

**LEGAL TRANSPLANTATION, REFORMATION MOVEMENT,  
AND MODEL FOR JUDGE MADE LAW IN INDONESIA**

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**ABSTRACT :** Before reformation, there are as many as 38 articles of Code Penal of Indonesia repealed by acts. After reformation movement 1998, Indonesian state-legal policy has been changed by many approaches, for instance, from centralization to decentralization, top down to bottom up approach, etc to emic perspective. The main legal research question: why did the legal policy change? What's the legal implication? Which articles of Code Penal have been repealed after changing such approach? To answer it, social legal research has been done. Theoretically, the good law is not separated from its social norms and culture norms where it's existence. In the sense of public law, good public law must accommodate to the social norms and culture norms as recommended by Friedman's concept that law (judicial decision) as product of system (legal substance, legal structure, legal culture). Legal culture itself means Indonesian-social and cultural forces. The results of research is below: (1) not all legal transplantation can't be retained but must be repealed in accordance with Indonesian social-cultural character; (2) to make the good legal substance, judge made law should accommodate social and cultural forces; (3) after new approach, there are 2 (two) articles of Code Penal repealed by and 15 articles of Code Penal appealed to Constitutional Court Decision. Its recommendation, in the decision making process, law should accommodate the Indonesian social and cultural forces.

**Keywords :** legal transplantation, model for judge made law, social-legal culture

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**INTRODUCTION**

We knew that the Indonesian independent day on August 17, year 1945. As Independent state, its government needed the criminal law to create the public order. To reconfirm the validity of colonial-criminal law in Indonesia on February 26, 1946, government issued the Act 1 year 1946 on Criminal law Regulation. Based on this Act, legal penal became the legal basic the changing for Wetboek van Strafrecht (WvS) vor Netherlands Indie (Code Penal for Indonesian). This code translated into Indonesian language as Kitab Undang-Undang Hukum Pidana (KUHP). Although article XVII Act Number 2 Year 1946 has a norm which states that This Act began to operate for Java and Madura Region since announce but for other region will be set up by president. Because of it, Wetboek van Strafrechtvoor Netherlands Indie become Wetboek van Strafrecht limited for Java and Madura Region. Implementation of KHUP for all Republic of Indonesia regions started September 20, 1958 by UU No. 73. As stated article 1 Act 1958 that "Act 1 Year 1946 on regulation of Criminal Law valid for all the region of

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Republic of Indonesia.

The Criminal Code of Indonesia has a real name *Wetboek van Strafrecht voor Nederlandsche Indie* (WvSNI) enacted in Indonesia and first with the *Koninklijk Besluit* (Edict of the King) No. 3315 October 1915 and entered into force on 1 January 1918. The facts of history behind the birth of the Criminal Code as a means of legitimacy of the rule of substantive criminal law in Indonesia, of course, basically in the Criminal Code that make her a basic rule rather than the rule of law, is inseparable Netherlands, can be implemented for suggestions to achieve the requirements, legal certainty and fairness in society. However, with the development of the social structure in society, it will have implications for the legal demanding legal needs that must be adapted to the development of society.

Therefore, KHUP rules which have been the material rules of criminal law as a result of developments in the social structure of society also have to adapt to various changes. It can be observed when we look at some of the rules in the Criminal Code that are not purely transplanted into national law, even in development there are some rules in the Criminal Code which is then separated into forms of legislation more concrete law such as the Law. After 40 years, Year 1998 had occurred Indonesian People Movement, one of appeals that government is to amend Constitution State 1945. Particularly issued The Constitutional Court (Mahkamah Konstitusi-MK). In the context of the authority of MK Article 24 paragraph (2) of the 1945 Constitution state, judicial powers shall be carried out by a Supreme Court and judicial bodies underneath it in the environment, namely: general courts, religious courts, military courts, administrative courts, and the Constitutional Court.

Under those provisions, the Court is one of the institutions of judicial power in addition to Supreme Court. Judicial Power shall be an independent power to organize judicial administration to uphold law and justice. Thus, the Constitutional Court is a judicial institution, as a branch of the judiciary, which is prosecuting the case-specific matters under its authority under the provisions of the Constitution 1945. On the other hand, after the birth of the Constitutional Court in the reform era in Indonesia which is intended as a guardian of the constitution (The Guardian of Constitution) with the authority to examine a law on the 1945 Constitution has given the implications of changes to the substance of the Criminal Code itself with changes in the articles of the Criminal Code that have been tested its material to the Court, this was done to address the legal needs in the community in order to achieve the substantive justice values. Related to validity of KUHP as Code of Penal, Good KUHP is not separated from its culture, social, where it's existence. Because of it, main legal research question: why did the legal policy change? What's the legal implication? Which articles of Code Penal have been repealed after changing such approach?

## **DISCUSSION**

### **The Reformation Movement and Its Implication**

Along with the momentum of the 1945 changes in the reformation movement period (1998-2004), and has implication. Reformation movement asks the government for changing the legal policy, centralization to decentralization, from top down to bottom up. In the field of judiciary, in the making process of law or judge made law must accommodate the social-cultural needs. Related to this appeal, an idea of the establishment of the Constitutional Court in Indonesia became stronger. The peak occurred in 2001 when the idea of forming the Constitutional Court adopted in 1945 changes were made by the Assembly, as defined in Article 24 paragraph (2) and Article 24C of the 1945 Constitution in the Third Amendment. Furthermore, to elaborate

and follow up on the mandate of the Constitution, the Government, together with the House of Representatives to discuss the Bill on the Constitutional Court. After discussion for some time, the bill was finally agreed by the government and the House of Representatives and approved in plenary session on August 13, 2003.

On that day, the Law of the Constitutional Court was signed by President Megawati Soekarnoputri and published in the State Gazette on the same day, then given a number of Law No. 24 Year 2003 regarding the Constitutional Court (State Gazette of 2003 No. 98, Supplement No. 4316). Judging from the aspect of time, Indonesia was the 78th that form the Constitutional Court as well as the first country in the world that make up this institution in the 21st century.

In the context of the authority of Constitution Court, article 24 paragraphs (2) of the 1945 Constitution states, judicial powers shall be carried out by a Supreme Court and judicial bodies underneath it in the environment, namely: general courts, religious courts, military courts, administrative courts, and the Court Constitution. Under these provisions, the Court is one of the institutions of judicial power in addition to Supreme Court. Judicial Power shall be an independent power to organize judicial administration to uphold law and justice. Thus, the Constitutional Court is a judicial institution, as a branch of the judiciary, which is prosecuting the case-specific matters under its authority under the provisions of the 1945 Constitution.

### **Models for Judge Made Law**

Theoretically, the good law is not separated from its social, culture where it's existence. In the sense of public law, good public law must accommodate to the social and culture norms as recommended by Friedman's concept that law (judicial decision) as product of system (legal substance, legal structure, and legal culture). Legal culture itself means Indonesian-social and cultural forces. Model of the Constitutional Court from 2003 to 2013 include: (1) the model decision that is legally cancel and declare void (Legally Null and Void); (2) The decision of the constitutional model of conditional (conditionally constitutional); (3) models unconstitutional decision conditional (conditionally unconstitutional); (4) model of decision postponed the application of the decision (limited constitutional and (5) decision models that formulate new norms. Implementation of the decisions of the Court can be seen from its decision model. Implementation of the decision model that is legally cancel and states that not apply and the model of the decision to formulate a executable norm (self executing/ self implementing), whereas both decition model of constitutional conditional and the model decision of unconstitutional conditional can not be directly executed (non-self-executing /implementing).

In this context of due process, Constitution Court in Indonesia present consistently based on Article 5 paragraph (1) Law Number 2009 that judges and constitutional judges shall explore, and understand the values of law and justice in the society.in the frame of that, Constitutional Court Judges consider deeply information, explanation, opinion from all experts on social, culture angle to give explanation accordance with their expert.Theoretically, such article 5 related to Frederich Karl von Savigny's concept that states “all law is originally formed by costum and popular feeling, that is, by silently operating forces. Law is rooted in a people's history; the roots are fed by the consciousness, the faith and the customs of the people”. I saw that models of judge made law also based on the Friedman's concept that law (judicial decision) as product of system (legal substance, legal structure, and legal culture). Legal culture itself means Indonesian-social and cultural forces via Article 5 paragraph (1).

Data shows (below matrix – Recapulation Report of Constitution Court Republic of

Indonesia 2003-2016)) that The total cases of judicial review provisions of the Criminal Code on the 1945 coming into existence of the Constitutional Court since 2003 to 2016 is cases with details: - 2 cases granted; - 2 courts granted in part; - 6 cases rejected; - 2 cases can not be accepted; - 2 case status assessment; - 1 case status Unauthorized Passing; Since 2003 until 2006 there was no filing of Judicial Review provisions of the Criminal Code submitted to the Constitutional Court, but the filing of judicial review provisions of the new Criminal Code started in 2006 until today.

## CONCLUSION

Theoretically, the good law is not separated from its social norms and culture norms where it's existence. In the sense of public law, good public law must accommodate to the social norms and culture norms as recommended (1) Frederich Karl von Savigny, that law and society have inherent connections. It means that laws are found in the common consciousness of the people where they are existence. (2) Friedman's concept that law (judicial decision) as product of system (legal substance, legal structure, legal culture).

The result of research is (1) not all legal transplantation can't be retained but must be repealed in accordance with Indonesian social-cultural character as described on Constitution 1945; (2) to make the good legal substance, judge made law should accommodate social and cultural forces; (3) after new approach, there are 2 (two) articles of Code Penal repealed by and 15 articles of Code Penal appealed to Constitutional Court Decision. Its recommendation, in the decision making process, law should accommodate the Indonesian social and cultural forces.

NO	NUMBER DECISION	CONTRARY TO CONSTITUTION	CONSIDERATION JUDGE	DECISION
1	013-022/PUU-IV/2006	Article 134 and Article 136 bis of the Criminal Code Testing in Article 28F of the Constitution 1945	Articles 134, 136 bis and article 137 Criminal Code is contrary to the Constitution 1945	Granted (Dissenting Opinion)
2	6/PUU-V/2007	Article 107, 154, 155, 160, 161, 207, and Article 208 of the Criminal Code regarding the submission of criticism is contrary to Article 27 (1), 28, 28C paragraph (1) and (2), 28D (1), 28E (2) and (3), 28F of the 1945 Constitution concerning the right to legal certainty and freedom of expression	Article 154 and 155 of the Criminal Code does not guarantee legal certainty contrary to article 28, section 28E (2) and (3) of the 1945 Constitution thus the petition is granted in part	Granted Partly

3	14/PUU-VI/2008	Petitioner argues that the provisions of the Criminal Code Article 356 against Article 1 (3), 27 paragraph (1), 28D (1) and (2), 28H paragraph (2), 28 paragraph (1), paragraph (2), paragraph (3), (4) and (5), 28J paragraph (1),(2) of the constitution 1945.	Problem of the application of law norm and not the constitutionality of the norms of law. Therefore the applicant's argument is groundless that the petition should be rejected. The Court declares that the petition of the applicant was rejected	Not Acceptable
4	42/PUU-VI/2008	Article 356 against Article 1 (3), 27 paragraph (1), 28D (1) and (2), 28H paragraph (2), 28 paragraph (1), paragraph (2), paragraph (3 ), (4) and (5), 28J paragraph (1) and (2) of the constitution 1945	The material the petition is concerned with the application of law in a criminal case which is under the authority of the judiciary in the Supreme Court, and can not be assessed by the Court and Losses Applicant is not a constitutional losses as referred to in Article 51 paragraph (1) and (2) of the Act	Not Acceptable
5	7/PUU-VII/2009	Article 160 Penal Code [ Act No. 1 Year 1946 ] [ Article 160 ] tested with Article 28 , Article 28C paragraph (2), Article 28E paragraph (2), Article 28E (3), Article 28G (1) Constitution 1945.	Stating Request denied by the applicant because of Article 160 of the Criminal Code is conditionally constitutional in the sense Constitutional along construed as offense meteril	Entirely Rejected

6	41/PUU-VIII/2010	The Criminal Code Section 303 subsection (1), (2), (3) and Article 303 bis paragraph (1), (2)	The reasons can't be legally proved	
7	21/PUU-VIII/2010	The Criminal Code [Article 303 Paragraph (1), (2), (3), Article 303 bis Paragraph (1) and (2) contrary to Constitution 1945	Based on the 1945 and the Law No. 24 Year 2003 regarding the Constitutional Court and Law No. 48 Year 2009 regarding Judicial Power state that the Court reject the petition in its entirety	Rejected
8	1/PUU-IX/2011	The Criminal Code [Section 310 subsection (1) and (2)]	The limit freedom of Petitioner as guaranteed in Article 28 and Article 28F of the 1945 Constitution. According to the Court Petitioner's opinion is not correct, because the constitution guarantee the rights of it	Rejected
9	84/PUU-X/2012	The Criminal Code and Law No. 1/PNPS/1965 on the Prevention of Abuse and/or blasphemy against constitution 1945	Article 156a revoked before the new regulations more as the provisions of the Transitional Provisions of the 1945 Constitution, it is concerned that abuse and defamation of religion arise that could lead to conflict in the community. The Court to declare article 156a of the Criminal Code does not have binding legal force is not legal grounds.	Entirely Rejected

10	23/PUU-XI/2013	Request Testing Article 510 Penal Code in conjunction with Article 15 paragraph (2) of Law No. 2 of 2002 on the Indonesian National Police and the Criminal Code against 1945	The applicant's withdrawal petition based on law in accordance with Article 35 paragraph ( 1 ) and ( 2 ) of Law No. 8 of 2011 on Amendments to Law No. 24 Year 2003 regarding the Constitutional Court	Provisions
11	1/PUU-XI/2013	Law No. 1/1946 on the Criminal Code and contrary to the Constitution 1945	The Court granted a clause that Article 335 of the Criminal Code that begins "Something other acts or treatment that is not pleasant" to "Whoever unlawfully forcing other people to do, not do or allow anything, with the use of violence, or to use the threat of violence, both against itself and other people"	Granted Partly
12	55/PUU-XII/2014	The constitutionality of Article 344 of the Criminal Code 1945	Petitioners can not reapply for judicial review of Article 344 Criminal Code ; Court to order the Deed of Cancellation of the registration application and return the application to the applicant's file	Provisions

13	110/PUU-XII/2014	Article 231 paragraph (3) of the Criminal Code contrary to the constitution 1945	1. Authority of the court is only concerned with the constitutionality of the norm in the law; 2. Based on all consideration, the Court found the applicant p has no legal grounds.	Entirely Refused
14	31/PUU-XIII/2015	Article 319 of the phrase "except under Article 316' against Article 1 (3) , Article 28 paragraph 1 of the Constitution 1945	Based on the assessment of the facts and the law the Court concludes Article 319 Penal Code along the phrase "except by Pasa 316" contrary to the Constitution of 1945	Granted the petition
15	44/PUU-XIV/2016	The Criminal Code [Interpretation Element paragraph 2 of Article 149 (1)]	The petition does not concern the judicial review against the 1945 Constitution, as contained in paragraph C above; the Court has no authority to hear the Petition	Not Authorized Passing



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