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Limitation Of Judicial Review Authority by Constitutional Court of the Republic of Indonesia Regarding Criminal Provisions in Laws

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Abstract

Decision of the Constitutional Court of the Republic of Indonesia Number 46/PUU-XIV/2016 which rejects the extension of meaning and scope of adultery, rape and fornication in Indonesian criminal law becomes polemic in society. This is because the acts are very contrary to the moral and religious values, and Pancasila as the ideology of the Indonesian nation. The limitation of judicial review authority by Constitutional Court of the Republic of Indonesia related to criminal provisions is the reason for not willing to take the exclusive authority of the legislator in the formulation of criminal provisions. On the other hand, the Constitutional Court itself often extends the meaning and scope of norms in laws unrelated to criminal provisions.

Keywords: Constitutional Court; Judicial Review; Criminal Provisions

INTRODUCTION

Judicial review of Articles 284, 285 and 292 of the Penal Code (KUHP) make polemics in the community. Moreover after the issuance of the decision of the Constitutional Court Number 46/PUU-XIV/2016. Various media coverage made 9 judges of the Constitutional Court guilty. this is because the criminal provisions petitioned for judicial review by 12 applicants, related to the extension of the meaning or scope of deeds that enter the category of adultery, rape and fornication as stipulated in the Indonesian Criminal Code.

Reaction was firmly conveyed by the largest Islamic religious figures and Islamic organizations in Indonesia, under the pretext of extending the meaning and scope associated with adultery, rape and fornication including acts that conform to the values of Islam as the majority religion in Indonesia. The reactions make the Constitutional Court make a press release to provide an explanation related to the decision, however whatever done by the Constitutional Court related to the explanation of the verdict,

will not be able to change its verdict[1], because the decision of the Constitutional Court is final and binding[2].

Various comments and responses from many sides, prompted me to write ideas related to the Indonesia Constitutional Court's decision and provide solutions related to these issues. My views and thoughts began with the authority of the Indonesia Constitutional Court, followed by the limitation of the authority of the Constitutional Court in judicial review of criminal provisions in the law as well as legal relations with morals. The legal and moral approach in the concept of judicial review is the basis for thinking about it.

Arrangement of Indonesian criminal law that is not in line with religious values that are majority embraced by Indonesian citizens, has been widely discussed various parties. Therefore, these thoughts and views become important to provide understanding to many parties, that the state of Indonesia is a multicultural country and even the largest in the world[3] (Lestari, 2015, p. 31) and multi-religion because as many as 137 local religions exist in Indonesia[4] (Charles, 2017, p. 30) for that the setting of positive criminal law should not only be sourced from one particular religion, by reason of the majority of religious followers. When the law only comes from a particular culture or religion, then the law will have a chance to distort the culture or other religion. The law itself was born to protect minority groups from the oppression of the majority group. The utilitarian view (Bentham, 1979, p. 14) that the law should provide the benefit for as many people as possible[5], but if the law does not give benefit or even distort the culture or religious minorities, then the law will not give happiness. If justice is seen when the law has benefited as much as possible, although on the other hand distort the cultural or religious minorities, it is not the essence of justice. Although I realize that when pluralism is accepted, it will be increasingly difficult to determine the legal system setting within a country or even the establishment of legal norms within a country. It is not easy to answer the problem, because it is a judgment of value that is determined by the emotional factor on the subjectivity of a person and is relative.

The task of the state is to bridge the heterogeneous cultural and religious differences by looking for equations to pour in a legal norm, then these differences are avoided to be formulated in a universal legal norm, so it is quite left to each region as part of regional autonomy to regulate it in accordance with the characteristics of their respective regions. The view of morality and law is the basis of my thinking on that matter.

The result of these different views has formed at least 3 community groups. The first group is the group that "sees its most religious group" which requires the rule of law to be in line with its own religious teachings, regardless of the religious teachings of

[1] A written statement in the press release of the Constitutional Court, 18 December 2017.
[2] Article 24C paragraph 1 The Constitution of the State of the Republic of Indonesia of the Year 1945 The Constitutional Court has the authority to adjudicate at the first and final instance, the judgment of which is final, to review laws against the Constitution, to judge on authority disputes of state institutions whose authorities are granted by the Constitution, to judge on the dissolution of a political party, and to judge on disputes regarding the result of a general election.
[3] Gina Lestari 'Bhinnekha Tunggal Ika: Indonesia's Multicultural Culture Amidst the Life of Sara' (2015) 28 (1) JPPK 31
[4] Charles 'Multicultural education thus strengthening the Cohesiveness of Unity and National Unity' (2017) 2 (1) Educative 30
[5] Jeremy Bentham, *Principles of Morals and Legislation* (Kitchener 2000) 14

others, because it considers only its most true and holy religion and gives happiness, and the danger in this group is to reject the rule of law that does not come from the teachings of his religion. Even judging that the entire rule of law is not in line with the teachings of his religion, if followed by his group, it will be infidel, misguided and bring suffering. The second group is the group that "views the most moralist group" which requires the rule of law to be in line with the values and morality it embraces, without regard to morality and values adopted by others and does not care about one's moral values including himself is very subjective and tend to be emotional. The third group is the group that "looks at the most normative group" who assume that the rule of law is a positive law created by the authorities and ignore any form of law that is not written or made by the authorities.

This article provides a clear explanation regarding the authority of the Indonesia Constitutional Court in conducting judicial review. This paper becomes very important to be understood by all parties, in order to know how far the authority of the constitutional court in conducting judicial review and also how to interpret and understand the development of law in a frame of legal morality.

Judicial review Authority of Indonesia Constitutional Court

The Constitutional Court has 5 authorities under Article 24C of the 1945 Constitution[6] namely to hear at the first and final level the verdict is final to:

1. To examine the law against the 1945 Constitution of the State of the Republic of Indonesia.
2. To decide the authority of state institutions whose authorities are granted by the 1945 Constitution of the Republic of Indonesia.
3. To decide the dissolution of political parties.
4. To decide upon disputes concerning election results.
5. The Constitutional Court is obliged to give a decision on the opinion of the People's Legislative Assembly that the President and/or Vice President are alleged to have committed an infraction (impeachment).

The authority to decide disputes over the results of the election of Governors, Regents and Mayors as long as there has not been a special court. The authority is a temporary additional authority, because it is in accordance with the decision of the Constitutional Court that the Constitutional Court has the authority to adjudicate disputes over regional head elections as long as there is no law regulating them[7].

Judicial review is one form of checks and balances derived from the idea of distribution of power by Montesquieu, because the legislative and executive powers are enormous in regulating, so that the judiciary is needed as a control over the legislative and executive powers in making regulations, or in other words the jurisdiction of the court to examine whether the law is contradictory or not to the constitution.

The ideas and ideas of *constitutioneel geschil* or constitutional disputes in Indonesia have actually existed since the session of the Indonesian Procurement Entity Preparation Agency (BPUPKI) which was initiated by Mohammad Yamin, but then the idea was opposed by Soepomo on the grounds that the basic concept of the state is not separation of power but the distribution of power, the duty of judges is to apply the

[6] Article 24C paragraph 1 (n2)
[7] Constitutional Court of the Republic of Indonesia Decision Number 97/PUU-XI/2013

law, not to test the law, the competence of judges to conduct judicial review contradicts the concept of supremacy of the People's Consultative Assembly, and as a newly independent country does not yet have experts on it and experience of judicial review[8]. Upon rejection, the idea of the Constitutional Court is not realized. It will be realized on November 9, 2001 through the third amendment of the Indonesian Constitution, and on August 13, 2003 Law Number 24 Year 2003 on the Constitutional Court was approved then on August 16, 2003 the constitutional judges were inaugurated and began to work effectively on August 19, 2003[9]. Prior to the establishment of the Constitutional Court, the judicial review authority was granted to the People's Consultative Assembly (MPR) according to Article 5 paragraph (1) of MPR Decree Number III/MPR/2000 concerning Source of Law and Legislation Regulation Order.

In the United States the history of judicial review is not separate from the Marbury versus Madison case in 1803 which is considered the most phenomenal case decided by Supreme Court of the United States[10] (Rehnquist, 1989, p. 114) and the view of John Marshall in 1801 stating that Supreme Court of the United States had the power to invalidate legislation enacted by Congress[11] (Tate). Judicial review in the United States is conceived essentially as a natural function of the judicial department and there is no specific court or tribunal with monopolistic jurisdiction to examine only the constitutionality of statutes - either state or federal courts may hear constitutional claims. Later in the 19th century the United States Supreme Court asserted its power as the ultimate and paramount interpreter of the Constitution[12] (Andrade, 2001, p. 979). In Europe known as constitutional review[13] (Sweet, 2003, p. 2745). Although the terminology of the constitutional review used by some countries in Europe is different from that of Indonesia which uses the term judicial review as used in the United States, Czechoslovakia, Austria and several other countries, but the establishment of special courts granted the authority of constitutional review[14] (Andrade, 2001, p. 979) and (Sweet, 2003, p. 2745) or judicial review by the Constitutional Court of Indonesia similar to that used by countries in Europe.

Regarding the authority of the Constitutional Court in the judicial review which became the focus of my discussion is inseparable from the concept of state law[15] (Lailam, 2015, p. 796), considering the Indonesian constitution has given full authority to the formation of laws to the president and legislature. The authority for the formation of such a large law needs to be controlled by the judiciary, so that the

[8] 'History and Formation, Position, and Authority of the Constitutional Court' (13 August 2015) <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=11768> accessed 3 January 2018

[9] ibid

[10] William H. Rehnquist 'The Supreme Court: How It Was How It Is' (1989) <https://books.google.co.id/books/about/The_Supreme_Court.html?id=XMyGAAAAIAAJ&redir_esc=y> accessed 3 January 2018

[11] C. Neal Tate 'Judicial review' <https://www.britannica.com/topic/judicial-review> accessed 3 January 2018

[12] Gustavo Femandes de Andrade, 'Comparative Constitutional Law: Judicial Review' (2001) 3 (3) CL 977

[13] Alec Stone Sweet, 'Why Europe Rejected American Judicial Review and Why it May Not Matter' (2003) 1 (1) Yale LSLSR 2744

[14] Gustavo Femandes de Andrade (n12) and Alec Stone Sweet (n13)

[15] Tanto Lailam, 'Pros and Cons of the Authority of the Constitutional Court in Adjudicating a Law that Regulates Its Existence' (2015) 12 (4) JK 795

resulting legislation does not distort the lives of citizens. The presence of judicial review as the embodiment of constitutional checks and balances as an essential element for a democratic country[16] (Tate) such as Indonesia. The authority of Indonesia's Constitutional Court as the guardian and the sole interpreter of the constitution, as well as guardian of the process of democratization as referred to in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia[17]. Although the Constitutional Court of Indonesia until now does not have a book of constitutional interpretation, but the philosophical basis of the judicial review authority of the Constitutional Court is the purpose of law, especially the legal objectives contained in Pancasila, namely the value of belief in the one supreme God value, the value of Justice and civilized humanity, the value of unity of Indonesia, the value of democracy led by understanding wisdom among honorable representatives from the parliament house, and value of social justice for all Indonesian people[18] (Lailam, 2015, p. 814).

Implementation of the authority of the Indonesian Constitutional Court, initially gained appreciation for the citizens, but not apart from the controversy when the Indonesian Constitutional Court tested the laws relating directly to the implementation of duties and authorities and the existence of the Constitutional Court itself is contrary to the principle *nemo judex idoneusin propria causa*. Judicial review of the Judicial Commission Law and the Constitutional Court Law. Both tests of the law have spawned the judgments of various parties, that the Constitutional Court's decision is far from the morality of the constitution, justice, neutrality, impartiality and objectivity[19] (Lailam, 2015, p. 799-800). The Constitutional Court's decision in principle confirms that the Judicial Commission is not authorized to oversee constitutional justices, because the constitutional judges do not include the judges as intended in Article 24B paragraph (1) of the 1945 Constitution[20] ("Constitutional Court of the Republic of Indonesia Decision Number 005/PUU-IV/2006", August 23, 2006)

The implications of the above mentioned Indonesian Constitutional Court ruling came when the Chairman of the Constitutional Court in 2013 and a member of the 2017 Constitutional Court were caught by the Corruption Eradication Commission (KPK). The incident caused a polemic in the community and many linked the arrests as a result of the absence of oversight of the Judicial Commission against constitutional judges, although the reasons are very fragile, since the supervision of the Judicial Commission does not guarantee the avoidance of such constitutional judges from deviant behavior.

The public's request to establish an external oversight of constitutional judges continues to be voiced, so the president on October 17, 2013 issued Government Regulation in Lieu of Law (PERPU) No. 1 Year 2013 which one of the points is to instruct the Judicial Commission and the Constitutional Court to establish a code of ethics and guidelines for the conduct of constitutional judges as well as the establishment of the Constitutional Honorary Council which is in charge of upholding the conduct and code of ethics of constitutional judges, but what is the power, again

[16] C. Neal Tate (n11)
[17] Article 24C paragraph 1 (n2)
[18] Tanto Lailam (n15)
[19] ibid
[20] Constitutional Court of the Republic of Indonesia Decision Number 005/PUU-IV/2006

the Constitutional Court in its verdict states that the PERPU is contrary to the constitution[21] ("Constitutional Court of the Republic of Indonesia Decision Number 1-2/PUU-XII/2014", February 13, 2014). The constitutional interpretation made by the Constitutional Court as described above is very egocentric in my opinion, because it may be deemed by the existence of an external supervisor will reduce the authority of the Constitutional Court as the interpreter of the Constitution, whereas external supervisors are needed to maintain the honor and nobility of constitutional judges and should not be interpreted will reduce the authority of the Constitutional Court as mandated by the provisions of legislation, since the oversight authority by the Judicial Commission does not include judicial technicalities.

Related to whether the Constitutional Court can conduct judicial review on the existence and authority. I think the Constitutional Court may have a judicial review regarding its authority, but what is important in implementing judicial review is not egocentric, because the constitutional judges are a very strictly selected statesman, although I realize it is not entirely a guarantee of independence that can override egocentric for a nobler legal purpose. Regardless of my bad record is related to the assessment of several decisions of the Indonesian Constitutional Court in judicial review of the rule of law concerning the existence and authority of the Constitutional Court, to obtain clarity, it is expected that the Indonesian Constitutional Court has a "textbook interpretation" of the constitution based on the values of Pancasila as a consistent Indonesian ideology and used in every implementation of judicial review, including concerning the existence and authority of the Constitutional Court itself.

Limitation of Judicial Review Authority by Constitutional Court

The impact of the Indonesian Constitutional Court's authority to conduct judicial review of the law against the constitution has encouraged people to fight for their constitutional rights, if one considers that the legislative and executive legislation violates its constitutional rights, that person submits to the Constitutional Court to assess and revoke the law. This description seems common, but when laws relating to criminal provisions, let alone those set forth in the criminal law, then it becomes interesting to discuss. I am interested to discuss it, because recently a group of people filed a judicial review to the Indonesian Constitutional Court to expand the meaning or scope of the criminal provisions provided for in Article 284, 285 and 292 Indonesian criminal law as I have described in the introduction.

The purpose of regulating criminal provisions in the law is to be in accordance with the objectives of the state, the act to be prevented or overcome the criminal law shall be the act that causes harm to the public, must pay attention to the cost of coping with the results achieved, must pay attention to the ability and capacity of law enforcement, because do not happen *overbelasting*[22] (Sudarto, 1983, p. 35-41). The orientation of criminal penalty in Indonesia is still retributive view or retaliation, not yet restorative justice as in the Netherlands and some other countries, except in the case of a child crime in Indonesia in terms of diversion, therefore the regulation of criminal law must be strictly proportionate and does not lead to over-criminalization which burdens society and law enforcement institutions.

[21] Constitutional Court of the Republic of Indonesia Decision Number 1-2/PUU-XII/2014
[22] Sudarto, *Law and Penal Law*, (A 1983)

In connection with the state of the criminal law of Indonesia mentioned above, when connected with the decision of the Indonesian Constitutional Court which rejected the application of the applicant related to the extension of the meaning and scope of the criminal provisions provided for in Article 284 (Adultery), 285 (Rape) dan 292 KUHP (Fornication) which to all correspond to the moral and religious values of the majority of the Indonesian population and in accordance with the values of Pancasila, but judged by the Constitutional Court is not just an extension of meaning and scope, but formulates a new criminal act that becomes the authority of the legislator.

It is acknowledged that the extent of meaning and scope of criminal law greatly affects the substance of criminal law itself, such as criminal acts, unlawful acts, fault, reasons for criminal elimination and the determination of the degree of fault or criminal sanctions, so that it distinguishes judicial review of criminal provisions with non-criminal provisions, since the regulation of criminal provisions and criminal sanctions gives the state power to inflict deliberate misery[23] (Bemmelen, 1979, p. 13) even the disappearance of independence which is the basic right of everyone, so the arrangement must be strict and done rationally and proportionally, not our emotional will or hatred for such an action. In addition, the criminal policy must be strictly enforced, because criminal provisions and criminal sanctions are ultimum remedium to improve human behavior[24] (Lamintang, 1983, p. 16-17), there are still many other instruments that can be used for it, in addition to criminal provisions and criminal sanctions.

Decision of the Constitutional Court of Indonesia Number 46/PUU-XIV/2016, indicating that the Constitutional Court of Indonesia has given its own restriction related to the authority of judicial review. The Constitutional Court does not want to provide an extension of the meaning and scope of a norm in the law related to criminal provisions, whereas it is often done by the Constitutional Court itself in the testing of laws that are not related to criminal provisions.

The reason the Constitutional Court does not want to provide an extension of the meaning of criminal provisions, because the extension of the meaning and scope of criminal provisions will affect the substance of criminal law, such as criminal offenses, unlawful acts, fault, reasons for criminal abolition and the determination of criminal sanctions ("Constitutional Court of the Republic of Indonesia Decision Number 46/PUU-XIV/2016", December 14, 2017). In addition, the principle of legality as a fundamental principle in Indonesian criminal law, so that the terminology of the law in the meaning of the principle of legality is a law in the real sense, a written product created by the legislator ("Constitutional Court of the Republic of Indonesia Decision Number 46/PUU-XIV/2016", December 14, 2017). Another reason the regulation of criminal provisions in the law is a criminal policy of the legislator, although the Constitutional Court's decision is equivalent to the law and its binding power is also equivalent to the law, but the position of the Constitutional Court remains as a negative legislator rather than a positive legislator[25] ("Constitutional Court of the Republic of Indonesia Decision Number 46/PUU-XIV/2016", December 14, 2017), so specifically in the criminal provisions of the prohibition of the use of analogies to the guidance of constitutional judges in limiting their authority in judicial review, because

[23] J.M. Van Bemmelen, *Penal Law I*, *Penal Law Materil General Section* (Hasnan, BC 1979) 13
[24] P.A.F Lamintang, *Fundamentals of Indonesian Penal Code* (SB 1983) 16-17
[25] Constitutional Court of the Republic of Indonesia Decision Number 46/PUU-XIV/2016

the Constitutional Court of Indonesia does not want to enter the criminal policy area which is the exclusive authority of lawmakers. The law must be made by an elected legislature which is then interpreted and implemented by an independent judiciary[26] (Barber, 2003, p. 446).

In addition, the regulation of criminal provisions is closely related to criminalization which is one form of restriction on one's rights and freedoms, so the formulation must come from the legitimacy of the state with the consent of the people, not through a judge or court ruling, as did the Court of Justice of the European Union (CJEU) in the Taricco case[27] (Billis, 2016, p. 20-38)

The limitation of the authority of the Constitutional Court, by the Constitutional Court of Indonesia itself, implies not all the provisions of criminal provisions in laws that do not reach crime and the offense as a whole causes the criminal provisions to be contrary to the constitution, since the regulation of criminal provisions constitutes the exclusive authority of the legislator, not the authority of a judge or court, including the Indonesian Constitutional Court. It is also what distinguishes the regulation of criminal provisions in the law with the provision of other provisions not related to the criminal provisions. Extension of the meaning and scope of the concept of adultery, rape and fornication in Indonesian criminal law, can indeed be done in accordance with the will of the applicants of the judicial review, namely through the legislation process. Currently the draft Indonesian Penal Code has been discussed in the legislature, therefore, should the legislators accommodate the wishes of the applicants, because the will is in accordance with the values of Pancasila as the ideology of the state of Indonesia and is the will of the people of Indonesia.

In contrast to Germany known as secular society[28] (Kommers, 1994, p. 5), but in the verdict *Bundesverfassung gericht* Germany in 1975 regarding the Abortion Reform Act which abrogated the legalization of abortion, arguing that the state is obliged to protect human life, including unborn in accordance with Article 1 paragraph (1) of the German Constitution. The right of the unborn life can not be based on the acceptance of his mother. On the basis of the verdict, a mother who has an abortion may be subject to punishment under German criminal law, except for valid reasons and certified medical approval explaining that her pregnancy may be harmful to her[29] (Kommers, 1994, p. 5).

Moral Position in Positive Law of Indonesia

Law and morals are like two sides of the coin where one justifies the other[30] (Fuady, 2014, p. 69) The conflict between law and morals in the United States occurred in 2003, when the US Supreme Court overturned anti-sodomy laws in 13 states in the case of Lawrence V. Texas[31]. Many people believe that the anti-sodomy law is a legal rule

[26] N.W. Barber, 'The Rechtsstaatand The Rule of Law' (2003) 53 (4) Law J 443
[27] Emmanouil Billis, 'The European Court of Justice: A "Quasi-Constitutional Court" in Criminal Matters? Th e Taricco Judgment and Its Shortcomings' (2016) ECL (7) 1
[28] D.P. Kommers, D. P., 'The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?' (1994) 10 (1) CHLP 1
[29] ibid
[30] Munir Fuady, *Grand Theory in law* (3th KPG 2014) 69
[31] Benjamin Truitt, <https://study.com/academy/lesson/legal-moralism-definition-lesson.html> accessed 3 January 2018

containing moral values[32] (Daroeso, 1986, p. 22), so that proper deeds that are not immoral also not justified by the rule of law.

Thomas Aquinas's view that law is an ordinance of reason for the common good of a (complete) community, promulgated by the person or body responsible for looking after that community[33] (George, 2017, p. 37). The cancellation of anti-sodomy laws in 13 US states certainly does not provide the common good for US society. The law must give the common good and must be responsible for maintaining the community, so that the common good can be achieved. Thomas Aquinas's legal and moral view is more theological, for his background as a saint to the church, if therefore the moral philosophy of Thomas Aquinas is the knowledge of how we should act independently of accepted religious decisions[34] (Mclnerny, 1987, p. 31).

For Petersen and Hart morality has gained serious attention from law and moral error can provide legal restrictions[35] (Thaysen, 2015, p. 179). Although the setting of positive law is independent of morality and so is between law and justice, because justice is a moral postulate[36] (Kelsen, 1961, p. 20). It can not be denied that sometimes in the formulation of legal norms contained in it moral values, ethics, behavior simultaneously. Is not the purpose of law and morals the same is justice, morality provides guidance for the individual to engage in actions that are beneficial to society, but it is recognized that many actions that benefit the community are not governed by the law, and vice versa, many actions that are not beneficial to society are not prohibited by law, because morals and laws have the same goals, but their reach is different[37] (Bentham, 1979, 2000, p. 87-88). When we want all moral provisions to be regulated in criminal law rules, then at that time we have committed a legal crime, because it is impossible that it can be done, although it can be done, it will give rise to fears for the community in performing daily activities. Like a child who goes out of the house does not ask permission to his parents, or a child who is lawless to his parents and so forth. Examples are acts that are contrary to morals, and whether the act should be regulated in criminal law and sanction a child for the act, can only create public order and security, certainly not.

The concept of universal morals and situational morals is the right concept to see the opposition. Where the universal morals are the principles that govern the attitude of human action derives from the prevailing reasons of human reason which apply universally and is not limited by certain spaces and territories. Universal morality is the meta-ethical position that some system of ethics, or a universal ethic, applies universally, that is, for "all similarly situated individuals", regardless of culture, race, sex, religion, nationality, sexual orientation, or any other distinguishing feature[38]

[32] Bambang Daroeso, *Basic and Concept of Moral Education Pancasila* (AL 1986) 22
[33] George Duke and Robert P. George, *Natural Law Jurisprudence* (Cambridge UP 2017) <https://www.cambridge.org/core/books/cambridge-companion-to-natural-law-jurisprudence/2B42DBD7E9833FAEF6A1DCBAEEC78C01 > accessed 3 January 2018
[34] Ralph Mclnerny, 'Aquinas's Moral Theory' (1987) 13 (1) ME 31
[35] Jens Damgaard Thaysen, 'Defining Legal Moralism' (2015) 16 (2) SATS Northern European Journal of Philosophy 179.
[36] Hans Kelsen, *General Theory of Law and State* (Anders Wedberg, R&R 1961) 20
[37] Jeremy Bentham, *The Theory of Lesilation* (Nurhadi, N.M.T.P.L 1979) 87-88
[38] Garth Kemerling, Moral universalism, (November 12, 2011) <https://www.revolvy.com/main/index.php?s=Moral%20universalism&item_type=topic> accessed 3 January 2018

(Garth, November 2011). Whereas situational morals are the principles governing the attitude of human actions derived from the reasons of human reason which only apply to certain areas according to the situation and conditions in the region[39] (Fuady, 2014, p. 71-72).

It is to seek universal morals in a multi-cultural and multi-religious society[40] ("Stanford Encyclopedia of Philosophy, The Definition of Morality") such as Indonesia is not easy, therefore, *atributif delegate legislatori* is an appropriate alternative to the autonomous system of government adopted in Indonesia. Although I am fully aware that the authority of autonomous regions is very limited, but the granting of authority to regulate the region in accordance with the characteristics of the region provided by the central government, so in this case there is no problem.

CONCLUSION

The authority of the judicial review of the law against the Indonesian Constitution is the Constitutional Court. Implementation of judicial review on the application of the extension of the meaning and scope of adultery, rape and fornication rejected by the Constitutional Court is a new legal order related to judicial review, because the Constitutional Court of Indonesia itself provides restrictions on its authority in judicial review. The reason for the rejection of the application is because the Constitutional Court does not wish to interfere with the exclusive authority of lawmakers regarding the regulation of criminal provisions in law. Although the limitation of authority is a clash between positive law and legal morality. However, the extension of the meaning and scope of the criminal provisions concerned in line with the moral and religious values and ideology of the Indonesian state. Although many people who provide an assessment of the decision of the Indonesian Constitutional Court is not good, but it is realized that not all moral rules can be formulated in the criminal provisions, because if it is done will lead to over-criminalization that actually makes the fear and conditions are not conducive in the community.

The regulation of the extension of the meaning and scope of adultery, rape and fornication in criminal provisions should only be done through the legislation process, not through a court decision, let alone a decision of the Constitutional Court. It is therefore expected that lawmakers in Indonesia (legislature and president) expand the meaning and scope of adultery, rape and fornication in the draft Indonesian Penal Code (RKUHP) which is temporarily discussed with the current government and legislature, in order to conform to Indonesian moral, religious and ideological values.

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[39] Munir Fuady (n30) 71-72

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