law;

- Whereas the formulation of the provision regarding judicial review in Law 4/2004 is intended to provide legal protection and to uphold justice. Therefore, considering such matter, the provision regarding Judicial Review in Article 23 Paragraph (1) of Law 4/2004 is not contradictory to Article 28D Paragraph (1) of the 1945 Constitution;

- Whereas in the context of law enforcement, the idea of progressive law has recently been developed, in which, according to Professor Satjipto Rahardjo, psychological component has significant role. The concept of law enforcement is not made as merely implementing regulations, but rather implementing them with high spirit as well as empathy, dedication, and determination. That is the reason why courage is one of the factors, in order to break away from conventional practices applied thus far, including to give a meaning to laws, principles, procedures, etc. Judges and Public Prosecutors require enlightment to have the courage to say that law is for human beings, not otherwise. It will lead to big consequences in giving a meaning to laws and it is the basic attitude desired by the progressive law;

- Whereas petitions for judicial review of laws filed to the Constitutional Court against the 1945 Constitution is not to review the vertical synchronization of Law 4/2004 and Law 8/1981 regarding KUHAP. With regard to similar provisions in two laws, the legal *adagium lex posteriori derogat legi priori* or new provisions supersede the previous provisions shall apply. Similarly, if there is different interpretation between the formulation in two or more laws and regulations which are at the same level with law, then the newly established law will apply, in this matter, the provision of Law 4/2004;

- Whereas in addition to the aforementioned principle of *lex posteriori derogat legi priori*, then according to the minutes of discussions on five draft laws in the field of law (*integrated justice systems)* on September 20, 2003, especially regarding the phrase “the relevant parties*”,* Law 4/2004 uses the phrase” the relevant parties”, due to the a precedent arising from a decision granting judicial review filed by Public Prosecutor for the sake justice of the community. In addition to such precedent, and in accordance with the purpose and objective of the lawmakers for including such phrase, there was an opinion that the relevant parties in a court decision are very broad. It is not only related to the rights of defendants or their heirs, but also to the issue of truth and justice. Therefore, anyone related to this issue including the general public, and in this matter the Public Prosecutors representing the public interest, may also take the legal

action of Judicial Review in the event that there are new evidence which justify such issue;

[3.15] Considering whereas the Petitioner has submitted written conclusion in which the Petitioner is principally remains firm on his stance, whereas the Government and DPR did not submit any written conclusion;

Opinion of the Court

[3.16] Considering whereas after taking the statements of the Petitioner as well as evidence and statements of Experts presented by the Petitioner, statement of the Government and DPR into account, the Court gives the following opinions:

Considering whereas the petitioner argued that Article 23 Paragraph (1) of Law 4/2004 which uses the phrase “the relevant parties” may file petition for Judicial Review against a court decision which has obtained permanent legal force to the Supreme Court, and is used as a basis for the Considerations in Decision Number 109 PK/Pid/2007 which grants the petition for Judicial Review filed by the Public Prosecutor, is violating legal certainty guaranteed by the 1945 Constitution. According to the Petitioner, legal basis for Judicial Review in criminal case should be Article 263 Paragraph (1) of KUHAP, which limitedly identifies the parties entitled to file petition for Judicial Review, and Public Prosecutor is not one of them. The Supreme Court should not have used Article 23 Paragraph (1) of Law 4/2004, because of the legal principle

stating that KUHAP is *lex specialis derogat legi generali,* and because the formulation of a phrase "*the relevant parties*" is obscure, thus according to the Petitioner, Article 23 Paragraph (1) of the *a quo* law has been in contradictory to Article 28D paragraph (1) of the 1945 Constitution;

[3.17] Considering whereas with regard to such argument the Court is of different opinion. It is true, as evident from Exhibit P-4 and Exhibit P-7, each of them is in the form of a decision of the Supreme Court in criminal case at the judicial review level, that inconsistency has occurred in the decisions of the Supreme Court regarding the admissibility of petition for Judicial Review in criminal cases, which respectively uses different legal basis and considerations. On one hand, the Supreme Court used Article 263 Paragraph (1) of KUHAP as the basis, stating that it cannot grant the petition for Judicial Review filed by Public Prosecutor, on the ground that Article 263 Paragraph (1) of KUHAP has determined explicitly and limitedly that the parties entitled to file petition for Judicial Review shall be the defendants or their heirs, in which it means that the parties which are not the defendants or their heirs cannot file the said petition for Judicial Review. It is further said, *"whereas such due process of law has the function as a limitation for the state authority in acting for its citizen and is normative in nature, hence it cannot be interpreted and breached since it will violate justice and legal certainty"* (Exhibit P-7). On the other hand, on the basis of previous decisions of the Supreme Court on judicial review which granted petitions for Judicial Review filed by Public Prosecutors, the Supreme Court "...*intends to establish its own legal procedures in order to accommodate the*

shortage regarding the rights or authorities of Public Prosecutors to file petition for Judicial Review in criminal cases". According to the Supreme Court, previous decisions which grant the petition for Judicial Review filed by Public Prosecutors contain "legal findings" which are in harmony with the spirit of laws and regulations, doctrines, and legal principles, among other things, by applying an extensive interpretation that "the relevant parties in criminal cases" in addition to the defendants or their heirs shall include Public Prosecutors (Exhibit P-4);

[3.18] Considering whereas apart from agreement or disagreement with such considerations and decisions of the Supreme Court, it is indeed the duty and within the scope of the Supreme Court, among other things, to interpret legal norms and to implement such norms in actual cases. The granting of the petition for Judicial Review based on, among other things, the interpretation of Article 23 paragraph (1) of Law 4/2004 which is argued to be contradictory to the 1945 Constitution is not caused by the issue of the constitutionality of the norms in Article 23 Paragraph (1) of Law 4/2004. Such article is a provision in the Law on Judicial Authorities, which is included in Chapter II under the title of Judicial Institutions and their principles, hence it understandable that its substance constitutes the principle applicable to the administration of Judicial Authorities by the Judicial Institutions under the Supreme Court including the General Court, Religious Court, Military Court, State Administration Court, as well as several forms of courts with special jurisdictions, which constitute courts under the supervision of the Supreme Court at the highest level. Therefore, Article 23 Paragraph (1) of the *a quo* law constitutes a principle regulating the right to file

petition for Judicial Review against court decision which has had permanent legal force (*inkracht van gewijsde*), which is applicable to all courts, including special courts under the supervision of the Supreme Court. Article 23 Paragraph (1) of the *a quo* law sets the basic principle for Judicial Review and give a mandate that laws regarding procedural law applicable for every court under the supervision of the Supreme Court implementing and performing the Judicial Authorities, should further regulate about the parties entitled to file petition for Judicial Review, as well as the requirements to be fulfilled for filing such petition;

[3.19] Considering whereas in understanding and assessing the relationship between Article 23 Paragraph (1) of Law 4/2004 containing the principle which is applicable and is binding to judicial institutions under the Supreme Court as the administrator of Judicial Authorities and the laws that are required to be established to regulate the requirements and conditions for filing Judicial Review against court decisions which have had permanent legal force, the Court is of the opinion that there are there alternative interpretations.

First, Article 23 Paragraph (1) of Law 4/2004 constitutes a principle or general rule, which must be specified by laws regarding criminal or civil legal procedure applicable to every court as well as special courts existing under the supervision of the Supreme Court. Article 23 Paragraph (1) of Law 4/2004 is an amendment to the formulation of Article 21 of Law 14/1970 regarding Basic Provisions of Judicial Authorities which reads, "*In the event there are particular matters or circumastances provided by law, the relevant parties may file petition*

for Judicial Review to the Supreme Court in civil and criminal cases on court decisions, which have obtained permanent legal force ." Such formulation is amended by Article 23 paragraph (1) of Law 4/2004 which reads, "*With regard to court decisions which have obtained permanent legal force, the relevant parties may file petition for judicial review to the Supreme Court, if there are particular matters or circumastances provided by law".* The parties intended by the phrase "the relevant parties entitled to file petition for Judicial Review to the Supreme Court" in criminal and civil procedural law applicable in the relevant court shall be determined in the procedural law applicable for each court under the supervision of the Supreme Court. Further provisions on Judicial Review are set forth in Law Number 5 Year 2004 regarding Amendment to Law Number 14 Year 1985 regarding the Supreme Court, which in Article 76 reads, "*Examination on petition for Judicial Review against decision in criminal case which has had permanent legal force shall use the procedure for judicial revies as set forth in KUHAP*." *In casu*, in criminal cases, the parties entitled to file petition for Judicial Review shall refer to Article 263 Paragraph (1) of KUHAP, in which the conditions or terms to be fulfilled for filing Judicial Review on court decisions in criminal cases which have had obtained permanent legal force are set forth.

Secondly, Article 23 Paragraph (1) of Law 4/2004 as explained by DPR, is a new development accommodating the changes following the admission of petition for Judicial Review filed by Public Prosecutor by the Supreme Court. Article 23 Paragraph (1), according to DPR, is a progress as a new paradigm which is oriented on the interest of the victims of crimes, in

addition to defendants, and as the result Public Prosecutors acting on behalf of the victims are granted the right to file petition for Judicial Review as well. *Thirdly,* the phrase “the relevant parties” in Article 23 Paragraph (1) as the parties entitled to file petition for Judicial Review is obscure and vague, which would result in legal uncertainty, and therefore it is contradictory to the 1945 Constitution. Such phrase has been used as a basis to violate Article 263 Paragraph (1) of KUHAP which limitedly determines the parties entitled to file petition for Judicial Review, since Public Prosecutor is allowed to file petition for Judicial Review on criminal decisions which have had permanent legal force.

[3.20] Considering whereas from the three alternative interpretations, the Court chooses the first alternative, because the Court is of the opinion that the norm in the *a quo* law constitutes a principle applicable in general for every court under the supervision of the Supreme Court. Determining the parties entitled to file petition for Judicial Review and requirements to be fulfilled to determine the admissibility of petition for Judicial Review filed by “the relevant parties” must be measured with the provisions set forth in the laws mandated or referred to by Article 23 Paragraph (1), applicable for the relevant field of law and/or court. Furthermore, Article 76 of Law 5/2004 as quoted above provides that the Code of Legal Procedure (KUHAP) shall still be used in Judicial Review of decisions in criminal cases which have had obtained permanent legal force.

[3.21] Considering, according to the Court, Judges in criminal cases shall be subject to and implement special rules on that matter, namely the applicable

criminal procedure law, *in casu* KUHAP. Judges in criminal or civil cases and judges within the jurisdiction of general court, religious court, state administration court, Military Court shall also implement the provisions of procedural law which is relevant to the case in hand. In examining and deciding upon a case, judges cannot merely use as basic consideration general rules which still constitute principles. However, in the event that there are any doubt and inclarity as to the norms which are specially applicable -*in casu* KUHAP- hence, it is deemed necessary to make interpretations based on a certain method which relates the interpretation made to the principle applicable in general in Article 23 paragraph (1) of Law 4/2004, as was the case in the *a quo* case, thus such matter is not related to the constitutionality of the norms being reviewed, but rather it is a problem of implementation or application of norms by the judges. Whereas there is a possibility that judges may in practice make a mistake in examining or deciding upon a case, then such matter is not the authority of the Court;

[3.22] Considering whereas with regard to arguments as conveyed by Government, DPR, and as stated by the Supreme Court in the legal considerations of Decision Number 109 PK/Pid/2007 regarding the importance of granting equal right for filing petition for Judicial Review of court decisions which have had permanent legal force, not only to the defendants or the heirs, but also to Public Prosecutors, in order to provide “fair legal certainty”, then the Court is of the opinion that the limitative rules in Article 263 Paragraph (1) of KUHAP must be observed from paradigm of Human Rights protection against state authority. Article 263 paragraph (1) of KUHAP reads, *"The defendants and their heirs may*

file petition for Judicial Review to the Supreme Court of court decision which have obtained permanent legal force, except acquittals ".

The Article which is limitative in granting the right to file petition for Judicial Review constitutes an extraordinary legal action, whereby there is still an opportunity for justice seekers to obtain justice, though the common legal actions has been taken. However, the provision of Article 263 (1) of KUHAP imposes a limitation against any decision enabled to be filed for Judicial Review. The defendants or their heirs may file petition for Judicial Review, except for acquittal *(vrijspraak)* or release from any legal claim *(ontslaag van rechtsvervolging).* A question arises whether or not the Public Prosecutor may file petition for Judicial Review according to the formulation of Article 263 Paragraph (1). The Public Prosecutor indeed cannot file petition for Judicial Review since philosophical basis of Judicial Review is that it is an instrument used for protecting the human rights of the defendants, to obtain a just legal certainty in the relevant legal process. Indeed, there is a possibility of a mistake in making a decision to acquit the defendants or the finding of new evidence showing the guilt of the defendant, in case such evidence previously obtained. However, the lengthy process that has been going through as from investigation, prosecution, examination, and decision in the court of first instance, appeal, and appeal to the Supreme Court is deemed to have given adequate opportunity for the Public Prosecutor to use the authority to prove the mistake of the defendant. Therefore, it is deemed fair if Judicial Review is limited only to the defendants or their heirs since the Public Prosecutors with all of their authorities in the court of first instance, appeal, and appeal to the Supreme Court are deemed to have obtained

adequate opportunity. If it is true that the limitive provision of Article 263 paragraph (1) of KUHAP is deemed no longer in accordance with the sense of justice existing in the community because of a shift in the paradigm, then the provision of Article 263 Paragraph (1) must be amended and adjusted first with a new legal awareness developing and living in the community through the legislation process;

[3.23] Aside from the history of the establishment of Article 23 Paragraph (1) of Law 4/2004 which was influenced by the Supreme Court's decision admitting a petition for Judicial Review filed by Public Prosecutor in a certain case prior to and during the revision of law concerning judicial institutions under the Supreme Court in 2003, as conveyed by DPR, hence for the sake of justice it is necessary to formulate the rights or authorities to file petition for Judicial Review which allow such broad interpretation in Law 4/2004. The Court is of a different opinion with such historical interpretation which justifies the practices of disregarding Article 263 Paragraph (1) of KUHAP on the pretest of the *lex posteriori derogat legi priori* doctrine, because Law 4/2004 does not provide for the subject matters regulated by Law 8/1981. However, as previously described that judges have the authority to make independent interpretation of onscure provisions of law. If it is true that such matter is deemed to violate the provisions of the 1945 Constitution, it is merely a problem of law enforcement. According to the Court, such matter is not the issue of constitutionality of Article 23 paragraph (1) of Law 4/2004. If the judicial practice as indicated in the two decisions filed by the Petitioner as evidence can show such inconsistency and if such practice also

results in legal uncertainty as provided in Article 28D Paragraph (1) of the 1945 Constitution, hence the constitutional rights of the Petitioner have been impaired. However, the Court is still of the opinion that such matter is not the authority of the Court. Such matter will fall within the jurisdiction of the Court if the Court is granted the authority by the 1945 Constitution to examine, hear, and decide upon cases of constitutional complaint as is the case with the authority of Constitutional Courts in many other countries;

4. **CONCLUSION**

Based on the foregoing considerations regarding the facts and the law as described above, it can be concluded:

[4.1] Whereas the provision of Article 23 Paragraph (1) of Law Number 4 Year 2004 regarding Judicial Authorities as a general provision which is a part of the provisions regulating judicial institutions under the supervision of the Supreme Court and its principles, and include a phrase *"the relevant parties"* to determine the parties entitled to file petition for Judicial Review of court decisions which have had permanent legal force, is not contradictory to the 1945 Constitution;

[4.2] Whereas decisions of the Supreme Court which admit the Petition for Judicial Review filed by the Public Prosecutor based on general interpretation of the phrase "*the relevant parties*" in Article 23 Paragraph (1) of Law 4/2004 by disregarding Article 263 Paragraph (1) of Law Number 8 Year 1981 regarding

Criminal Procedural Law, which limitedly determines the parties entitled to file petition for Judicial Review in criminal cases, are related to the implementation of law, which is not related to the constitutionality of norms in Article 23 Paragraph (1) of the *a quo* law*;*

[4.3.] Whereas the petition of the Petitioner is not sufficiently grounded and has no legal basis; and therefore, it must be rejected.

5. **RULING**

In view of Article 56 Paragraph (5) of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316), then based on the 1945 Constitution of the Republic of Indonesia,

Passing the Decision,

To declare that the petition of the Petitioner is rejected.

Hence this decision was passed in the Consultative Meeting of Justices attended by nine Constitutional Court Justices on Wednesday, the thirteen of August two thousand and eight and pronounced in the Plenary Meeting of the Constitutional Court open for public held today, Friday, the fifteenth of August two thousand and eight attended by eight Constitutional Court Justices, namely H. Harjono, as the Chairperson of the Panel of Justices, Maruarar Siahaan, H.A.S Natabaya, Moh. Mahfud MD, H, Abdul Mukhtie Fadjar,

I Dewa Gede Palguna, H.M. Arsyad Sanusi, as well as Muhammad Alim, respectively as Members, assisted by Sunardi as the Substitute Clerk, as well as in the presence of the Petitioner/his Attorney-in-Fact, the Government or its representative, and the People's Legislative Assembly or its representative.

CHAIRPERSON OF THE PANEL OF JUSTICES,

sgd.

H. Harjono

JUSTICES,

sgd.	**sgd.**
Maruarar Siahaan	**H.A.S. Natabaya**
sgd.	**sgd.**
Moh. Mahfud MD	**H. Abdul Mukthie Fadjar**
sgd.	**sgd.**
I Dewa Gede Palguna	**HM. Arsyad Sanusi**

sgd.

Muhammad Alim

6. CONCURRING OPINION AND

DISSENTING OPINION

With regard to the foregoing Court's decision, one Constitutional Justice, namely Muhammad Alim, expresses concurring opinion and two Constitutional Justices, namely H. Abdul Mukthie Fadjar and H. Harjono, express dissenting opinion as follows:

[6.1] **Concurring Opinion of Constitutional Justice Muhammad Alim**

With regard to the Petitioner's argument that the provision of Article 23 Paragraph (1) of Law Number 4 Year 2004 (hereinafter referred to as Law 4/2004) which mentions, "*the relevant parties may file petition for Judicial Review to the Supreme Court*", whereas pursuant to provision of Article 263 Paragraph (1) of KUHAP only the defendants or the heirs may file petition for Judicial Review hence it results in legal uncertainty, I am of the opinion that such matter is merely a matter of the implementation of law by the Supreme Court which is deemed to have violated legal certainty by the defendant. It should be understood that the aforementioned Article is not only intended for the petition for Judicial Review against criminal case decision which has had permanent legal force, but also for civil case decision with permanent legal force. The petition for Judicial Review in civil case decision gives opportunity for both parties, plaintiff and defendant, to file petition for Judicial Review provided that they meet particular requirements.

The Article petitioned for Judicial Review by the Petitioner, namely Article 23 Paragraph (1) of Law 4/2004 regarding Judicial Authorities is one of the Articles contained in the umbrella law whose further implementation in the procedural law shall be regulated by law; therefore, what should be petitioned for Judicial Review is not the *a quo* article, but the law on such procedural law. Article 263 Paragraph (1) of KUHAP is not petitioned for Judicial Review because according to the Petitioner, such Article is already precise and correct, moreover, it is favorable to the Petitioner since the Public Prosecutor is not given the opportunity to file petition for Judicial Review.

Having read Article 28D Paragraph (1) of the 1945 Constitution, the Petitioner only reads, "*legal certainty",* it should be added by *"fair",* hence it completely reads, "fair *legal certainty"*.

It is necessary to find out at first the sense of fairness. The word "fair (*adil*)" is derived from Arabic namely "***adl***" which in Arabic dictionaries, it shall mean "***equal***" (see M. Quraish Shihab, *Wawasan Al Quran,* Mizan, Bandung, 1999, page 111).

Kamus Besar Bahasa Indonesia explains that fair means (1) not biased, impartial; (2) take sides with the right party, firmly stands for truth; (3) rightly, non-arbitrary (See *Kamus Besar Bahasa Indonesia,* Ministry of Education and Culture, Balai Pustaka, Jakarta, 1997, page 7).

To explain the sense of fairness in the aforementioned dictionary, M. Quraish Shihab writes as follows:

> *"Equality" which is the meaning of the word "fair" makes the actors act "impartially", and a fair person basically take sides with the right party" because both the right and the wrong should obtain their rights. Thus, the person will act properly and not arbitrarily." (M. Quraish Shihab, loc. cit.).*

Majid Khadduri categorizes legal justice into (1) procedural justice or formal justice, and (2) substantive justice (Majid Khadduri, *The Islamic Conception of Justice*, The Johns Hopkins University Press, Baltimore and London, 1984, page 136).

In procedural justice, formal justice, or procedural law justice, law shall provide equal treatment to both parties.

Unlike procedural law justice which is required to treat both parties equally, substantive justice may not treat the parties equally, but it should be in accordance with a fair and proper part.

A part which is fair, proper, or proportional in Arabic term shall mean *al qist.*

This *Al-qist* or "part" (which is fair and proper) is substantive justice as mentioned above is not oriented to equality but to a proper part.

Substantive justice cannot make any generalization. Each case must be considered severally, ***Suum Cuique Tribuere***.

> *"Talking about law is talking about the relationship among human beings. Talking about law is talking about justice. Therefore, every conversation about law, vivid or obscure, always constitutes a conversation about justice as well."* (Satjipto Rahardjo, *Ilmu Hukum*, PT. Citra Aditya Bakti, Bandung, 1996, page 159).

Furthermore, Allah SWT, the only one God who creates all human beings and this universe orders all human beings to act justly since justice is very close to religious devotion (Al Quran Shura Al Maaidah/5 : 8).

In the event that the defendants, as the decision on his/her case has had permanent legal force and has been executed, since petition for Judicial Review does not postpone execution in accordance with the provision of Article 268 Paragraph (2) of KUHAP, is still given the opportunity to file petition for Judicial Review, which the provision is procedural law that must treat all parties equally, it would be so unfair if the Public Prosecutor representing the people in general, the victims in particular, is not given an equal opportunity to file petition for Judicial Review.

It is an unequal treatment if the defendants are highly protected while the victims in criminal cases represented by the Public Prosecutor are not

given protection equal to that given to the defendants in case there is a ***novum*** for filing petition for Judicial Review.

It is evident that based on the decision which has obtained permanent legal force the Defendants are the guilty party which is given the opportunity to file petition for Judicial Review, while the victims represented by the Public Prosecutor is the party who is oppressed by the Defendants is not given the opportunity to file petition for Judicial Review.

Such unfair legal certainty as well as unequal treatment given to the defendants who are allowed to file petition for Judicial Review and the Public Prosecutors representing the people including the victims who are not given equal opportunity to file petition for Judicial Review shall be a rule or action which is contradictory to the 1945 Constitution.

In handling concrete cases filed to it, in the event of non-compliance, and even contradiction between legal certainty and justice, a court of law should choose justice because it is in accordance with opening statement in every Decision, namely “For the Sake of Justice Under the One Almighty God” NOT “For the Sake of Legal Certainty Under the One Almighty God”.

In the event that a judge fighting against such unfair legal certainty which only gives opportunity to the defendants whose criminal decision has been executed to file petition for Judicial Review without giving an equal opportunity to the Public Prosecutor representing the people including the victims, it is proper to

support the judge since he/she must prioritize justice over legal certainty. The judge may not become a trumpet of law *(la bouche qui pronounce les paroles de la loi)* in the event that the injustice of such law has been obvious.

May Allah SWT blesses this opinion, Amen.

[6.2] **Dissenting Opinion of Constitutional Court Justices H. Harjono and H. Abdul Mukthie Fadjar**

With regard to subject matter of the petition questioning the constitutionality of Article 23 Paragraph (1) of Law Number 4 Year 2004 regarding Judicial Authorities (briefly referred to as Law 4/2004), we have a dissenting opinion with the majority of justices who consider the petitioner's petition more as the issue of law implementation, rather than the issue of constitutionality of legal norms, with the following basic considerations:

1. Whereas the subject matter of the petition is based on the existence of Article 263 of the KUHAP and Article 23 of Law 4/2004 in which both articles are actually implemented separately, hence the constitutional right of the Petitioner has been impaired, since it is only subject to Article 23 of Law 4/2004, while the provision of Article 263 of KUHAP is not implemented to the Petitioner. Whereas in order that we can precisely observe the relationship between the aforementioned two articles, the position and purpose of both articles must be reviewed.
2. Whereas the Criminal Procedural Code whose formal form is Law Number 8 Year 1981 regarding Criminal Procedural Law, constitutes criminal

procedural law which is formal law in nature to implement substantive law namely criminal law. Criminal Procedural Code is intended to replace RIB (the Renewed Indonesian Reglement), since RIB is deemed insufficient to protect human rights in criminal proceedings. Such matter can be proved by the statement included in the General Elucidation of Criminal Procedural Code which among others declares:

- "… thus, '*Het Herziene Inlandsch Reglement*' (*Staatsblad* Year 1941 Number 44) in relation to Law Number 1 Drt. Year 1951 (State Gazette Year 1951 Number 59, Supplement to State Gazette Number 81) as well as all other subordinate legislation, insofar as it is regarding criminal procedural law, it is necessary to be revoked since it is not in accordance with the aspirations of the national law and replaced with new criminal procedural law having codificative and unificative characteristics based Pancasila and the 1945 Constitution."
- Furthermore, the following is also included in the General Elucidation: "Therefore, this law which regulates national criminal procedural law, shall be required to be based on philosophy of life of the nation and state principle, therefore it is only appropriate that the provision of substance of article or paragraph reflects protection against human rights as well as obligation of citizen as described previously, and principles to be further mentioned."

- In the General Elucidation, it is also mentioned that there are ten principles which regulate the protection against noble status and dignity of human being to be held in this Criminal Procedural Law (Law Number 8 Year 1981) one of such principles as included in sub-paragraph (d) reads: “For the person arrested, detained, prosecuted **or adjudicated** without any ground **based on** law and or due to mistake regarding the person or the implemented law, he/she should be given compensation and rehabilitation as from investigation and the officials enforcing law which voluntarily or due to their negligence causing such legal principle to have been violated, claimed, subject to criminal sanction, or subject to administration penalty.”

3. Whereas from the aforementioned description, it is obvious that the intention of the legislator of KUHAP is to protect the rights of the suspect, defendant in hearing process either when a person arrested, detained, prosecuted or adjudicated. Thereby, such protection is not only given in hearing process of first instance but also in examination of cassation instance, even in hearing of review since it is included in the process to pass Judgment to the suspect.
4. Whereas KUHAP as criminal procedural law will give direct impact to human rights and provision included in KUHAP in principle constitutes provision which provide the basis for legalizing the performance of preliminary investigator, investigator, and public prosecutor, even the

Justice in the hearing process. In the event that such action is not conducted by the officials enforcing law or conducted in normal situation, it constitutes violation against human rights. KUHAP shall give an authority to officials enforcing law, but such authority must be limited and restricted since if it is not restricted, the use of such authority will inflict a very great loss to community member whose constitutional rights are guaranteed. As a law related to human rights, the formulation of criminal procedural law in a constitutional state shall meet the following principles: (1) *lex script*, namely whereas the provision of law must be in writing, (2) *lex certa*, namely the provision of law must guarantee the legal certainty, and (3) *lex stricta*, namely the provision of law is formulated strictly, because by such formulation the balance between human rights and state authority shall be guaranteed.

5. In implementing law, the Justice may conduct interpretation against law; however, with regard to the provision of criminal law and criminal procedural law, interpretation on law must be implemented limitedly. The prohibition on extensive interpretation is intended to protect the rights of suspect including the rights guaranteed by the constitution or the defendant and also the prohibition on analogy making. Article 263 Paragraph (1) of Criminal Procedural Law reads, ”With regard to the Court's decision which has obtained permanent legal force, except for decision to be free and to release from legal claim, the defendants or the heirs may file petition for Judicial Review to the Supreme Court.” Such

provision has actually met criteria as: *lex scripta*, *lex certa*, *and lex stricta* required in law which limits the freedom of citizen rights.

6. In the formulation of Article 263 Paragraph (1) of such KUHAP, what is related to the *a quo* case is the definition of ”the defendants or the heirs”. Such formulation has clearly defined who is referred to the defendants or the heirs, hence it is unnecessary to make an interpretation. Elucidation of Article 263 of KUHAP states that, “this Article includes the reasons to be used to file petition for Judicial Review against a criminal case decision which has had permanent legal force.” Law Number 14 Year 1985 regarding the Supreme Court (abbreviated as Law 14/1985) in Article 76 States that, “In examining the petition for Judicial Review against a criminal case decision which has had permanent legal force, review proceeding is still be used as regulated in KUHAP.” With the coming into effect of this Article, then the Provision of Article 263 Paragraph (1) of KUHAP constitutes procedural law which is binding to Justice. Law 14/1985 has been amended by Law Number 5 Year 2004 and in such amendment the provision included in Article 76 of Law 14/1985 has not undergone any changes, which means that such provision remains in effect.

7. Article 23 Paragraph (1) of Law 4/2004 regarding Judicial Authorities states that, “ With regard to the Court's decision which has obtained permanent legal force, the relevant parties may file a petition for judicial review to the Supreme Court, in the event there are particular matters or

situations provided by law.” This law is Law regarding Judicial Authorities, hence it constitutes an umbrella or a provision which is more general in nature than Law regarding the Supreme Court and law in the other judicial Circle. Thereby, the provision included in law which is more specific shall come into effect if the Supreme Court examines the case of review; in other words, Law 4/2004 cannot stand itself. The definition of a phrase ”the relevant parties” shall refer to the provision stipulated by law which regulates their respective procedural law.

8. The provision of Article 23 of Law 4/2004 has in fact created legal uncertainty since the definition of the parties is implemented inconsistently in the implementation of such provision during the hearing process in criminal case. In defining the parties of this provision of Article, it is interpreted that the Public Prosecutor includes in such definition, hence the Public Prosecutor may file petition for Judicial Review, but in other cases it is interpreted that the Public Prosecutor cannot file such petition (Observe Decision Number 84 PK/Pid/2006 and Decision Number 109 PK/Pid/2007).

9. It is indeed true that Article 23 Paragraph (1) of Law 4/2004 constitutes a provision which is in general nature applicable to all types of case of Review, either for Judicial Review in civil case, review in criminal case, review in case decided by Court in the Circle of Religious Court, Review of case decided by Court in the Circle of State Administration Court, as well as Review of case decided by Court in the Circle of Military Court, but

their implementation should refer to law applicable to each court. Such matter can be observed in Law Number 14 Year 1985 regarding the Supreme Court which has been amended by Law Number 5 Year 2004 (hereinafter referred to as the Supreme Court Law) which the provision regarding Review has in fact not undergone any changes, namely the provision including in Chapter IV of Procedural Law remains applicable to the Supreme Court, Part Four, the Examination on the Review of Court's Decision which has Had Permanent Legal Force, the point is that the Review in civil case has been regulated in detail in Article 67 through Article 75 of the Supreme Court Law while Review in criminal case has been regulated based on Article 76 of the Supreme Court Law by referring to the provision of KUHAP. With regard to the case decided upon by Court in the Circle of Religious Court and State Administration Court based on the provision of Article 77 Paragraph (1) of the Supreme Court, the provision applicable to Review in civil case shall apply. With regard to Review in case decided upon by military court based on Article 77 Paragraph (2) of the Supreme Court, the provision of KUHAP shall apply. Thereby, in fact, the existence of Article 23 Paragraph (1) of Law 4/2004 is not too necessary, since without the existence of this Article, legal vacancy will never occur.

10. In the actual practice, with the coming into effect of Article 23 of Law 4/2004, it opens different interpretation or multi-interpretation, hence it results in legal uncertainty. The Court should not base on the ground that

such multi-interpretation is solely the practical issue and not relates to the constitutionality, hence the Court has no authority to review. The Court should consider that in several previous decisions, the Court does not draw a dichotomy between the practical issue and the norm constitutionality issue. The Court's decision which gives Conditionally Constitutional nature is the decision which considers the practice or the implementation of norm, since the Court stipulates the norm constitutionality depends on how a provision to be reviewed is to be implemented or conducted. In the event that the provision of law is implemented in accordance with the opinion of Court, such provision of law is not contradictory to the Constitution while in the event that such provision is implemented not in accordance with the opinion of Court, such provision is contradictory to the Constitution.

11. Based on the foregoing description, We are of the opinion that Article 23 Paragraph (1) of Law 4/2004 is a reason of the inconsistency in the implementation of provisions regarding the parties entitled to file petition for Judicial Review in criminal cases; therefore, the petition of the Petitioner should have been sufficiently grounded to be granted. In the event that there is a desire to shift the paradigm in criminal procedural law which is too oriented to the Defendants (criminal actor) to a new paradigm which follows the principle of balance between the criminals and the victims/community, not by allowing the existence of legal norm which

leads to multi-interpretation, but by changing and harmonizing many laws related to Review in criminal case.

SUBSTITUTE REGISTRAR,

sgd.

Sunardi