

Legal Protection Against Status Determination of Suspects for Unpleasant Crimes After the Decision of the Constitutional Court Number 1/PUU-XI/2013

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Abstract

The Constitutional Court has the authority to harmonize laws against the 1945 Constitution of the Republic of Indonesia. One of the decisions is regarding Article 335 paragraph (1) of the Criminal Code and Article 21 paragraph (4) of the Criminal Procedure Code, which are considered Contrary to Article 28D of the 1945 Constitution of the Republic of Indonesia. The Constitutional Court Decision Number 1/PUU -XI/2013 eliminates the phrase "unpleasant actions" because it is considered multi-interpretative and emphasizes subjectivity. In detail, after the Decision of the Constitutional Court Number 1/PUU-XI/2013, there are still pre-trial cases of determining suspects based on unpleasant acts. The formulation of Article 335 Paragraph (1) of the Criminal Code, which is used after the decision, requires the fulfillment of 2 (two) elements, namely "using violence" or "threats of violence". In each indictment, the phrase "unpleasant act" is considered a formal excuse. This writing aims to assess the application of the Constitutional Court Decision in legal practice. The legal method used is normative legal research. The author exerts a statute approach, conceptual approach, and case approach. The legal material is then analyzed using grammatical and systematic interpretation methods. Article 335 Paragraph (1) of the Criminal Code must be used cumulatively. Law enforcement of criminal acts of unpleasant acts cannot be retroactive. Under the Principle of Legality, or in Latin, *Nullum Delictum Nulla Poena Sine Pravia Lege*.

Keywords: Determination of A Suspect, Unpleasant Deeds, Constitutional Court Ruling

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INTRODUCTION

The institution that guarantees the conformity of the regulations made in the 1945 Constitution of the Republic of Indonesia according to Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia is the Constitutional Court. One of the main powers of the Constitutional Court is to examine laws against the 1945 Constitution of the Republic of Indonesia. Seeing this, every Indonesian citizen who feels that his rights have been harmed by an article in the law that is considered contrary to the 1945 Constitution of the Republic of Indonesia can file a *judicial review*. to the Constitutional Court) (Sirait et al., 2020). This happened to the application for a judicial review of Article 335 Paragraph (1) of the Criminal Code (hereinafter referred to as the Criminal Code) by Oei Alimin Sukamti Wijaya in 2013 to do or not to do something by threat of violence. Article 335 paragraph (1) of the Criminal Code (1946) reads: First, is threatened with a maximum imprisonment of one year or a maximum fine of four thousand

five hundred rupiahs, Second, whoever unlawfully **forces** another person to do, not to do, or to allow something, by using **violence**, some other act or **unpleasant treatment**, or by using threats of violence, some other act or unpleasant treatment, both towards the person himself and others (bold by the author).

The offense of Article 335 Paragraph (1) point 1 is categorized as a general crime and has multiple interpretations, because it allows all things to be included in the phrase “Unpleasant Actions”. The element of unpleasant conduct causes the article to be applied flexibly and it is possible to link it to other types of criminal acts. Therefore, the suspect on the charge of unpleasant acts based on Article 21 Paragraph (4) point b of the Criminal Procedure Code (hereinafter referred to as the Criminal Procedure Code) can be detained. Unpleasant acts are difficult to measure, making them vulnerable to arbitrary practices by investigators, reporters, and public prosecutors (D et al., 2019).

The Constitutional Court then issued Decision Number 1/PUU-XI/2013 concerning the Elimination of Displeasing Deed Phrases to provide legal certainty and legal protection as stated in Article 28D of the 1945 Constitution of the Republic of Indonesia (Awaliyah, 2014). This decision has legal consequences with the abolition of the phrase “Unpleasant Actions” in Article 335 Paragraph (1) point 1 of the Criminal Code. However, it does not mean that the entire article is deleted because this article can still be applied only if it fulfills the elements with threats or violence. The abolition of the phrase "Unpleasant Deed" originated from a request submitted by Oei Alimin Sukamti Wijaya who considered himself as an individual or individuals who were harmed by the use of the offense.

The vague and broad formulation of Article 335 Paragraph (1) point 1 is considered not in line with the *Lex Certa* and *Lex Stricta aspects* of the legality principle. Therefore, the element of “unpleasant treatment” contradicts the aspects of *Lex Certa* and *Lex Stricta* in the principle of legality. According to Wirjono Prodjodikoro, the article in the Dutch Criminal Code which acts as a guide for the preparation of Article 335 of the Criminal Code does not have the element of "unpleasant treatment". This element is only found in the Indonesian Criminal Code (formerly *Wetboek van Strafrecht voor Nederlands Indie*) (Swadana, 2014). The Chief Justice of the Constitutional Court, Hamdan Zoleva Hakim who issued the Constitutional Court Decision No. 1/PUU-XI/2013, decided that the phrase, “Something else or unpleasant treatment” in Article 335 Paragraph (1) point 1 of the Criminal Code is considered contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force.

The decision of the Constitutional Court Number 1/PUU-XI/2013 since it was read by the Constitutional Court Justices at trial is considered to have permanent legal force. So, there is no

longer any reason for law enforcement to use Article 335 Paragraph (1) of the Criminal Code by including the phrase "unpleasant acts" in their demands. In practice, it is still found that law enforcers use the phrase "unpleasant acts" in Article 335 paragraph (1) point 1 of the Criminal Code to criminalize someone. Therefore, the judge's decision which still includes the phrase "unpleasant act" can be taken as legal action (Anggraeni, 2019). One example of the determination of a suspect in a criminal act of unpleasantness occurred in 2016 which was handled by the Pekanbaru District Court. Herman Datuk Ais Bin Bahtiar as the Petitioner filed a pretrial against the validity of his husband's arrest. The criminal offense charged is an unpleasant act or threat of violence against Rajab. The Petitioner's Arrest Warrant for Herman is considered to be the embodiment of arbitrary actions by law enforcement. From the findings above, there is a difference between the facts on the ground (*das sein*) which is considered contrary to the Constitutional Court Decision Number 1/PUU-XI/2013 (*das sollen*), which later became the main reason for the author in completing legal research. This then raises the question of what legal remedies can be taken against the determination of the status of a suspect who uses the phrase "unpleasant act" in the offense of Article 335 of the Criminal Code as the basis for demands after the Constitutional Court Decision Number 1/PUU-XI/2013.

There are several studies similar to this research, so as to ensure their novelty (*novelty*) of this article, it will be described the difference with these articles. As for similar research and the differences, namely:

1. Novia Anggraeni's article entitled "Analysis of Judge's Decision Number 607/PID.B/2015/PN.Kag Post-Constitutional Court Decision Number 1/PUU-XI/2013 concerning Unpleasant Acts Article 335 paragraph (1) point 1 of the Criminal Code" which was published in Journal of Law, 2019. The research from Novia Anggraeni focuses only on Decision Number 607/PID.B/2015/PN.Kag which in fact is narrower in scope than this research, because it only focuses on the decision, meanwhile, in this writing, the author tries to conclude the application in practice since the decision of the Constitutional Court was handed down. Therefore, the authors choose to analyze the decision with a newer year and focus on the conflict with the principle of legality.
2. An article from Indriana Dwi Mutiara Sari, Handias Gita, and Anggita Doramia Lumbanraja entitled "Analysis of Criminal Law Policy Against Unpleasant Acts of Crime" published in the Indonesian Legal Development Journal, Volume 1, Number 2, 2019. In this article the focus is only on legal politics. regulation of unpleasant acts in Indonesia, but has not described legal remedies against the determination of suspects

for criminal acts of unpleasant conduct after the Decision of the Constitutional Court Number 1/PUU-XI/2013.

RESEARCH METHODS

This legal research is normative that focuses on studying legal issues related to the urgency of legal protection against the determination of the status of a suspect in a criminal act of unpleasant behavior after the decision of the Constitutional Court Number 1/PUU-XI/2013. In detail, carry out a basic analysis of considerations for amendments to Article 335 of the Criminal Code paragraph (1) Point 1 based on the Decision of the Constitutional Court Number 1/PUU-XI/2013 concerning the Elimination of Displeasing Phrases. Furthermore, it discusses the legal consequences of the Constitutional Court's decision and the efforts that can be made towards the determination of the suspect in the Unpleasant Crime Act after the enactment of the Constitutional Court's Decision Number 1/PUU-XI/2013. Primary legal materials that are used as references include the Criminal Code, Criminal Procedure Code, Laws and Judges' Decisions. Meanwhile, secondary legal materials used as references include textbooks, scientific articles, and scientific journals via the internet. The primary and secondary legal materials are then analyzed to obtain conformity and relevance to answering the issues in this paper. Empirical data are only used to describe real conditions in the field and are not legal analysis material.

The research method used is the statute *approach*, the case *approach* and the conceptual *approach*. The statute *approach* is carried out by reviewing all laws and regulations related to legal issues. The case approach through analysis of existing decisions related to the issues discussed. The conceptual approach departs from the views and doctrines that develop in legal science (Marzuki, 2016).

RESEARCH RESULTS AND DISCUSSION

The Legal Consequences of the Decision of the Constitutional Court Number 1/PUU-XI/2013 on the Crime of Unpleasant Acts

The mechanism for controlling legal norms is the main thing that is important to implement in order to keep the constitutional rules in the 1945 Constitution of the Republic of Indonesia and the laws and regulations in line. Based on Article 24C paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia, the Constitutional Court has 4 (four) powers: (1) Judicial review of the 1945 Constitution; (2) To decide on disputes over the authority of state institutions and their powers granted by the 1945 Constitution of the Republic of Indonesia; (3) give a decision on the dissolution of a political party; and (4) give a decision regarding the dispute over the general election results. In conclusion, the position of the Constitutional Court in the Indonesian constitutional structure is the key to the realization of *separation of power* a

substantive. With the separation of powers, it is hoped that will be created *checks and balances*. This division of power, in fact, can also be understood as a preventive effort to avoid the occurrence of power that is only concentrated in one part that is vulnerable to abuse of power. This is in accordance with the leading opinion of John Dalberg-Acton or commonly known as Lord Acton, namely: "*Power tends to corrupt, absolute power corrupts absolutely*" (Peggy, 2016).

The examination from the Constitutional Court in terms of theory and practice is divided into 2 (two) types of testing, namely formal testing (*formale toetsingsrecht*) and material testing (*materiale toetsingsrecht*). All laws and regulations that are made must be sourced from the 1945 Constitution of the Republic of Indonesia and do not conflict with the contents of the 1945. Laws that are proven to be contrary to the 1945 have legal consequences that can be canceled through *judicial review* Constitution of the Republic of Indonesia Constitution of the Republic of Indonesia to the Constitutional Court of the Republic of Indonesia (Supriyanto, 2011). Article 51 of Law Number 24 of 2003 concerning the Constitutional Court affirms that every Indonesian citizen who feels that his rights have been harmed by an article in the law that is considered contrary to the 1945 Constitution of the Republic of Indonesia can submit a *judicial review* to the Constitutional Court (Sumadi). , 2011).

The Constitutional Court issued Decision Number 1/PUU-XI/2013 concerning the Elimination of Displeasing Deed Phrases to provide legal certainty and legal protection as stated in Article 28D of the 1945 Constitution of the Republic of Indonesia (Awaliyah, 2014). This decision has legal consequences with the abolition of the phrase "Unpleasant Actions" in Article 335 Paragraph (1) point 1 of the Criminal Code. However, it does not mean that the entire article is deleted because this article can still be applied only if it fulfills the elements with threats or violence.

The application for judicial review related to Article 335 paragraph (1) point 1 of the Criminal Code begins with This case filed by Oei Alimin Sukamto Wijaya through his attorney. At that time he was a suspect as a result of the enforcement of Article 335 of the Criminal Code. The Petitioner from the Surabaya Genteng Police detained the applicant on August 5, 2012 after he was found in an argument involving the owner of the Meritus Hotel (Haryono Winata). The second fact is that the applicant is in a position of being persecuted by Haryono Winata et al. The application of Article 335 paragraph (1) of the Criminal Code by the applicant is considered constitutionally to injure individual rights without exception if there are investigators or public prosecutors who apply the article.

The background of the petition began on August 5, 2012, the Petitioner was abused by the owner of the Meritus Hotel at the Meritus Hotel Surabaya. As a result of the incident, the Petitioner

suffered bruises on his face. The applicant then reported the case to the Gubeng Surabaya Police. The case was not immediately handled by the authorities, and further harmed the Petitioner. The Petitioner admitted that he felt he was being blackmailed by being asked for compensation of Rp. 3 billion which was later reduced to Rp. 500 million. The applicant's acts of abuse and attempts at extortion were later reported by the applicant to the East Java Regional Police on August 30, 2012. However, the Regional Police only issued a letter stating that the elements of the Petitioner's report were not proven.

The Gubeng Surabaya Police determined the Petitioner as a suspect with the argument of an unpleasant act referring to Article 335 paragraph (1) of the Criminal Code with the owner of the Meritus Hotel Surabaya as the Reporting Party. The reason used is that the applicant said: *"hey, if you dare, don't beat me here (your hotel). If you dare, let's fight in Suramadu."* The applicant was named a suspect through a Detention Order Number SP.Han/123/X/2012/JATIM/RESKRIM. The Petitioner considers this series of incidents to have violated his constitutional rights.

The Supreme Court of the Republic of Indonesia in its Decision No. 675 K/Pid/1985 dated August 4, 1987 to correct the acquittal (*vrijspraak*) from the Ende District Court No. 15/Pid.B/1984 dated March 25, 1985, provides qualifications for unpleasant acts, among others: *"with an act, unlawfully forces people to allow something."* So, the meaning of this understanding is that the defendant's actions that are against the law can result in other people or the victim not doing anything so that something is forced to happen while the victim does not agree or does not want something to happen. It can happen because one of the parties doesn't like it or doesn't allow it to happen; but at the same time not having physical and psychological abilities as an effort to reject, hinder, and avoid the occurrence of acts that are against the law (Tuhumury, 2015).

Article 335 paragraph (1) point 1 of the Criminal Code is considered a multi-interpretation article and cannot provide legal certainty. This article is contained in Chapter XVIII concerning Crimes Against the Independence of Persons, so the legal norms contained in it are examples of criminal law norms which contain prohibitions against certain acts that threaten a person's independence. The second objective is to strengthen constitutional legal norms as referred to in Article 28D of the 1945 Constitution of the Republic of Indonesia. The elements of a criminal act in Article 335 paragraph (1) point 1 of the Criminal Code are as follows: first, whoever; second, Unlawfully; third, Forcing others to do, not to do or to allow something; fifth, By using violence, other actions or unpleasant treatment, or by threats of violence, both against the person himself or others.

Looking at the provisions of Article 335 paragraph (1) point 2, a crime can only be prosecuted if there is a complaint from the affected person. The application of Article 335 Paragraph (1) of the Criminal Code emphasizes the interpretation of the "element of coercion" as the main element that must be fulfilled in a series of unpleasant acts, both physical and psychological coercion. The author argues that, the parties interpreted "unpleasant actions" by "treating people unfavorably". Where both have different meanings.

When viewed from the applicability and purpose of Article 335 paragraph (1) of this Criminal Code, it can be said that this article is contrary to the principle of legality. In accordance with Article 1 Paragraph (1), or in Latin it is called *Nullum delictum, nulla poena sine praevia lege poenali*, that there is no offense, no crime, without being preceded by criminal provisions in the legislation. In the system *civil law*, there are 4 (four) aspects of the principle of legality that are applied, namely: *Lex Scripta*, *Lex Certa*, *Non-retroactive*, and *Lex Stricta* (Rahayu, 2014). In the context of Article 335 Paragraph (1) of the Criminal Code, it appears that this Article does not meet the aspects *Lex Certa* of the Legality Principle and *Lex Stricta* of legal certainty. *Lex Certa* is a Latin term which translates as "certain laws". Legislators must define clearly without (*ambiguity nullum crimen sine lege stricta*), so that there is no formulation that does not have a double meaning for prohibited and sanctioned actions. According to Schaffmesiter, Keijzer and Sutorius regarding the terms of *Lex Certa*, it is emphasized that the position of the law must be clearly stated as (Kantjai, 2016): a). people's guidelines in choosing their behavior; and, b) the basis for providing certainty regarding the limits of authority to the authorities.

Aspect *Lex Certa* here means legal certainty. The elements of "other actions" and elements of "unpleasant acts", can provide opportunities for unclear interpretations and do not provide legal certainty. The element of "other actions" is also an element that has no clear boundaries. This uncertainty explains that this element only shows that it is not an act of violence, but does not explain in detail what actions are actually prohibited (P. Moeliono & Wulandari, 2014).

In the provisions of Article 21 paragraph (4) letter b of the Criminal Procedure Code, it reads: "Detention can only be imposed on a suspect or defendant who commits a criminal act and or attempts or provides assistance in the crime in terms of: a). The crime is punishable by imprisonment of five years or more; b). The crime as referred to in Article 282 paragraph (3), Article 296, **Article 335 Paragraph (1)**, Article 351 paragraph (1), Article 353 paragraph (1) Article 372, Article 378, Article 379 a, Article 453, Article 454, Article 455, Article 459.

Meanwhile, *Lex Stricta* here means that criminal law is not elastic or must be interpreted as it is read. Acts subject to criminal acts must be in written form. A rule of law must be interpreted clearly and strictly (Toelle, 2015). Here it is emphasized that in criminal law analogies should not

be made. Thus, the multi-interpreted nature of Article 335 paragraph (1) of the Criminal Code is considered to be contrary to this Legality Principle.

The decision of the Constitutional Court Number 1/PUU-XI/2013 **stipulates** that the phrase "Something else or unpleasant treatment" Article 335 Paragraph (1) is considered **contrary** to Article 28D of the 1945 Constitution of the Republic of Indonesia and **has no binding legal force**. Normatively, the type of decision of the Constitutional Court according to Articles 56-57 of Law no. 24 of 2003 concerning the Constitutional Court in conjunction with Article 57 of Law no. 8 of 2011 concerning Amendments to Law no. 24 of 2003 concerning the Constitutional Court consists of 3 (three) types, namely the decision is **granted, rejected, and cannot be accepted**. In 2004 it was then introduced as "Conditional Decisions" as an effort to provide a sense of justice and certainty and prevent a legal vacuum (Mardatillah, 2018).

In accordance with the authority of the Constitutional Court to interpret the 1945 Constitution of the Republic of Indonesia, through the Decision of the Constitutional Court Number 1/PUU-XI/2013 it is stated that in its decision it omitted the phrase "unpleasant act". So that it reads: "Whoever unlawfully forces another person to do, not do or allow something, by using **violence**, or by using **threats of violence** either against the person himself or others".

The legal consequences of the decision of the Constitutional Court Number 1/PUU-XI/2013 the judge stated that Article 335 paragraph (1) point 1 of the Criminal Code is not legally binding and was followed by a change in the phrase by eliminating "unpleasant acts". In the judge's decision in the Constitutional Court Decision Number 1/PUU-XI/2013, the judge partially granted the applicant's request and declared a partial change to the phrase in Article 335 paragraph (1) item 1 of the Criminal Code. Article 335 paragraph (1) of the Criminal Code and Article 21 paragraph (4) of the Criminal Procedure Code are considered contrary to Article 28D of the 1945 Constitution of the Republic of Indonesia. The legal consequence of the amendment to Article 335 of the Criminal Code paragraph (1) point 1 by the Constitutional Court is the emphasis on offenses on elements of violence or threats of violence in Article 335 of the new Criminal Code is absolute. The next juridical implication is that it relates to changes in elements in Article 335 of the Criminal Code by the Constitutional Court as a unit (cumulative) (Kurniawati & Liany, 2019).

Article 56 of Law no. 24 of 2003 concerning the Constitutional Court states that the decisions that can be handed down by the Constitutional Court are decisions stating that the application cannot be accepted, the application is granted, and the application is rejected. The decision of the Constitutional Court provides an interpretation in the form of instructions, directions and guidelines as well as conditions, and it is possible to change a norm. If the interpretation given in the decision of the Constitutional Court met then classified as **a constitutional decision**

conditional (conditionally constitutional). on the other hand, if the interpretation is not met, then the norm of law or statute be **unconstitutional conditional** (conditionally unconstitutional). The conditional unconstitutional decision states that a legal norm is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force.

The Model Decision of the Constitutional Court Number 1/PUU-XI/2013 is conditionally unconstitutional, because it is motivated by the PUU material which is "forced" to be given certainty and justice (referring to the phrase "unpleasant act". states that the phrase in Article 335 Paragraph (1) of the Criminal Code is contrary to the 1945 Constitution of the Republic of Indonesia. It basically states that the phrase "*Something else or an unpleasant treatment*" in Article 335 Paragraph (1) point 1 of the Criminal Code does not have binding legal force. what the judge determined was that the article was not abolished, but only removed the phrase "Unpleasant Deeds" as an effort to provide legal certainty (Rahman & Agung, 2016). According to M. Kumm, in determining the decision, the Constitutional Court may use the proportionality method (Kumm, 2016). 2004) This method underlies the decision-making process in an effort to provide an analytical structure for the judge in deliberation before making a decision.

Briefly, the difference in the position of Article 335 of the Criminal Code before and after the Constitutional Court Decision Number 1/PUU-XI/2013 is explained in the table below:

NO	Difference	Before Decision	After Decision
1	Mentioning Offenses	Unpleasant Acts	Coercion
2	Subjectivity	Very Subjective	Very Objective
3	Elements core element	(Force, violence, threat of violence, acts unpleasant)	(Force, violence, threat of violence)
4	Meaning	Size, Multiple interpretations	Narrow, not interpretations
5	Aspects of Multiple interpretations	not Provide Legal Certainty	Provide Legal Certainty
6	substance	Contrary to the Constitution NRI 1945 (Specially Article 28 D)	does not contradict the 1945 Constitution of the Republic of Indonesia
7	Detention Context	Discriminatory	Not discriminatory

The conclusion that can be drawn is that the Constitutional Court Decision Number 1/PUU-XI/2013 has a legal consequence of eliminating the phrase "unpleasant acts". Thus, it can be

understood that it is **not possible to use the element of "unpleasant acts" to convict someone**, because the Constitutional Court's decision is final and binding since the verdict is read (*inkracht van gewijsde*) in accordance with the Elucidation of Article 10 paragraph (1) of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court (Soeroso, 2016). The type of action originating from Article 335 Paragraph (1) of the Criminal Code after the decision, must be used to fulfill one of the elements, namely "Using violence" or "Threats of violence". It is no longer applied as before the verdict, which is enough with the presence of "unpleasant actions", then it can criminalize someone.

Efforts to determine Suspects for Unpleasant Acts of Crime after the Constitutional Court's Decision the Constitutional Court's

Decision Number 1/PUU-XI/2013 resulted in legal consequences related to the enforcement and changes in the contents of Article 335 Paragraph (1) of the Criminal Code which in fact decriminalizes related to unpleasant acts. However, problems arise, especially in the practical facts that occurred after the decision of the Constitutional Court Number 1/PUU-XI/2013, it is still often found that law enforcers use offenses for unpleasant acts as the basis for determining suspects. Legal protection efforts must be taken to fulfill the purpose of the law itself, namely legal certainty, justice, and expediency (Wijoyo et al., 2020).

Suspects who are determined as criminal acts of unpleasant conduct after the fall of the Constitutional Court Decision Number 1/PUU-XI/2013 have the right to obtain protection and equal rights before the law. Referring to the classification of legal protection facilities according to Philipus M. Hadjon who classifies legal protection into preventive and repressive (Hadjon, 1987), the efforts that can be taken to protect suspects of criminal acts of unpleasant acts are preventive and repressive.

One concrete effort in the form of repressive legal protection that can be taken for suspects to get justice and protection of human rights, one of which is pretrial. Pretrial is part of the judicial process, which also has the authority to examine and decide on ongoing cases. The provisions of Article 1 point 10 of the Criminal Procedure Code defines pretrial as the authority of the district court to examine and decide, as related to (the legality of arrests and detentions, termination of investigations and prosecutions, as well as requests for compensation or rehabilitation from the suspect in cases that have not been brought to court). Juridically the implementation related to pretrial is regulated in Articles 77 to 8 of the Criminal Procedure Code.

Decision No. 21/PUU-XII/2014 is used as a way by the Constitutional Court to expand the types of pretrial objects. Several objects that were previously not included in the pretrial object (determination of suspects, searches, and confiscations) have resulted since the decision was read

out to be valid as pre-trial objects. This decision resulted in the expansion of the object of Pretrial which previously only consisted of arrest, detention, termination of investigation or termination of prosecution. This is then reaffirmed in Article 2 Paragraph (2) of PERMA No. 4 of 2016 which regulates the procedural law related to Pretrial on the validity of the determination of the suspect where the object of examination is as far as the formal aspect, namely the presence or absence of 2 (two) valid evidence.

The object of the pretrial determination of the suspect is part of the investigation where it is clear that there is a deprivation of human rights. The police as law enforcement agencies have the authority to determine the evidence for the determination of suspects based on the Constitutional Court Decision Number. 65/PUU-IX/2011 which stipulates that "Determination of Suspects" is part of the pretrial. Protection of the suspect's rights in the end does not necessarily abort the alleged crime, re-investigation can still be carried out following the appropriate rules and rules (Suswantoro et al., 2018).

Determination of a suspect for a criminal act of unpleasant conduct. Law enforcement officials use this method as a form of administrative action (*administrative justitia*). This action was carried out after the discovery of the suspect and was not a forced effort. Therefore, it can be interpreted that in the event that an arrest and detention is declared invalid, it is very possible to begin with the determination of an illegal suspect beforehand. the determination of an illegal suspect in other words contributes to making the detention invalid. However, at the same time illegal arrests and detentions are not necessarily preceded by determination.

In the process of proving the material requirements of the arrest and detention of the Petitioner, namely Oei Alimin, it was seen that there were irregularities. There is no solid evidence but only a statement from Haryono and the discovery of irregularities which resulted in compensation of Rp. 300 million. If through the pretrial approach, the material requirements for sufficient initial evidence as one of the material requirements are not met or can be declared invalid. Thus, arrests and detentions are illegal. However, the case of Oei Alimin occurred in 2013 before the issuance of the Constitutional Court's Decision regarding pretrial. It is clear that the Petitioner lost his independence in determining the suspect. The arbitrariness of the apparatus on the interpretation of Article 335 Paragraph (1) of the Criminal Code.

A detention letter that still uses Article 335 paragraph (1) of the Criminal Code by including the phrase "unpleasant act", can be considered a formal defect in accordance with PERMA No. 4 of 2016. This PERMA regulates the prohibition of PK (Review) on pretrial decisions and regulates case objects that can be submitted for pretrial. According to Yahya Harahap, for the sake of carrying out the interests of examining criminal acts, the law authorizes investigators and public

prosecutors to take coercive measures in the form of arrest, detention, confiscation and so on (Harahap, 2010).

Pretrial judges are limited to conducting *administrative reviews* of arrests and detentions. Where this is based on the formal requirements of arrest and detention, both related to the absence of arrest warrants, detention warrants, family copies and other formal administrative matters. In practice, pretrial judges rarely examine material requirements, one of which is preliminary evidence. The supervisory function by the pretrial institution is only *post facto* (after the fact). This causes the investigation and testing to be limited to the nature of formality which prioritizes the objective element, while the subjective element is not included in court supervision (Harahap, 2010).

Pekanbaru District Court Decision Number 5/Pid.Pre/2016/PN. Pbr is one example of the determination of a suspect in a criminal act of unpleasant behavior that occurred after the Constitutional Court Decision Number 1/PUU-XI/2013. Pretrial here is used by the Petitioner to test the validity of the determination of the suspect. The parties include:

- ✓ Samsidar (Herman Datuk's wife) as the Petitioner.
- ✓ Against the Head of the Bukit Raya Sector Police as Defendant I;
- ✓ Head of the Criminal Investigation Unit of the Bukit Raya Police as Respondent II;
- ✓ Head of the Pekanbaru District Attorney's Office as Respondent III;
- ✓ Pekanbaru City Police Chief as Respondent IV;
- ✓ Regional Supervisory Inspectorate as Respondent V;
- ✓ and the Head of the Riau Regional Police as Respondent VI.

Briefly, this case began with the arrest of the Petitioner's husband, Herman Datuk Ais Datuk Bin Bahtiar. The charges are written as “unpleasant conduct or threats of violence” against Rajab's brother. Herman was accused of swinging a machete and acts of violence at Rajab in the incident of the Respondent destroying the mosque signpost. On 02 April 2016 Herman was detained for 20 days until 21 April without a proper summons. Then a pretrial was filed on the basis of arbitrary actions by the Respondents.

The head of the highway sector police unit did not arrest and detain the applicant's husband based on two sufficient pieces of evidence. However, only based on the report of the reporter, Rajab's brother and the statements of the friends of the reporter who were also witnesses. The contents of the detention letter also use Article 335 Paragraph (1) as a reason for sentencing. Where, the phrase “unpleasant acts” in this Article has been abolished through the Constitutional Court Decision Number 1/PUU-XI/2013.

The Judge's Decision in the Pekanbaru District Court Decision Number 5.Pid.pra/2016/PN.Pbr, namely: 1). Granted in part; 2). To declare that the actions of Respondent I, II, and III are unlawful acts; 3). To declare that the acts of arrest and detention carried out by the Respondent in Pre-trial I are illegal; 4). Ordered the Pre-Trial I Respondent to immediately release or release the Petitioner's husband; 5). Sentencing the Pre-trial Respondent I to pay compensation to the Petitioner in the amount of Rp1,000, 5). Charged the case fees to the Respondents of Pretrial I, II and III in the amount of Rp. 7,500, -, 6). Refuse the Pre-Trial Application for other than and the rest.

This was based on the opinion of the judge that the **Arrest Warrant was considered formally flawed**, so that the letter was invalid and had no binding force. Second, because the Letter of Extension of Detention still uses the phrase "unpleasant behavior". Third, that Article 335 paragraph (1) of the Criminal Code which is considered a rubber article because it is contrary to Article 28 D of the 1945 Constitution of the Republic of Indonesia. This article is considered very subjective in the assessment of Investigators and Public Prosecutors. The judge basically uses Article 335 paragraph (1) point 1 of the Criminal Code which reads "anyone who unlawfully forces another person to do, not to do, or to allow something to use violence either against the person himself or another person. The problem that often arises in the element of "unpleasant actions" is the blurring of meaning. In essence, Article 335 paragraph (1) point 1 of the Criminal Code cannot be used as the basis for imposing a criminal offense against a person. This is because first, the Constitutional Court Decision Number 1/PUU-XI/2013 has permanent legal force and the phrase is not a form of criminal act, but is only limited to one of the elements in Article 335 paragraph (1) item 1 of the Criminal Code. Thus, it can be seen that in their judgment, the judge followed the Constitutional Court's Decision Number 1/PUU-XI/2013 concerning the abolition of the phrase "unpleasant acts".

CONCLUSION

The Constitutional Court issued Decision Number 1/PUU-XI/2013 regarding the phrase "unpleasant acts" which resulted in the abolition of the phrase "Unpleasant Acts" in Article 335 paragraph (1) item 1 of the Criminal Code. However, it does not mean that the entire article is deleted, this article can still be applied if it fulfills the elements with threats or violence only. *Ratio Legis* which is based on practice in every case that makes it a "Rubber Article". The interpretation of the meaning of "unpleasant actions" becomes very subjective depending on each individual and situation. Therefore, this Article does not provide legal certainty, because it is contrary to the principle of legality, especially *Lex Stricta and Lex Certa*. The decision of the Constitutional Court Number 1/PUU-XI/2013 is a type of conditional unconstitutional. This is motivated by the PUU

material which is "forced" to be given certainty and justice (referring to the phrase "unpleasant act". The applicant's application is declared granted by stating that the phrase contained in Article 335 Paragraph (1) of the Criminal Code is contrary to the 1945 Constitution of the Republic of Indonesia. The applicability of Article 21 Paragraph (4) letter b of the Criminal Procedure Code which refers to Article 335 paragraph (1) point 1 of the Criminal Code is sufficient to refer to the material norms after the decision of the constitutional court.

The decision of the Constitutional Court as an institution that has the right to examine laws against the 1945 Constitution of the Republic of Indonesia remains final and binding so that it must be considered as a complementary law to the Criminal Procedure Code. Therefore, it is not possible to include this phrase to criminalize someone. In accordance with these provisions, if there is a determination of a suspect with the argument "unpleasant act", then he can take legal action. Legal efforts that can be taken to determine the validity of detention are through Pre-Trial. Pekanbaru District Court Decision Number 5/Pid. Pra/2016/PN.Pbr is an example of the use of the phrase "unpleasant act" to criminalize someone. The Decision states that the warrant for arrest and detention on the basis of an unpleasant act is considered a formal defect and the Respondent is considered to have committed an unlawful act. In practice, in cases that use Article 335 Paragraph (1), the judge considers the elements contained in it and no longer includes elements of "other actions or unpleasant treatment". The elements in Article 335 Paragraph (1) of the Criminal Code must be used cumulatively, namely fulfilling the elements of "Using violence" and "Threats of violence". It is no longer applied as before the verdict, namely alternatively, which considers "unpleasant actions" alone to be sufficient as a reason for criminalizing someone.

The results of the writing are directed as reference material, especially in the field of criminal law, confirming the existence of Article 335 Paragraph (1) point 1 of the Criminal Code, so that there will be no more misguided thinking about the phrase unpleasant acts. Whereas the Constitutional Court Decision Number 1/PUU-XI/2013 is an important momentum and sign in the conviction of a person. However, due to the widespread use of this "rubber article" prior to the verdict, the author can only examine a limited number of cases of "unpleasant acts", while the facts on the ground do not rule out the possibility that many other decisions can be found as reasons for filing cases. The change in meaning after the decision of the Constitutional Court, is an interesting and essential legal issue to be discussed, it would be more perfect if the research with the discussion of this article could be developed through different perspectives and through analysis of other cases in the field.

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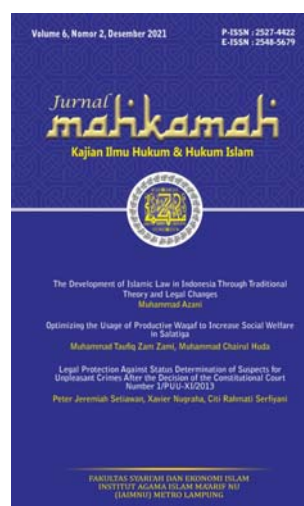
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