



Guaranteeing Freedom of Speech: The Role of the Primus Inter Pares Principle in the Presidential Insult Clause

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Abstract

The ratification of Indonesia's new Criminal Code (KUHP) on December 6, 2022, has sparked concerns over potential restrictions on human rights, particularly the right to freedom of expression. These concerns arise from the reintroduction of the article on insulting the president, which had been annulled by the Constitutional Court in Decision No. 013-022/PUU-IV/2006. The government contends that the revised provision is now grounded in the primus inter pares principle, which, according to the Minister of Law and Human Rights, seeks to uphold the president's dignity without compromising public freedom of speech. This study employs a normative juridical methodology with statutory and comparative approaches to analyze how the primus inter pares principle in the presidential insult article can safeguard freedom of expression. The findings suggest that, while the principle is designed to prevent the misuse of presidential protections, its practical application remains unclear and susceptible to misinterpretation. Consequently, further clarification and judicial oversight are necessary to ensure an equitable balance between state dignity and individual rights.

A. Introduction

Law as a science encompasses not only "law in the books" and "law in action," but also "law in the minds." Indonesia was proclaimed an independent nation on August 17, 1945, by its founding fathers, Soekarno and Mohammad Hatta. The following day, on August 18, 1945,



the Constitution of the Republic of Indonesia (UUD NRI 1945) was adopted as the foundational legal document of the Unitary State of the Republic of Indonesia (NKRI). This Constitution has remained the cornerstone of Indonesia's legal and political framework.

A deeper understanding of the Constitution reveals its essential function as the fundamental norm that upholds state sovereignty and guides the nation towards justice, welfare, and independence. Achieving these ideals requires social order, which is maintained through laws enacted by legitimate authorities.¹

One such legal framework is criminal law, which serves to protect legal interests at individual, societal, and state levels.² These interests are reflected in the structure of the Criminal Code (KUHP). On December 6, 2022, the House of Representatives (DPR RI) enacted the new Criminal Code Law, replacing the Dutch East Indies Criminal Code that had been in force for approximately 104 years.

The new Criminal Code Law consists of 37 chapters and 630 articles, one of which is Chapter II, Part Two, concerning offenses against the honor or dignity of the President and Vice President. Article 218(1) stipulates: "Any person who publicly attacks the honor or dignity of the President or Vice President shall be subject to a maximum imprisonment of three years and six months, or a maximum fine of category IV." This provision has sparked debate due to its vague phrasing, particularly regarding the interpretation of "attacking honor." Questions arise as to whether the term encompasses casual remarks, satire, or extends to criticism of presidential performance and campaign promises.

The controversy is further fueled by Constitutional Court Decision No. 013-022/PUU-IV/2006, which previously declared similar provisions unconstitutional. Critics argue that reintroducing this article contradicts that ruling and infringes upon citizens' constitutional rights to freedom of expression, as guaranteed under Articles 28 and 28E(3) of the 1945 Constitution. In a modern democratic society, freedom of speech is considered fundamental and should not be curtailed under vague or overly broad legal provisions.

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¹ Mexsasai Indra, *Dinamika Hukum Tata Negara Indonesia*, (Bandung: PT. Refika Aditama, 2011), hlm.42.

² Eddy O.S. Hiarij, *Prinsip-Prinsip Hukum Pidana* (Yogyakarta: Cahaya Atma Pustaka, 2016), hlm.35.

³ Alfikri Lubis, Kompas, *Mempersoalkan Pasal Penghinaan Presiden di RKUHP*, 4th July 2022, <https://nasional.kompas.com/read/2022/07/04/10140641/mempersoalkan-pasal-penghinaan-presiden-di-rkuhp>, accessed date on 3 February 2023

In contrast to opposing views, the government and a significant portion of the public support the inclusion of the presidential insult provision, arguing that it differs fundamentally in implementation from its counterpart in the old Criminal Code. The government asserts that the principle underlying the provision has shifted from *lese majeste* to *primus inter pares*, transforming the offense from a general offense (*delik biasa*) into a complaint-based offense (*delik aduan*). According to the government, this change aligns with the Constitutional Court's considerations in Decision No. 013-022/PUU-IV/2006. Furthermore, by adopting the *primus inter pares* principle, the government contends that citizens' constitutional rights to freedom of expression remain protected.⁴

Against this backdrop, the author aims to examine the extent to which the presidential insult provision in the new Criminal Code upholds human rights protections through the application of the *primus inter pares* principle. Although various studies have explored this topic, the author highlights three key articles that have contributed to the existing discourse:

The first article, authored by Zico Junius Ferando, Pujiono, and Nur Rochaeti and titled "Examine the Article of Contempt Against the President and Vice President in Indonesia", analyzes the provisions on contempt against the President and Vice President in the Draft Criminal Code. The authors argue that these provisions do not contravene Constitutional Court Decision No. 013-022/PUU-IV/2006 and emphasize the importance of safeguarding the dignity and honor of the President and Vice President within Indonesia's presidential system. The article asserts that such protection should be maintained through appropriate legal regulations.⁵

The second article, by Nuzul Shinta Nur Rahmasari and Hari Koesnadi, titled "Revival of the Article Against Contempt of the President and Vice President in the Draft Criminal Code", critiques the reintroduction of the contempt provision, which had previously been invalidated by Constitutional Court Decision No. 013-022/PUU-IV/2006. The authors contend that this move suggests a disregard for the Constitutional Court's authority by the government and the legislature.⁶

The third article, by Robinsius Asido Putra Nainggolan and titled "Comparison of Insult Regulation Towards President/Vice President in the Decree of the Constitutional Court", examines the formulation of the contempt provision in the Draft Criminal Code and compares it with Constitutional Court Decision No. 013-022/PUU-IV/2006. The research highlights both similarities and differences, concluding that the Draft aims to provide legal protection for the President and Vice President as state symbols.⁷

This paper's novelty lies in its exploration of the extent to which the *primus inter pares* principle guarantees citizens' rights to express opinions based on 3 (three) issues: the importance of the guarantee of freedom of expression in the state, the constitutionality of the

⁴ Jawapos. *Wamenkumham Jelaskan Pasal Penghinaan Presiden tak dihapus dari RKUHP*, 3rd November 2022, <https://www.jawapos.com/nasional/03/11/2022/wamenkumham-jelaskan-pasal-penghinaan-presiden-tak-dihapus-dari-rkuhp/>, accessed date on 3 February 2023

⁵ Zico Junius Ferando; Pujiono; dan Nur Rochaeti, "Telaah Pasal Penghinaan Terhadap Presiden Dan Wakil Presiden Di Indonesia", *Rechtsvinding*, 11 (1), April 2022, Page 135-152, <http://dx.doi.org/10.33331/rechtsvinding.v11i1.826>

⁶ Nuzul Shinta Nur Rahmasari and Hari Soeskandi, "Penghidupan Kembali Pasal Terhadap Penghinaan Presiden Dan Wakil Presiden Dalam Rancangan Kitab Undang-Undang Hukum Pidana" *Mimbar Keadilan*, 15 No.1, February 2022, Page 34, DOI: <https://doi.org/10.30996/mk.v15i1.5832>

⁷ Robinsius Asido Putra Nainggolan, "Comparison of Insult Regulation Towards President/Vice President in The Decree of The Constitutional Court" *Constitutionale*, 2 (1), January-June 2021, Page 27-40, [10.25041/constitutionale.v2i1.2203](https://doi.org/10.25041/constitutionale.v2i1.2203)

article on insulting the president and the guarantee for the protection of citizens' right to express opinions in the article on insulting the president.

B. Importance of Guaranteeing Freedom of Speech

Freedom of speech is a right for all people in Indonesia regardless of gender, religion, caste or creed. The opinion expressed can be one's own objective opinion, a supportive opinion or a controversial opinion. The norm of the right to freedom of expression and opinion in Indonesia is regulated in the 1945 Constitution of the Republic of Indonesia in Article 28, Article 28 E, and Article 28 F. The articles read as follows:

1. Article 28 reads "The freedoms of character and assembly, to express one's thoughts orally and in writing and so forth shall be determined by law".
2. Article 28 E paragraph (2) reads "Every person has the freedom to believe in beliefs, express thoughts and attitudes in accordance with his or her conscience".
3. Article 28 E paragraph (3) reads "Everyone has the right to freedom of association, assembly and expression".
4. Article 28 F reads "Everyone has the right to communicate and obtain information to develop their personal and social environment, and has the right to seek, obtain, own, store, process and convey information using all available channels".

The right to freedom of expression and opinion is explicitly guaranteed in binding legislation and is a fundamental aspect of public law. According to Dr. Bonaventure Rutinwa, as cited by Jimly Asshiddiqie, freedom of expression encompasses two key elements: (1) the right to seek, receive, and impart information and ideas of all kinds, regardless of frontiers; and (2) the right to choose the means for it. Thus, this right protects not only the content of ideas and information but also their form, medium, and channels of communication.⁸

As a state that adheres to the civil law tradition, Indonesia formally recognizes the right to freedom of expression as a component of human rights. However, in practice, law enforcement frequently adopts repressive measures that contradict constitutional guarantees. These include arbitrary arrests, criminalization of expression, and excessive restrictions, reflecting a shift in perception—from viewing freedom of expression as a constitutional right to treating it as a potential threat to public order and national security. While freedom of expression is not absolute, its limitations must be lawful, proportionate, and consistent with human rights standards.⁹

This tension has led to a dualistic public understanding of freedom of expression: some regard it as an absolute right, while others view it as subject to strict limitations.¹⁰ Such divergent interpretations can result in legal violations, including anarchic protests or the destruction of public property.¹¹ These perceptions are also shaped by cultural and

⁸ Jimly Asshiddiqie. *Kemerdekaan Berserikat, Pembubaran Partai Politik dan Mahkamah Konstitusi*. (Jakarta: Konstitusi Press. 2006), hlm. 17.

⁹ Barda Nawawi Arief, *Masalah Penegakan Hukum Dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan* (Prenada Media, 2018).

¹⁰ Miptahul, 'Analisis Yuridis Hak Kebebasan Berpendapat Bagi Pengguna Media Sosial Menurut Undang-Undang Nomor 19 Tahun 2016 Tentang Perubahan Atas Undang-Undang Nomor 11 Tahun 2008 Tentang Informasi Dan Transaksi Elektronik (Studi Putusan No. 3168/PID. SUS/2018/PN. MDN)', SOSEK: Jurnal Sosial Dan Ekonomi, 1.2 (2020), hlm. 76–87. <https://doi.org/10.55357/sosek.v1i2.58>

¹¹ Syafa`at Anugerah Pradana, Rusdianto Sudirman, & Muh. Andri Alvian, "Kemelitan Penegakan Hukum terhadap Hak Kebebasan Berpendapat", Jurnal Syariah dan Hukum, 20 (1) July 2022, hlm. 156-168. <https://doi.org/10.35905/diktum.v20i1.2811>

technological developments, particularly the rapid growth of social media. The spread of unverified information, misuse of images of public officials, and inappropriate digital content illustrate the negative consequences of uninformed expression. Nevertheless, freedom of expression also facilitates constructive criticism—for instance, public scrutiny of uneven infrastructure development—demonstrating citizens' concern and desire for accountability and reform.

This situation presents a significant challenge for law enforcement, particularly in ensuring public education and awareness regarding the right to freedom of expression. In the context of the Industrial Revolution 4.0, educating the public on this right is a crucial mandate to ensure its implementation benefits both citizens and law enforcers. This effort requires optimizing Indonesia's legal framework, with active roles played by institutions such as the National Law Development Agency and concerned civil society actors. Moreover, the fulfillment and protection of freedom of expression must be prioritized by legislators through the formulation of systematic and comprehensive legal provisions in future legislation.

C. Constitutionality The Article About President Insult's Article In The Criminal Code (KUHP)

The inclusion of the presidential insult provision in the Indonesian Criminal Code remains controversial, particularly given the Constitutional Court's prior ruling in Case No. 013-022/PUU-IV/2006¹², which declared Article 134 of the Criminal Code unconstitutional. In that case, petitioner Eggi Sudjana challenged Article 134, arguing that it failed to clearly define what constitutes an insult to the president¹³, thereby violating the principle of legal certainty. The vagueness of the article, he argued, invites multiple interpretations¹⁴ and poses a risk of arbitrary enforcement, ultimately infringing upon the constitutional right to freedom of expression.

The petitioner contended that Article 134 is inconsistent with several provisions of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945)¹⁵, namely Article 27(1), Article 28, and Article 28E(2) and (3), all of which guarantee freedom of expression and other civil liberties. He further argued that the article has been used to repress speech and violate constitutional rights.¹⁶ As evidence, he cited his own case, in which he was prosecuted for clarifying information to the Corruption Eradication Commission (KPK) regarding the alleged receipt of a luxury vehicle by then-President Susilo Bambang Yudhoyono. The petitioner argued that such prosecution not only violated his right to free expression but also infringed

¹² Antara, *Eggi Sudjana Submitted a Material test on The Criminal Code* <https://www.antaranews.com/berita/39587/eggi-sudjana-ajukan-uji-materiil-terhadap-kuhp>, accessed date 11 January 2023

¹³ Athallah, "Status Quo Pengaturan Pasal Penghinaan Presiden Sebagai Pembatas Hak konstitusional Terkait Kebebasan Berpendapat di Indonesia Beserta Potensi Pengaturannya di Masa Depan: Studi Kasus Penghinaan Presiden di Media Sosial (Kasus Ruslan Buton)" *Jurnal Studia Legalia: Jurnal Ilmu Hukum*, Vol. 3 No.1, October 2022, Page 6. <https://studialegalia.ub.ac.id/index.php/studialegalia/article/view/20>

¹⁴ Constitutional Court Decision Number 013-022/PUU-IV/2006 about Review of the Criminal Code against the 1945 Constitution of the Republic of Indonesia, page 8

¹⁵ *Ibid*, Page 8

¹⁶ Satya Bangsawan, "Kajian Kritis Terhadap Putusan Mahkamah Konstitusi Nomor 013-022/PUU-IV/ Adhya 2006 tentang Pembatalan Pasal Penghinaan Presiden" *Refleksi Hukum: Jurnal Ilmu Hukum*. 4, No.1, 2019, Doi. <https://doi.org/10.24246/jrh.2019.v4.i1.p97-114>

upon his right to convey and obtain information, as protected under Article 28F of the Constitution.¹⁷

In that case, the Constitutional Court concluded that Article 134 of the Criminal Code potentially violates the constitutional rights to freedom of expression and the right to access and disseminate information. In its legal reasoning, the Court emphasized that the petitioner's challenge related to the application of the presidential insult provision, which had been used to curtail these fundamental freedoms. The Court considered the opinions of three legal experts.¹⁸

First, Mardjono Reksodiputro argued that the offense of insulting the president is outdated and unnecessary, as Articles 310–321 of the Criminal Code already provide adequate protection of individual dignity, including for the president. He noted that Article 134 originated during the colonial era and is no longer compatible with modern democratic values.

Second, J.E. Sahetapy asserted that Articles 134, 136, and 137 of the Criminal Code are incompatible with Article 28E(3) of the 1945 Constitution, which guarantees freedom of opinion and expression. He criticized these articles for failing to distinguish between criticism and defamation, thereby undermining democratic discourse and the ability to hold public officials accountable.¹⁹

Third, Andi Hamzah emphasized that the validity of the presidential insult provision should be assessed in the context of national values and ethics, as the Criminal Code reflects the civilization of a nation. He argued that the issue lies not with the norm itself but with its procedural application.²⁰ Nevertheless, he concurred that even without Article 134, the president could still seek redress under general defamation provisions in Articles 310–324 of the Criminal Code.

Based on the expert opinions and constitutional analysis, the Constitutional Court concluded that the presidential insult provision cannot be applied as it fails to ensure equality before the law and infringes upon constitutional rights. Consequently, the Court ruled in favor of the petitioner, declaring the provision incompatible with the 1945 Constitution of the Republic of Indonesia.²¹

Regarding whether the legislature can reintroduce a similar provision in the new Criminal Code, this research argues that lawmakers retain the authority to formulate a presidential insult article. Freedom of expression, while fundamental, is not absolute; it is a derogable right subject to reasonable limitations.²² The Constitutional Court did not prohibit the future enactment of

¹⁷ Detiknews, *Kronologi Eggi Sudjana Divonis Bersalah Karena Menghina Presiden*, 5 September 2011, <https://news.detik.com/berita/d-1716086/kronologi-eggi-sudjana-divonis-bersalah-karena-menghina-presiden>, accessed date 12 January 2022

¹⁸ Constitutional Court Decision Number 013-022/PUU-IV/2006 about Review of the Criminal Code against the 1945 Constitution of the Republic of Indonesia, Page 58.

¹⁹ "Everyone has the right to communicate and obtain information to develop their personality and social environment, and has the right to seek, obtain, possess, store, process and convey information using all available channels" see Article 28F The 1945 Constitution of the Republic of Indonesia

²⁰ See also Adhya Satya Lambang, *Kebijakan Tindak Pidana Penghinaan Terhadap Presiden*, Thesis, Universitas Diponegoro, Semarang, 2009, page 75

²¹ Constitutional Court Decision Number 013-022/PUU-IV/2006 about Review of the Criminal Code against the 1945 Constitution of the Republic of Indonesia, Page 62

²² Jonaedi Efendi "The element of the right to express opinions is not included in non-derogable rights, which include: 1) Right to life, 2) Right not to be tortured, 3) Right to freedom of thought and conscience, 4) Right to religion, 5) Right not to be enslaved, 6) the right to be recognized as a person before the law, and 7) the right not to be prosecuted on the basis of applicable law recede" see Jonaedi Efendi and Fifit Fitri Lutfianingsih, *Non Derogable Rights dalam Peraturan Perundang-undangan di Indonesia*, Jakad Media Publishing, Surabaya, 2020, Page 5, see also Bagir Manan, *Perkembangan Pemikiran dan Pengaturan Hak Asasi Manusia di Indonesia*, Alumni, Bandung, 2001, page 5

such a provision but recommended that it be framed as a complaint-based offense to prevent misuse.²³

Moreover, the presidential insult provision is not inherently unconstitutional. Article 28J(2) of the 1945 Constitution explicitly permits restrictions on the right to freedom of expression to protect the rights of others.²⁴ These restrictions must be narrowly tailored and grounded in laws aimed at safeguarding public order, morality, security, and the democratic process.²⁵

According to McGoldrick, there are two key rationales underlying the necessity to limit human rights²⁶: first, respect for individual rights is not absolute, as the state must balance individual freedoms with broader public interests; second, restrictions are necessary to resolve conflicts between competing individual rights. In the context of freedom of expression, limitations are often justified to maintain this balance.

For example, although freedom of speech in the United States is constitutionally protected, it is not without limits. The U.S. Supreme Court, notably through Justice Oliver Wendell Holmes, established jurisprudence restricting speech that incites public disorder or harms the reputation and dignity of individuals or groups.²⁷

Based on these considerations, reinstating the article criminalizing insults against the president in Indonesia's new Criminal Code is both constitutionally permissible and pragmatically justified. The need to balance individual rights with public order supports the urgency of such limitations.

D. Guarantee of Freedom Speech Under the Principle Primus Inter Pares

Before further examining the concept of primus inter pares in safeguarding freedom of opinion, it is necessary to first consider the advantages and disadvantages arising from the Constitutional Court's decision in case number 013-022/PUU-IV/2006. The Court's intention to annul or declare certain articles unconstitutional, particularly those concerning the protection of the president's dignity, merits appreciation due to its underlying objective of upholding the constitutional rights of citizens.²⁸ The provisions in the current Criminal Code criminalizing insults against the president arguably threaten the constitutional right of individuals to express their opinions freely. This is primarily because such provisions are rooted in the principle of lèse-majesté, which historically protects the dignity of heads of state and government.²⁹

The principle of lèse-majesté originates from ancient Roman law and is traditionally associated with monarchies. It serves as a legal foundation for penalizing acts that insult or defame members of the nobility.³⁰ Within criminal law, offenses under this principle are

²³ Muhammad Reza, *et. Al*, "Criminal Legal Policy and Unconstitutionally on Contempt of The Ruler or Public Body" *Jurnal Hukum dan Peradilan*, Vol.9, No.1. (2020), Page 82-83, <http://dx.doi.org/10.25216/jhp.9.1.2020.71-98>

²⁴ Manfred Nowak, *Pengantar pada Rezim HAM Internasional*, Raoul Wafenberg Institute of Human Rights and Humanitarian Law Partnership with Department Law and HumanRights Indonesia, page 15

²⁵ Sipghotulloh Mujaddidi, "Konstitusionalitas Pembatasan Hak Asasi Manusia dalam Putusan Mahkamah Konstitusi" *Jurnal Konstitusi*, Vol. 18 No. 3, September 2021, page 547DOI: <https://doi.org/10.31078/jk1833>

²⁶ Dominic McGoldrick, "The Interface Between Public Emergency Powers and International law". *International Journal of Constitutional Law*, Vol.2, No.2, April 2004, page 363

²⁷ Joanne B. Hames and Yvonne Ekern, *Introduction to Law*, 6th Edition, Pearson Education, Hoboken New Jersey, 2019, page 150

²⁸ Ajie Ramdan, "Kontroversi Delik Penghinaan Presiden/Wakil Presiden Dalam Rkuhp Kajian Putusan Mahkamah Konstitusi Nomor 013-022/PUU-IV/2006" *Jurnal Yudisial*, 13 No.2, Agustus 2020, Page 247, DOI: 10.29123/jy.v13i2.421

²⁹ Nuzul Shinta Nur Rahmasari and Hari Soeskandi, Page 34

³⁰ David Steckfuss, "Kings in the Age of Nations: The Paradox of Lese-Majeste as Political Crime in Thailand", *Comparative Studies in Society and History*, 37 No.3, July 1995, Page 447 DOI: 10.1017/S0010417500019769

categorized as ordinary crimes, allowing for prosecution to proceed without the necessity of a formal complaint from the aggrieved party.³¹

Thailand remains one of the countries that continues to enforce *lèse-majesté* through Article 112 of its Criminal Code.³² However, this provision has faced significant criticism and calls for repeal.³³ Critics argue that the article imposes excessively harsh sanctions on acts of political dissent and restricts freedom of expression by limiting media coverage and public discourse concerning the royal family across television, radio, and other information platforms.³⁴

The *lèse-majesté* principle parallels Article 137 of the Criminal Code, which the Constitutional Court annulled. Article 137's restrictions clearly infringe upon citizens' constitutional rights to express criticism or warnings toward the government, as protected under Articles 28 and 28E(3) of the 1945 Constitution. Thus, the Court's annulment of Articles 134 and 137 is justified.³⁵

Nevertheless, the Court's ruling raises concerns. Eliminating the presidential insult provision has led to an overly liberal interpretation of freedom of expression, neglecting the constitutional status of the president and vice president as distinct from the public. Accordingly, legal protections for their honor, dignity, and prestige remain necessary and constitutionally mandated.³⁶

Given this, reinstating the presidential insult article in the new Criminal Code is warranted.³⁷ Deputy Minister of Law and Human Rights Eddy Hiariej noted that the new article discards the *lèse-majesté* principle in favor of *primus inter pares*, a framework that better balances human rights protection with respect for state leaders.³⁸

The central question this paper addresses is the extent to which the *primus inter pares* principle can effectively guarantee constitutional rights, particularly the right to freedom of opinion and expression. Before answering, it is important to clarify the meaning of *primus inter pares*. Based on an interview with criminal law expert Muhammad Fatahillah Akbar³⁹, this

³¹ Haberkorn, T. "Dictatorship as occupation in Thailand. The Journal of Legal Pluralism and Unofficial Law", *Journal of Legal Pluralism and Unofficial Law* 49(3), September 2017, 338–352. doi:10.1080/07329113.2017.1383789

³² Eugenie Merieau, "Thailand's Lese-Majeste Law: On Blasphemy in a Buddhist Kingdom", *Buddhism, Law & Society*, Vol. 4, 2019, Page 53–92. https://www.researchgate.net/profile/Eugenie.Merieau/publication/334480041_On_Blasphemy_in_a_Buddhist_Kingdom_Thailands_Lese_Majeste_Law/links/5d2d8fa8a6fdcc2462e32daa/On-Blasphemy-in-a-Buddhist-Kingdom-Thailand-s-Lese-Majeste-Law.pdf

³³ Bangkok Post, *Thailand needs to talk about lese majeste law*, 23 June 2020, <https://www.bangkokpost.com/opinion/opinion/1939428/thailand-needs-to-talk-about-lese-majeste-law>, accessed date on 2 February 2023

³⁴ Peter Leyland, "The Struggle for Freedom of Expression in Thailand: Media Moguls, the king, Citizen Politics and the Law" *Journal of Media Law*, 2 No.1, 115-137 doi:10.1080/17577632.2010.11427356

³⁵ Jonatan Putera, *Pengaturan Tindak Pidana Penghinaan Terhadap Pemerintah Dan Penghinaan Terhadap Martabat Presiden Atau Wakil Presiden Dalam Rancangan Kitab Undang-Undang Hukum Pidana Yang Berpotensi Mengancam Hak Kebebasan Berpendapat Dikaitkan Dengan Asas Lex Certa Dan Putusan Mahkamah Konstitusi yang Berkaitan*, (Universitas Katolik Parahyangan, 2018), page 11

³⁶ Antara Kalteng, *Pasal Penghinaan Presiden Untuk Menjaga Marwah*, 11 Oktober 2022, <https://kalteng.antaranews.com/berita/596885/pasal-penghinaan-presiden-untuk-menjaga-marwah>, accessed date 3 February 2023

³⁷ Antara Kalteng, *Pasal Penghinaan Presiden Untuk Menjaga Marwah*, 11 Oktober 2022, <https://kalteng.antaranews.com/berita/596885/pasal-penghinaan-presiden-untuk-menjaga-marwah>, accessed date 3 February 2023

³⁸ Khotibul Laila "If We Are Cancelling Article of Presidential Insult and is considered normal on the basis of a liberal approach, we are the same as we don't respect the values of Pancasila" see Khotbatul Laila, "Hukum Progresif sebagai Solusi Kebebasan Berpendapat dengan Asas Demokrasi Pancasila", *Jurnal Cakrawala Hukum* 10, No. 2 (2019). <https://doi.org/10.26905/idjch.v10i2.3546> (diakses 18 Februari 2022).

³⁹ Interview with Muhammad Fatahillah Akbar, held on date 10th January 2023

principle originates from an analogy to leadership selection in communities, where a leader is chosen based on demonstrated strength, typically proven through competition or conflict. The victor is deemed the strongest and thus entitled to lead.⁴⁰

Regarding the article on insulting the president, legislators analogize that any alleged insult must be addressed directly by the president rather than prosecuted by the state. This approach encourages direct confrontation between the president and the citizenry, contrasting sharply with the *lèse-majesté* principle, which renders heads of state passive recipients of insult without requiring their active participation. Consequently, insults directed at the president are not automatically prosecuted by the state; instead, the aggrieved party must present substantial evidence, consistent with the legal maxim *actori incumbit probandi*—the burden of proof lies with the accuser.⁴¹

Based on this explanation, the author argues that the *primus inter pares* principle embedded in the latest presidential insult article effectively safeguards citizens' constitutional rights, particularly the right to freedom of expression. Opinions or statements perceived as diminishing the president's dignity are not automatically criminalized; rather, the burden of proof lies with the accuser. Furthermore, the article operates on a passive basis, requiring a formal complaint from the president and/or vice president to initiate legal action through the Indonesian National Police. Consequently, if the president regards certain expressions as mere criticism rather than defamation, no prosecution can proceed. Conversely, if deemed insulting, the president and/or vice president must substantiate the claim with compelling evidence before any legal measures are taken.⁴²

This procedural mechanism aligns with the Constitutional Court's reasoning in Decision No. 013-022/PUU-IV/2006, which emphasized that the offense should only be actionable upon complaint by the affected party. Accordingly, the Court recommended that the complaint-based approach be incorporated into the presidential insult provision in the revised Criminal Code.⁴³

E. Conclusion

In conclusion, the protection of freedom of opinion is paramount, as it is repeatedly guaranteed by the constitution. The challenge for the state lies in imposing necessary restrictions without infringing upon citizens' constitutional rights. Therefore, the state must enact regulations that balance these rights with appropriate limitations. The reinstatement of the presidential insult article in Law Number 1 of 2023 concerning the Criminal Code aligns with constitutional principles and legal precedent. Notably, the Constitutional Court's annulment of Article 134 and related provisions in Decision No. 013-022/PUU-IV/2006 did not declare these provisions permanently unconstitutional. Rather, the Court's ruling served as a basis for criminal law reform regarding offenses against the president and vice president.

Moreover, the article's reinstatement reflects societal demands and is grounded in a shift from the *lèse-majesté* principle to the *primus inter pares* principle. This shift is evidenced by

⁴⁰ Tapil Rambe, *Sejarah Politik dan Kekuasaan*, (Medan: Yayasan Kita Menulis, 2019), page 46

⁴¹ Adhya Satya Lambang Bangsawan. Op. Cit

⁴² Adhiatma Wemby and Satrio Prayogo, "Tinauan Kebijakan Pidana Terhadap Martabat Presiden dan/atau Wakil Presiden dalam RKUHP" *Pandecta Research Law Journal* 15 (2), Desember 2020, 207-217, DOI: <https://doi.org/10.15294/pandecta.v15i2.22402>

⁴³ Constitutional Court Decision Number 013-022/PUU-IV/2006 about Review of the Criminal Code against the 1945 Constitution of the Republic of Indonesia, Page 62

transforming the offense from an ordinary crime to a complaint offense, thereby requiring the president or vice president to initiate legal action. This change embodies a balance between citizens' constitutional rights and state obligations, ensuring the right to express opinions remains broad and protected unless legal proceedings are duly initiated by the president or vice president.

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