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## Legal Analysis Regarding Reviews Even If A Court's Decision Has Permanent Legal Force

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**Abstract.** Even though a law has been made in detail regarding the review procedure, it does not mean that it has been able to anticipate everything. There is a possibility of errors or mistakes and the inability of written law to adjust the development of human civilization according to its era. When we take advantage of knowledge and technology it is possible to cause harm to the accused or someone this can happen. This problem raises questions academically regarding judicial review which can be carried out more than once even though the court's decision already has permanent legal force. Therefore, the aim of this research is to do it more than once, even though the court's decision already has permanent legal force. While the method used in this research is normative legal research or library research. This type of research examines laws that are conceptualized as norms or rules that apply. The results of this study indicate that the judicial review (PK) as stipulated in Law Number 8 of 1981 concerning the Criminal Procedure Code currently aims to realize justice for justice seekers. In addition, the judicial review aims to guarantee humane treatment of victims or defendants or convicts in finding justice.

**Keywords.** Judicial Review, Court Decision, Permanent Legal Force

### 1. Introduction

In the Criminal Procedure Code in Indonesia there are two legal remedies, namely ordinary legal remedies and extraordinary legal remedies. Ordinary legal remedies include appeals and cassation, while extraordinary legal remedies include cassation for the sake of law and review. This general understanding of legal remedies (*rechtsmiddelen*) can be seen in Chapter I Article 1 Number 12 of the Criminal Procedure Code which reads "Legal remedies are intended as the right of the accused or public prosecutor not to accept a court decision in the form of resistance, appeal, cassation, or the right of the convict to submit a request review in matters and according to the manner regulated by law. According to Lilik Mulyadi (2012), legal remedies are meant to be a means to implement the law, namely the right of the convict or public prosecutor not to accept a court decision or decision because they are not satisfied with the decision or decision [1]. Thus the review of court decisions that have permanent legal force is part of the extraordinary legal remedies regulated in the Criminal Procedure Code (KUHAP).

Basically, legal remedies for reviewing court decisions that have obtained permanent legal force (*herziening*) are clearly regulated in Chapter XVIII Part Two Articles 263-269 of the Criminal Procedure Code which is a further elaboration of Article 24 of Law Number 48 of 2009 concerning Judicial Power [2]. In fact, with a court decision that has permanent legal force, it is impossible to change it again (Rama, 2018) [3]. However, starting from the provisions of Article 263 paragraph (1) of the Criminal Procedure Code which reads "for court decisions that have obtained permanent legal force, except for acquittals or acquittals from all lawsuits, the convict or his heirs may submit a request for review to the Supreme Court" (Mulyadi, 2010) [2]. Based on the provisions of this article, in practice in the field it turns out that it is not only the convict or heir who can submit a review because the public prosecutor can also apply for a review.

Institution for review (*herziening*) as an extraordinary legal effort, is a legal remedy that is reactive to court decisions that have obtained permanent legal force. In the history of Indonesian law, the judicial review institution in Indonesia was formed due to the revelation of a case that was so shocking in the world of Indonesian criminal law at that time, namely the Sengkon and Karta cases which occurred in the early 1980s. Even though at that time in Article 21 of Law Number 14 of 1970 concerning Principles of Judicial Power, the principle of review had been determined, but it seemed that this could not be implemented because it was considered only a principle and there were no further implementing regulations (Thamrin et al., 2020)[4]. Based on this, 1980 which regulates the possibility of submitting a request for review of decisions that have obtained permanent legal equity in criminal cases.

From Supreme Court Regulation No. 1 of 1980 means that every decision of the district court, high court, and the Supreme Court which has obtained permanent legal force based on the article in the Supreme Court Regulation can be requested for review unless the decision is acquitted or released from all lawsuits. Judicial review is part of extraordinary legal efforts which in practice can be submitted by convicts, heirs and prosecutors if new evidence (*novum*) is found. Even though human rights have only been explicitly stated in the 1945 Constitution in the second amendment (Year 2000), however, legal developments in Indonesia have undergone changes by prioritizing human rights enforcement. He admitted that the implementation of human rights in the constitution in Indonesia has influenced all aspects of law enforcement in Indonesia, especially in the scope of criminal law. In judicial practice, based on Article 4 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, it also stipulates, "The court shall judge according to the law without discriminating against people". This means that everyone who is brought before the court must be tried fairly by a court that is free, impartial and not arbitrary (Ariawan, 2010) [5].

Every criminal justice examination adhering to the above principles is a manifestation of a shift in the application of the examination system adopted in criminal procedural law, namely from an *inquisitoir* system to an *accusatoir* system, where suspects or defendants are seen as subjects. Therefore, the examination process is carried out in a transparent manner, and during the examination at trial the defendant has the same opportunity to defend his interests (Akbar and Hendra, 2021) [6]. The request for review regulated in the Criminal Procedure Code does limit the review to only one time (Article 268 paragraph (3) of the Criminal Procedure Code. The conditions, according to Chudry Sitompul in Runtuwene (2015), are the existence of a *novum*, a conflict between one decision (*inkracht*) and another, and containing an oversight or error. which is evident from the judge. Since the decision of the Constitutional Court Number 34/PUU-XI/2013 concerning judicial review may be submitted more than once, it automatically

cancels the binding power of the article governing judicial review in the Criminal Procedure Code (KUHAP) [7].

In this rule of law and the application of law in Indonesia's current situation, it can be formulated into 13 (thirteen) basic principles of the rule of law (Rechtsstaat) which apply today. According to Jimly Asshiddique, the thirteen basic principles are the main pillars that support the establishment of a modern state so that it can be called the Rule of Law (or Rechtsstaat) in its true sense, namely: 1) Supremacy of Law). In this section it is necessary to underline, namely: a) There are all problems of normative and empirical recognition of the principle of the rule of law, namely that it is resolved by law as the highest guideline. b) In the perspective of the rule of law (supremacy of law), in essence the real supreme leader of the state, is not a human being, but a constitution that reflects the highest law. c) Normative acknowledgment regarding the rule of law is an acknowledgment that is reflected in the formulation of laws and/or constitutions, while empirical acknowledgment is an acknowledgment that is reflected in the behavior of the majority of the people that law is indeed 'supreme'. 2) Equality before the Law. There is equal position for everyone in law and government, which is recognized normatively and implemented empirically. Within the framework of this principle of equality, all discriminatory attitudes and actions in all their forms and manifestations are recognized as prohibited attitudes and actions; except for special and temporary actions called 'affirmative actions' to encourage and accelerate the progress of certain groups of people to achieve an equal level of development. 3) Principle of Legality (Due Process of Law). In every rule of law, it is required to apply the principle of legality in all its forms (due process of law), namely that all government actions must be based on valid and written laws and regulations. 4) Limitation of Power. There is a limitation on the power of the State and the organs of the State by applying the principle of vertical division of powers or horizontal separation of powers. Which in essence is to avoid arbitrary power. 5) Independent Mixed Organs. The existence of government institutional arrangements that are independent because, the independence of these institutions is considered very important to guarantee the principles of a rule of law and democracy. 6) Independent and impartial judiciary. 7) In every rule of law, there must be an opportunity for every citizen to challenge the decisions of state administration officials and the implementation of the decisions of state administrative judges (administrative court) by state administration officials. It is important to mention this State Administrative Court separately, because it is he who guarantees that citizens are not deceived by the decisions of state administration officials as the party in power. 8) Administrative Court (Constitutional Court). It is also common for the modern rule of law to adopt the idea of a Constitutional Court in its constitutional system, either by institutionalizing it which stands alone outside of and equal to the Supreme Court or by integrating it into the authority of the existing Supreme Court. The importance of the judiciary or Constitutional Court is in an effort to strengthen the system of 'checks and balances' between the branches of power which are deliberately separated to guarantee democracy. 9) Protection of Human Rights. There is constitutional protection of human rights with legal guarantees for the prosecution of its enforcement through a fair process. 10) Democratic (Demokratische Rechtsstaat). The principles of democracy or people's sovereignty are adhered to and practiced which guarantees the participation of the community in the process of making state decisions, so that every statutory regulation that is stipulated and enforced reflects the values of justice that live in society. 11) Serves as a means of Realizing State Goals (Welfare Rechtsstaat). Law is a means to achieve a common idealized goal. The ideals of law itself, whether institutionalized through the idea of a rule of law (democracy) or realized through the idea of a rule of law (nomocracy) are meant to improve public welfare. 12) Transparency and Social

Control. Existence so that the weaknesses and deficiencies contained in the official institutional mechanism can be supplemented in a complementary way by direct community participation (direct participation) in the framework of ensuring justice and truth. 13) Belief in the One Supreme God. Specifically regarding the ideals of the Indonesian Law State which is based on Pancasila, the idea of our statehood cannot be separated from the first and foremost precepts of Pancasila. So that the thirteenth element emphasizes that the Indonesian rule of law upholds the values of the Almighty God. This means that the principle of the rule of law does not ignore the belief in the sovereignty of God Almighty which is believed to be the first and main precept in Pancasila (Asshiddiqie, 2007) [8]. Meanwhile, according to A. V. Dicey in Siallagan (2016) argued that in general every country that adheres to the rule of law there are three basic principles put forward, namely the supremacy of law, equality before the law, and law enforcement by way not contrary to law (due process of law) [9].

The problems in this study were also analyzed from the aspect of justice. According to John Rawls's theory: "A Theory of Justice", he emphasized that no one is allowed to dominate choices or take advantage of unfair opportunities such as the advantages of natural gifts or social position (Faiz, 2009) [10]. Rawls summarizes it in 3 (three) principles of justice which are often used as references by some experts, namely: 1) The principle of equal liberty of principle. 2) The principle of difference (differences principle). 3) The principle of equal opportunity (equal opportunity principle). Likewise, the problems in this study also used a progressive legal theory approach. Progressive legal theory requires law enforcement not only to carry out statutory regulations, but to capture the legal will of society. In the event that there is a law that is considered to be shackling the law enforcement process, then this is where progressive law will work with law enforcement institutions together with state agencies that have the authority to form statutory regulations (Aulia, 2018) [11]. The idea of progressive law departs from the view that law must be straight and seen as a science. Therefore, law is not only considered complete after it has been compiled into statutory regulations. With this idea, the law is expected to be able to serve the community and answer all the problems that occur in society with the aim of being able to keep up with current developments. Satijpto Rahardjo (2005) offers a progressive legal concept with the slogan pro-justice law and pro-people law [12]. Progressive law emphasizes this kind of thing to legal actors. Legal actors are required to prioritize honest and sincere feelings in carrying out the law. Law is seen from the developments that occur in society so that the law referred to in the progressive school of law is the law of the people.

According to J.C.T Simorangkir in Dewi (2019) that *herzening* is a review of court decisions that have permanent legal force [13]. Thus *herzening* is a review of decisions at all levels of court (District Court, High Court, Supreme Court) that have obtained permanent legal force, except for free decisions or free from all lawsuits. Meanwhile, the term used in civil law is Request Civil. However, after the enactment of Law Number 8 of 1981 concerning Criminal Procedure Code, the term used in criminal procedural law is "Reconsideration" [14]. Thus reviewing or *herzening* is examining and trying or re-deciding court decisions that already have face-to-face legal force (In Kracht van gewijsde) because it is known that there are new things that previously could not be known which if revealed then the judge's decision will be different [15]. As referred to in Article 263 paragraph (1) of the Criminal Procedure Code, judicial review can only be carried out on court decisions that have obtained permanent legal force and are not free decisions or decisions released from all lawsuits.

## **2. Method**

The type of research used in this study is normative legal research or library law research [16]. Normative legal research examines laws that are conceptualized as norms or rules that apply while still taking into account the existing social conditions in society (legal morality). The applicable legal norms are in the form of written positive legal norms formed by statutory institutions (constitutional laws, codifications, statutes, government regulations, presidential regulations, and so on) [17]. P research like this is often referred to as a dogmatic study (doctrinal research) [18]. The normative legal research method uses a normative juridical approach. The normative juridical approach is an approach that refers to the applicable laws and regulations [19]. In accordance with this type of research, namely normative legal research, the data in this study are secondary data. According to Soerjono Soekanto and Sri Mamuji in Badruzaman (2019), secondary data includes: (1) Primary legal materials, namely binding legal materials; (2) Secondary legal materials, namely legal materials that provide explanations regarding primary legal materials such as draft laws, research results, works from legal circles, and so on; (3) Tertiary legal materials, namely materials that provide instructions and explanations of primary and secondary legal materials, such as dictionaries, encyclopedias, and so on [20].

## **3. Result and discussion**

The understanding of justice related to law is not only due to the demands of the people but actually justice is impartial to those who are entitled because justice must be obtained from those in power in a country. In this context, it is not uncommon for a review of the reasons to occur because those in power or the state experience mistakes or errors in the trial process, especially the court's decision on a case. In connection with the decision of the Constitutional Court Number 34/PUU-XI/2013 which canceled the binding power of Article 268 paragraph (3) of the Criminal Procedure Code, it shows that the Constitutional Court is quite aware of developments that are occurring in society at this time because in reality the development of science and technology has also affected the existence of law. currently in force in Indonesia. If we look at Article 268 paragraph (3) of the Criminal Procedure Code, this is an article which stipulates that a review (PK) of a court decision that has permanent legal force can only be carried out once. However, in line with the current developments in science and technology, this article is considered to be no longer in line with developments occurring in society and is considered to have contradicted justice as upheld in the principles of a rule of law like Indonesia. This article is considered as an obstacle for justice seekers to review more than once. This is what is interesting to study or analyze in more depth so as not to conflict with the principles of justice so as to find out what actually underlies a judicial review to be carried out more than once on a court decision that has permanent legal force.

There is a principle that Judicial Review is the right of the convict to regain rights and justice. Concerning reviewing more than once is a new rarity for law enforcers, especially the Supreme Court judges in Indonesia. Judicial review is the right of the convict or heir to regain rights and justice that have been illegally and unfairly usurped by the state. The decision of the Constitutional Court that allows judicial review (PK) can be carried out more than once against the background of a request for judicial review filed by Anatazari Azhar to the Constitutional Court, even though there have also been various cases of judicial review before.

The reasons why a review can be carried out more than once as stated in the decision of the Constitutional Court are as follows:

1) Historically and philosophically extraordinary judicial review is a legal effort that was created to protect the interests of the convict. This is different from ordinary legal remedies in the form of an appeal or cassation which must be linked to the principle of legal certainty. This is because if there is no time limit for filing ordinary legal remedies, it will create legal uncertainty which creates injustice because the legal process is not completed.

2) Extraordinary legal remedies aim to find justice and material truth. Justice cannot be limited by time or formality provisions that limit extraordinary legal remedies for judicial review, which are in the Criminal Procedure Code, which can only be filed once. It is possible that after the review was filed and it was decided, there was a substantial new situation (*novum*), which was only discovered at the time of the review before it had not been found.

3) Criminal Procedure Code (KUHAP) itself aims to protect human rights from state arbitrariness in relation to the right to life and freedom as fundamental rights. This right is guaranteed in the constitution as stated in Article 28 I paragraph (4) and Article 24 paragraph (1) of the 1945 Constitution. Therefore, Judicial Review as an extraordinary legal remedy regulated in the Criminal Procedure Code must be within such a framework, namely to enforce the law and justice.

In this case, the Constitutional Court emphasized that legal efforts for review also need to be limited in order to achieve legal certainty. However, this is not the case with efforts to achieve justice. We cannot run away from the essence of justice which is a very basic human need and is more basic than legal certainty. "Material truth contains the spirit of justice, but procedural law norms contain the nature of legal certainty which sometimes ignores the principle of justice.

4) Against this, legal remedies aiming to find material truth in order to fulfill legal certainty have been completed with a court decision that has permanent legal standing (*inkracht van gewijsde*), and places the accused as a convict. This is confirmed by Article 268 paragraph (1) of the Criminal Procedure Code which states, "A request for review of a decision does not suspend or stop the implementation of the decision.

5) According to the Constitutional Court, the limitation of rights and freedoms is indeed regulated in Article 28J paragraph (2) of the 1945 Constitution, however, this cannot be misinterpreted to limit the submission of a judicial review only once. This is because the filing of a review of criminal cases is closely related to the most basic human rights, which also concern freedom and human life. Moreover, the submission for judicial review is not related to guarantees of recognition, respect for the rights and freedoms of others.

6) In the science of law there is the principle of *Litis Finiri Opoetet*, which means that every case must have an end. However, this principle is related to legal certainty, but in terms of justice in criminal cases, this principle cannot be applied rigidly because if a judicial review is only once, especially if a new situation (*novum*) is found, then this is contrary to the principle of justice. which is highly respected by the Indonesian judiciary.

Eugen Ehrlich in Djasmani (2011) argues that the central point of legal development does not lie in laws, judge decisions, or the science of law, but in society itself. Social order is based on the fact that law is accepted based on social rules and norms reflected in the legal system [21]. Ehrlich argues that actors who develop a legal system must have a close relationship with the values that live in society. Almost the same thing was stated by Gustav Radbruch in Hutahaeen (2022) that the law must fulfill several things as the basic values of the law. The basic values of the law are justice, benefit and legal certainty [22]. Hans Kelsen in Suheri (2018) also argues that law is an order of human actions. Although on the other hand Kelsen said that law must be purified from non-juridical elements such as sociological, political,

historical and ethical elements. But Kelsen nevertheless acknowledged that the law was not, as is sometimes said, a rule. Law is a set of rules that contain a kind of unity that is understood as a system [23].

In contrast to Hans Kelsen who stated that law must be protected from non-legal elements, Satjipto Rahardjo in his progressive law argued that progressive law shares opinions with thoughts that have existed in the history of law such as historical (Savigny), realist (America, Europe), Sociological (Pound, Ehrlich, Black), and responsive (Nonet and Selslinick) (Nasrulloh, 2015) [24]. That all of these legal minds basically accept the interpretation of law as a bridge between ethical and rigid laws and a changing present and future. The law will be sought after and trusted by the community if the law is in charge of guiding and serving the community. For this reason, the law cannot cling to the past but to the present and the future. This is the essence of progressive law and the interpretation of progressive law (Al Arif, 2019) [25]. However, progressive law covers even more broadly because in progressive law it gives more space to make various adjustments, even progressive law considers that law is for humans, not vice versa, humans are for law. is to uphold justice. Formality provisions cannot limit a process in the context of seeking justice. Also to find justice can not be determined by time. It is also unavoidable that after review and it is decided that it may occur in the future, new conditions or evidence (novum) that are very important are found that have not been found in the previous PK. If article 268 paragraph (3) of the Criminal Procedure Code, which determines that judicial review can only be carried out once and continues to be maintained, then contextually the article has violated and deprived the rights of justice seekers.

In relation to Article 268 paragraph (3) of the Criminal Procedure Code regarding Judicial Review, Antazhari has submitted a request for judicial review to the Constitutional Court [26]. Based on this request, the Constitutional Court then considered several matters which were later stated in the Constitutional Court Decision Number 34/PUU-XI/2013 as follows:

- 1) The reasons for being able to submit a review as specified in Article 263 paragraph (2) of the Criminal Procedure Code which states "A request for review is made on the basis of:
  - a. If there is a new circumstance which gives rise to a strong allegation, that if the said circumstance had already been discovered while the trial was still in progress, the result would be an acquittal or an acquittal of all lawsuits or the demands of the public prosecutor could not be accepted or lighter criminal provisions were applied to that case;
  - b. If in various decisions there is a statement that something has been proven, however the matter or circumstances as the basis and reason for the decision which is stated to have been proven, it turns out to be contradictory to one another;
  - c. If the decision clearly shows an oversight by the judge or a real mistake.

The Constitutional Court considers that these reasons are generally related to the nature of the criminal justice process, the proof of which must really convince the judge about the truth of the occurrence of an event (material truth), namely a truth in which there is no longer any doubt. The search for truth like this is motivated by the nature of criminal law as in the expression "like a double-edged sword". That is, criminal law is meant to protect humans, but by imposing punishments it essentially attacks what is protected from humans;

- 2) The rule of law principle that has been adopted in the 1945 Constitution places a principle that everyone has human rights, which thus obliges other people, including the state, to respect them. Even constitutionally, the constitutional provisions regarding human rights in

the historical-philosophical perspective in the formation of the state are intended to protect the entire Indonesian nation and are based on just and civilized humanity (see the Preamble of the 1945 Constitution). Therefore the state is obliged to provide protection, promotion, enforcement and fulfillment of human rights. (See Article 28 I paragraph (4) of the 1945 constitution. The principle described above, especially the last one, gives rise to another principle that the judicial process in criminal cases must arrive at material truth, a truth in which there is no longer any doubt. Two principles are thus also born in the criminal justice process, namely "it is better to acquit a guilty person than to impose a sentence on an innocent person". In this expression there is a deep meaning, that when a court renders a decision declaring a person guilty and therefore being sentenced to a sentence, it must really be based on a legal fact that is believed to be the truth. If this is not the case, it will happen that the state through the criminal court has violated human rights, even though constitutionally the state through the judicial process must actually protect human rights (see Article 24 paragraph (1) of the 1945 Constitution);

3) The state's obligation to recognize and protect human rights to the point that the principles of a democratic rule of law require that the implementation of human rights be guaranteed, regulated and set forth in laws and regulations [see Article 28 I paragraph (5) of the 1945 Constitution]. Criminal procedural law is an implementation of the enforcement and protection of human rights as a constitutional provision in the 1945 Constitution. This is also in accordance with the principles of a democratic rule of law, namely due process of law;

4) Related to the enforcement and protection of human rights which are also constitutional rights based on the 1945 Constitution, in the criminal justice process that is experienced a person must get fair legal certainty [see Article 28D paragraph (1) of the 1945 Constitution]. In this case it is emphasized that legal certainty which often dominates a judicial process is given a fundamental requirement, namely justice which is a basic need for every human being, including when undergoing a judicial process. That's why it's important to regulate review so that everyone in the criminal justice process they are undergoing can still get justice, even when the decision has obtained permanent legal force for certain reasons which are generally related to justice.

From the description in the Constitutional Court decision, it can be understood that even though the actions of the judges in court have been regulated in detail in the Criminal Procedure Code (KUHAP), it is possible that new circumstances (*novum*) may occur, then opportunities to seek justice cannot be limited, even human rights violations may occur. Because a judge is only a human being who in his actions still has human limitations so the possibility of mistakes or oversights cannot be avoided. Through the decision of the Constitutional Court No. 34/PUU-XI/2013 that article 268 paragraph (3) does not have binding legal force. So that a court decision that has permanent legal force if a review is then carried out can be made more than once.

Regarding the Judicial Review based on the Constitutional Court's decision which allows PK to be carried out more than once, there has been debate among legal thinkers in Indonesia which raised pros and cons. Some interpret law textually and some think law contextually. Thinkers who view law textually refer to legalistic-positivism while those who think contextually refer to progressive legal schools which are related to legal realism. In legal positivism (dogmatic juridical school) considers law to create legal certainty, which means that the law contained in statutory regulations is a certainty that must be realized. In this way, social order will be created. Against this law becomes something that is autonomous because judges carry out a legal approach through a formal legalistic approach to statutory provisions. The risk is, if in law enforcement (judges in court) only legal certainty is put forward, the element of

justice will be left behind. Such a view shows that this school firmly rejects the review being carried out more than once. As a result, a legalistic-positivism philosophy or school was marginalized and replaced by legal realism and on the other hand a new construction of a progressive law-based legal culture which is currently developing [27].

#### 4. Conclusion

Based on the decision of the Constitutional Court (MK) Number 34/PUU-XI/2013 which canceled the binding power of Article 268 paragraph (3) of the Criminal Procedure Code, this article is no longer binding on the public. Thus efforts to review in a criminal case cannot be limited to one time only in the context of seeking essential justice for a person's fate to avoid being punished with criminal sanctions of imprisonment or death penalty if based on material evidence it is found that the convict is innocent. In Article 263 paragraph (2) explains that if in that condition all lawsuits or demands of the Public Prosecutor cannot be accepted or lighter criminal provisions are applied to that case; if in various decisions there is a statement that something has been proven, however the matter or circumstances as the basis and reason for the decision which is stated to have been proven, turns out to be contradictory to one another; if the decision clearly shows an oversight by the Judge or a real mistake. In the case of a review that can be carried out more than once, there are several things that need to be considered by the government, which include the following: 1) Review of reviews can be carried out more than once by (a) the convict and/or represented by his attorney; (b) heirs of convicts, and (c) public prosecutors; 2) Novum, which can be submitted to the next PK is only the PK obtained by utilizing the development of Science and Technology (IPTEK); 3) It must be determined about the quality of the advocates who are allowed to practice in assisting convicts who submit PK more than once. Should be by experienced advocates.

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