

**SOCIAL PERSPECTIVES;  
LEGAL POLICY POST-CONSTITUTIONAL COURT DECISION  
NO. 46 / PUU-XIV / 2016 CONCERNING IMMORAL PROVISION OF INDONESIA  
CRIMINAL CODE**

**Syafri hariansah**

hariansah.syafri@gmail.com

Department Constitutional Law

Sekolah Tinggi Ilmu Hukum Pertiba Pangkalpinang

**ABSTRACT**

*This paper examines the analysis of Court Decision Number 46 / PUU-XIV / 2016 concerning the application to extend criminal offenses in the Criminal Code (KUHP) related to adultery (Article 284), rape (Article 285), and lewd acts (Article 292). In the ruling, the Constitutional Court rejected the request for all. This verdict ends with differences of opinion among Constitutional Justices. Four of the nine Constitutional Court Justices presented dissenting opinions. Decision No. 46 / PUU-XIV / 2016 is very worthy to be studied in depth, because in its decision, there is a conflict of judges based on different perspectives and methods in answering constitutional issues.*

**Keywords:** Constitutional Court, Criminal Code (KUHP), adultery, rape, lewd

**Introduction**

One of the important deal after the declaration of independence on 17 August 1945 was an agreement to make Pancasila to be the basis and ideology of the state. Pancasila has a very fundamental position as the basis to implement the life of the state. Pancasila itself comes from the sanskrit language "panca" which means five and "sila" means the basic principle. These five basis hierarchically regulate the divinity, humanity, unity, democracy and social justice.

The hierarchy of Pancasila puts divinity as the first foundation in the execution of the state. This first precept of divinity brings logical consequences while emphasizing some important issues. Firstly, the religion and the state are two things that can not be separated in the life of the Indonesian nation, therefore the first principle gives special emphasis on the identity of the Indonesian nation as a religious nation. Secondly, in the normative view all laws and regulations must refer to or derive from theological values and basic moral

concepts that are based on the value of Belief in the One Supreme God. (Syafuruddin Amir, 2013:54)

The first three principles provide the legitimacy of the concept of a Pancasila law state that places the principle of the Supreme God as the main principle, as well as the religious values that underlie the motion of life of the nation and state, not the separating state of religion and state, and not merely adhering to the principle of individualism and the principle of communalism.

It is undeniable that the increasingly rapid flow of globalization has led to the decline of noble values in society. The behavior of adultery or sexual intercourse, crime of rape and homosexual behavior that occurred in Indonesia indirectly reduce the value of eastern as the identity of the Indonesian nation. This condition is further exacerbated after the codified rule of law in the criminal law (KUHP) has limitations and it is unable to touch the perpetrators of this crime. This weakness is certainly become a serious

threat to criminal law enforcement today in Indonesia.

This concern raises the urge to reform the Criminal Procedure Code (Criminal Procedure Code) and the Criminal Code (KUHP) as a Formal and Material rule that is deemed to be inconsistent with current developments. In fact, in 2010 the government has submitted the draft Penal Code and the Criminal Code to the House of Representatives, moreover the draft is included in the list of national legislation priorities, but the draft has not been approved by the Parliament until now. The delays in the ratification of the Criminal Code and the Indonesian Penal Code clearly contradict the spirit of law enforcement itself, which is essentially a lawful country, Indonesia must provide guarantee, protection and legal certainty for its citizens.

The weakness contained in the Criminal Code and the long process of legislation has caused a loss of constitutionality for justice seekers in Indonesia. However, after the third amendment of the 1945 Constitution, particularly in Article 24 C Paragraph (1), the Constitution expressly gives the right to Indonesian citizens to submit a constitutionality lawsuit to the Constitutional Court as the sole interpreter and the guardian of the constitution as well as the guardian of the state ideology which has an obligation to always keep the norms of the law in order it does not reduce, narrow, transgress, and / or even contradict with other important values that lived and developed in Indonesia.

As their authority to conduct the examination of constitutionality in the case of the Criminal Code test article 284 paragraph (1) - (5) about adultery, 285 about rape, 292 about homosexual sex. In its verdict the Constitutional Court rejected the lawsuit and stated that the Criminal Code does not contradict the 1945 Constitution. This

decision then raises the pros & cons in society. The society think that the decision of the Constitutional Court is inconsistent with the principle of the divine inhumanity and tend to legalize the behavior of adultery, rape and homosexual in Indonesia.

### **Research Methodology**

This research is Socio legal. A Socio-legal study is an interdisciplinary approach to analyze the law, legal phenomenon, and relationships between these and wider society. Both theoretical and empirical work is included, and perspectives and methodologies are drawn from the humanities as well as the social sciences. Furthermore, the approach used in this study is a qualitative approach. Punch states that: "Qualitative research is the empirical research where the data are not in the form of numbers" Qualitative research is an empirical study (Keith Punch, 2006:35-36) that the data are not in numbers. Qualitative research is designed to facilitate the understanding of all questions presented in each study

### **Discussion**

#### **Cases Disposition**

On April 19, 2016, The constitution court received a lawsuit from 12 Indonesian citizens who filed a lawsuit for the Judicial Review of Law No. 1 of 1946 on the Rule of Criminal Law or the Criminal Code *juncto* Law No. 73 of 1958 on the Declaration of the Constitution of the Republic of Indonesia Of Law Number 1 Year 1946 on the Rule of Criminal Law for the Entire Territory of the Republic of Indonesia and Amending the Criminal Code against the 1945 Constitution of the State of the Republic of Indonesia.

The lawsuit was filed on April 19, 2016, and was registered in the Court on April 21, 2016 based on Application 94 / PAN.MK / 2016. Upon

revision, the suit is officially registered in the case Number 46 / PUU-XIV / 2016. The Petitioners conducted a judicial review of Article 284 KUHP verses 1 through 5 articles on adultery, article 285 of the Criminal Code on rape, and article 292 of the Criminal Code on homosexuality.

In the lawsuit, the petitioner assumes that the provisions of the Penal Code are considered to threaten the family's resilience, and therefore the petitioner requests that article 284 on adultery, once restricted in the context of marriage, extends to an outside marriage context.(Decision No. 46/PUU-XIV/2016:30-31) Then Article 285 on rape, which was previously restricted to men against women, was requested to be extended to men to men and women to men.(Decision No. 46/PUU-XIV/2016:48). According to the applicant, men are also likely to be victims of rape.(See Turchik, J. T., & Edwards, K. M, 2012:22). Whereas Article 292 concerning fornication of a child, whose origin is from the same type of adult male to the immature which is requested to remove the age limit.(Decision No. 46/PUU-XIV/2016:50)So, adults who do the same-sex relationships with adults can be punished.(Decision No. 46/PUU-XIV/2016:50)

The Petitioner argues that the provisions of the Criminal Code particularly in articles 284, paragraphs 1 to 5, 285 and 292 are contradictory to the provisions of the 1945 Constitution Article 29 paragraph (1),(Decision No. 46/PUU-XIV/2016:29) Article 28B paragraph (1) and paragraph (2)(Decision No. 46/PUU-XIV/2016:29) Article 28H paragraph (1). (Decision No. 46/PUU-XIV/2016:29)and Article 28J paragraph (2).(Decision No. 46/PUU-XIV/2016: 29)

In it's lawsuit, the applicant stated that the current Criminal Code is a legacy of the Indies era derived from

the Civil Law System or according to Rene David called The Romano-Germany Family in which The Romano-Germany Family is influenced by the teachings that accentuate the flow of individualism and liberalism (Individualism, Liberalism, and Individual Right).(Decision No. 46/PUU-XIV/2016:31 and David, R., & Brierley, J. E. C, 1978:80)this is very different from the culture of the Indonesian nation that upholds the value of social values.

If then the Criminal Code is still forced to be applied without adjusting the social values that live in Indonesian society, it is not impossible to lead to new conflicts.(Theo Lamintang, 2011:80) Therefore, according to the applicant, KUHP considered not in accordance with the social and cultural developments that occur in Indonesia today. The Petitioner asks the Court to extend the scope, to change the types of acts that can be punished in the articles of the Criminal Code petitioned for judicial review because according to the Petitioners, Criminal Code is no longer appropriate with the development of society.

The case of adultery, rape and homosexuality are the most urgent and urgent problems experienced by the Indonesian nation for the petitioners, therefore a new rule is needed to resolve this issue, while the current legislative process in the DPR tends to run slowly so it can not be ascertained when it finished. Or in other words, the applicant asks the Court to conduct a criminal policy (criminal policy) in the sense of formulating an act that was not previously an act that can be criminalized into a criminal act (*delict*).(Decision No. 46/PUU-XIV/2016:31-32)

### **Rape, Adultery and Homosexual in Indonesian criminal Code**

The Book of Criminal Law or the Criminal Code is a law that regulates

the criminal offenses materially in Indonesia. The current Criminal Code is a Criminal Code derived from Dutch colonial law, namely *Wetboek van Strafrecht voor Nederlandsch-Indie*. The validation is done through *Staatsblad* Year 1915 number 732 and came into effect since January 1, 1918.

After the independence, the Criminal Code remains in place with the alignment of conditions that are no longer relevant. This is based on the Transitional Provisions of Article II of the 1945 Constitution which states that: "All state bodies and existing regulations are directly applicable as long as the new constitution has not been implemented according to this Constitution." It was these provisions that then became the legal basis for the enactment of all the laws and regulations of the colonial period in the independence period.

The Criminal Code systematically consists of 3 books. Book I sets out the general rule consisting of IX chapters. The second book set about the crime consisting of XXXI Chapter, and the last of the third book consists of IX Chapter and specifically regulates the violation. Adultery, rape and obscenity in Indonesia can be categorized as immoral crime. The rules of these three matters are specifically set out in Book II of the Criminal Code on the crime of article 284 verse (1) - (5) on adultery. The criminal act of rape is set in article 285 and obscene specifically mentioned in article 292.

### 1) Acts of Adultery

Article 284 states:

- (1) By a maximum imprisonment of nine months shall be punished:
  1. a. any married man who knowing that Article 27 of the Civil Code is applicable to him, commits adultery (*overspel*);
  - b. any married woman who commits adultery;

2. a. any man who takes a direct part in the act knowing that the guilty co-partner is married;

- b. any unmarried woman who takes a direct part in the act knowing that the guilty co partner is married and that Article 27 of the Civil Code is applicable to him.

- (2) No prosecution shall be instituted unless by complaint of the insulted spouse, followed, if to the spouse Article 27 of the Civil Code is applicable, within the time of three months by a demand for divorce or severance from board and bed on the ground of the same act.
- (3) In respect of this complaint Articles 72, 73 and 75 shall not be applicable.
- (4) The complaint may be withdrawn as long as the judicial investigation has not commenced.
- (5) If Article 27 of the Civil Code is applicable to the spouse, the complaint shall not be complied with as long as the marriage has not been severed by divorce or the verdict whereby severance from board and bed has been pronounced, has not become final.

If an analysis of the provisions of that article is made it is understood that adultery is intercourse committed by a man or woman who has married with a woman or man who is not his wife or husband. This intercourse is done on the basis of likes, without any coercion from either party. (R. Soesilo, 1976) This chapter specifically mentions the four essential conditions for the fulfillment of this criminal act, i.e.

1. having intercourse with a woman or man that is not her husband or his wife. (This

- person should not have been married)
2. he is not subject to Article 27 of the Civil Code; (Indonesia Civil Code: Article 27)
  3. her intercourse partner is subject to Article 27 of the Civil Code
  4. knowing that her partner has had married or married, and the provision of Article 27 of the Civil Code applies to her partner to have the intercourse.

In the criminal law enforcement system in Indonesia, the crime of adultery is an absolute complaint offense or in other words a new person may be punished if there is a complaint or report from the person who is the victim of the crime, and the victim of a crime may revoke his report if any of them has occurred a peace during the event has not yet begun to be examined in court.

## 2) Act of Rape

Article 285 of the Indonesian Criminal Code states:

Any person who by the force of force forces a woman to have sexual intercourse with him out of marriage, shall, be guilty of rape, shall be punished with a maximum imprisonment of twelve years

Article 285 of the Criminal Code has three important elements, firstly the act of coercion for intercourse, both of which show the way that is done by violence or the threat of violence, and the third object of the crime is a woman who is not his wife. In the doctrine of criminal law the act of force (*dwingen*) can be understood as an act directed at others by suppressing the will of the person in opposition to the will of his

heart so that he accepts the will of the person who suppresses or equal his own will.(Adami Chazawi, 2005:67)The clause of this article emphasizes men as criminals. In Indonesian criminal law, the crime of rape is categorized into ordinary offense or in other words the police can process a rape case without the consent of the complainant or the victim.

## 3) Act of Homosexual

In his writings, R Soesilo says that obscene can be interpreted as all acts that violate decency or a vile act, all in the environment of sexual lust like kissing, groping members of the genitals, groping the breasts, and so forth.

Article 292 of the Penal Code states:

Any adult who commits any obscene act with it minor of the same sex as a minor impression of five years.

Philosophically, the formulation of article 292 was established in order to protect the legal interests of immature people from acts that violate public morals.(Adami Chazawi, 2007:59)There are at least 3 important elements that are regulated in the article 292 of the Criminal Code. Firstly, obscene activity is only done by adults. Secondly, it is done with the same sex whether male or female and thirdly, it is done to the children.

If there is further analysis the clause of Article 292 of the Criminal Code has a subjective element of *pro parte dolus pro parte culpa* or the intent and negligence committed by adults against children. Under these circumstances the court is required to prove the existence of the actor's knowledge (subjective element) or at least the alleged perpetrator that the victim of immorality is immature. If the court can not prove its element then the judge can not automatically sentence



the perpetrator.(Theo Lamintang, 2009:47) This issue would be a dilemma for the judge when faced with this condition, therefore it takes the judge's judgment in deciding this obscene case.

### **Decision of the Court**

#### **Rejecting the Claim**

In its verdict the Constitutional Court rejected the petition for judicial review of the criminal law article on adultery, rape and homosexual sex. In its judgment, the judge stated that the provision is not contradictory to the 1945 Constitution. The decision on this case is determined by voting with the composition of 5 judges who reject it include Saldi Isra, I Dewa Gede Palguna, Maria Farida Indrati, Suhartoyo and Manahan Sitompul, while 4 other judges have dissenting opinions. The four judges are Arief Hidayat, Anwar Usman, Wahidudin Adams, and Aswanto stated that the provision is contradictory to the 1945 Constitution and does not base on religious norms and divine rays.

The reasons for the rejection by the Constitutional Court are based on some considerations. First, in relation to Article 284, in its judgment, the judge declares that if the lawsuit is granted, a change of the criminal act which was originally submitted shall become a normal offense. The change of this offense is feared to change the qualification of article 284 which was originally constructed as a domestic affair of married men or married women into state affairs. Regarding Article 285 the judge considers that the rules of rape by force or threats against women in accordance with the Act as given to the context Of the Criminal Code is not related to the more specific Domestic Abolition Ordinance (KDRT) Law.

Related to Article 292, the Judge stated that if the petition is granted, it would require the

Constitutional Court to make new laws and regulations. Though it is not the authority of the Constitutional Court, but the House of Representatives and the president as the forming of the Act. In this context, the position of the Constitutional Court as a negative legislator is not in the understanding to form of the Act (positive legislator). When it comes to criminal law norms, the Constitutional Court demands not to enter criminal or criminal law politic. The examination of the Act which in essence contains a request for criminalization or decriminalization of certain acts can not be done by the Constitutional Court because it is a form of limitation of the rights and freedoms of a person where such limitation in accordance with Article 28 J Paragraph (2) of the 1945 Constitution is the exclusive authority of the Act maker.(Institute for Criminal Justice,Article: 284 paragraph (1), paragraph (2), paragraph (3), paragraph (4) and paragraph (5), Article 285 and Article 292 of the Criminal Code)

#### **Dissenting opinion**

The four constitutional stated that the Court may accept the lawsuit as well as provide the extension of meaning as the wishes of the applicant. Hakim Aswanto declared the establishment of legal norms, especially in the lawsuit about adultery and same-sex relationships should always be based on religious values and rays of Godhead. He argues "When the norm of law is contrary to the value of religion then the norms of the law must be adapted to the religious values and teachings of the Godhead"(Decision No. 46/PUU-XIV/2016:453-467)

In his judgment, Hakim Aswanto also assessed the provisions of Article 284 of the Criminal Code on the threat of punishment for married couples which then committing adultery with others should be extended to unmarried

couples.(Decision No. 46/PUU-XIV/2016:453-467)That is in line with the wishes of applicants who ask for adultery interpreted more broadly, including covering the relationship of a couple who have not married. Hakim Aswanto think the relationship of adultery outside marriage has always been against the religious values and the rule of law prevailing in Indonesia. According to him, intercourse is only allowed between married men and women. "Thus the provisions of Article 284 of the Indonesian Criminal Code clearly narrow the scope of the concept of adultery according to religious values and living law of Indonesian society.(Decision No. 46/PUU-XIV/2016:453-467)

Hakim Wahidudin in his judgment, judging the inclusion of elements of minors or immature in the *beleid* shows 'victory' of homosexuals. According to the judge, the behavior is highly reprehensible and contrary to the Godhead principle.(Decision No. 46/PUU-XIV/2016:453-467)

### **Judicial Restraint Vs Judicial Activism**

As mentioned in the previous paragraph, the Constitutional Court in its ruling declared to reject the petition for the entirety of the three article petitions in the Criminal Code. This decision was taken through a vote with fifth judges who declared it refused and four judges expressed dissenting opinion. These differences in the view that is illustrated in the decision of the Constitutional Court is more motivated by different judges approach in answering constitutional issues. This difference in perspective is certainly a fair judicial process, because every constitutional judge is given an objective authority based on his ability to execute interpretations in order to answer constitutional issues.

As simply, there are two different approaches used by constitutional judges to answer the challenge of constitutionality, in decision No. 46/PUU-XIV/2016. First, five judges refused to put forward the principle of Judicial Restraint or judicial restrictions, whereby all fifth judges had the view that the Court could restrict or refrain from making policy which is the domain of legislators, executive and other legislative authorities. (Pan Mohamad Faiz, 2017: 8)

In the judicial process, this view is based on three important aspects. Firstly, legalism or formalism in which the judge is only legal and not justified to make the law, Second, institutional competences or better known as process jurisprudence where the judge is not allowed to interfere with the legislative, executive in making policy. Thirdly, constitutional restraint, or constitutional restriction that forces judges not to declare a norm contrary to the constitution of an executive or legislative decision or action.(Richard A. Posner, 1986:180-186)

The limitation of this authority is explicitly illustrated by argumentation of the legal considerations of Decision No. 46 / PUU-XIV / 2016 which states "the extension of criminal offenses or criminalization is a form of limitation of the right and deprivation of citizens' freedom." Majority of constitutional judges considers that in the constitutionality review of these 3 articles of the Criminal Code it is necessary to limit the authority of the Constitutional Court to not engage in the policy of criminal law which is entirely the authority of the legislative institution, because the criminal law that has the greatest sanction needs to get the people's approval and the formation mechanism is in the legislature.

In addition to this, immoral issues are a very complex issue in Indonesia so the judges need to think

about the legal consequences or logical consequences that arise after the verdict. The second view, four judges who declared dissenting opinion, which is identical to the Judicial Activism approach. Judicial Activism itself is as a control or influence by the judiciary against political and administrative institutions. (Brian Galligan, 1991: 71) In the practice of justice, Judicial Activism has its weakness and criticism because it is considered to run a judicial discretion that can be contrary to the general principle. (Pan Mohamad Faiz, 2017:409-450)

The principle of Judicial Activism itself is counterproductive of judicial restraint, but on the one hand, judicial activism viewpoint is considered as a breakthrough for constitutional judges to respond to the challenges of social change in solving constitutional issues by way of firing principles derived from constitutional texts and existing decisions in order to implement the basic values of the constitution progressively. (Christopher G. Buck, 2007: 785)

Four Constitutional judges in this case position themselves as eligible and authorized judges to give consideration to political, social, and economic policies. (Christopher G. Buck, 2007: 785) In their view, the judges regarded the need for interference by the constitutional court to grant either explicit or implicit rights protection of the rights in the constitution. Second, there should be an effort to protect vulnerable groups from the negative decision-making process based on majority considerations. Third, to restore and protect the rights of constitutional to citizens who are violated, both are individual and group. Fourth, to adjust the development of global justice by using comparative and international law. (Christopher G. Buck, 2007: 785)

This argument is expressly contained in the view of a judge whose constitutional right of everyone is "just legal certainty", not just legal certainty, so that if there is a legal certainty in the form of a law of the Act that reduces, narrows, transgresses, and / or contrary to the basic of Belief in the One and the value of religion and living law in accordance with the development of society and the principle of republic of Indonesia, the legal certainty is not a fair legal certainty that must be declared contradictory to the 1945 Constitution and has no binding legal force and absolutely no submitted as an open legal policy of the legislator.

### Conclusions

The Constitutional Court in its ruling states reject the petition for judicial review of Article 284, Article 285 and Article 292 of the Criminal Code (KUHP) on adultery, rape and homosexuality. This decision is taken through voting or in other words the decision is not taken unanimously. 5 judges declared refused and 4 other judges expressed dissenting opinion.

The Consideration of this refusal is based on the consideration that the Constitutional Court is basically a negative legislator not in the understanding as a act maker (positive legislator). When it concerns criminal law norms, the Constitutional Court demanded not to enter the territory of criminal or political criminal law.

While the other four judges who declare dissenting opinion have a reversed view. Which is, under certain conditions the Constitutional Court may be a positive legislator by extending the scope of a crime (*strafbaar feit*). If the norms of the law actually reduce or even contradict the religious values and divine rays which are essentially 'given' to the order and well-being of human life, in this condition the judge is



required to be able to explore the values that exist in society.

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