

Problems with the Reformulation of the Article on Insulting the President and Vice President in the Context of a Democratic State



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ABSTRACT: This research aims to find out the problems of the Criminal Code regarding the reformulation of the article on insulting the President and Vice President in the context of a democratic country. The formulation of the problem discussed by the researcher is to significantly review the portion of protection given to the President and Vice President based on the legalized Criminal Code. This research also discusses the implementation of the *Primus Interpares* principle whether it is in accordance with the existing portion of the law and does not discriminate against the rights of the people in expressing criticism and is in accordance with the principles of democracy. This research includes normative legal research, with data collected based on written regulations and expert opinions. The results of this research show that in the principle of democracy, the relationship between the people and the leader is interrelated, because there is a *check and balance* mechanism. Therefore, any form of *lex specialis* protection of the President and Vice President cannot be justified in a country that adheres to the democratic presidential principle. In addition, although the government considers this insult article as a representation of the application of the principle of *Primus Interpares*, in the rule of *Primus Interpares* itself, the president cannot be *Primus Interpares* in cases related to the democratization of power values because the President has become *Primus Interpares* in running his government.

KEYWORDS: Insulting the President and Vice President, Criminal Code, Democracy, Primus Interpares

1.0 INTRODUCTION

The 1945 Constitution must always be the main principle in law enforcement in Indonesia. Moreover, Indonesia is a state of law based on democracy, so the theory and practice of law enforcement must be in accordance with the spirit contained in the 1945 Constitution (Indra, 2011).

One of the rules referred to in this discussion is the provisions of criminal law. Criminal law is a representation of one example of a legal instrument that aims to protect the interests of the community in the legal process. These interests can be related to individual interests, broad interests (society), or interests bound by state law (Hiariej, 2016).

In 2006, the Indonesian government implemented changes to the Criminal Code (KUHP), listed in the Article on Insulting the President. In this amendment, the maximum imprisonment was reduced from 7 years to 5 years, and criminal punishment can only be given if the statement or action is done intentionally and is intended to insult the President or Vice President (Rahmasari and Soeskandi, 2022). Nevertheless, the Article on Insulting the President is still controversial in Indonesia, and many parties are still demanding that this article be abolished because it is thought to be contrary to human rights and freedom of speech.

The implementation of the article on insulting the president in Indonesia has drawn polemics because it is considered to limit freedom of expression. Some of the problems where this article is applied are sometimes considered an abuse of power by the government or law enforcement officials. Not only that, the article on insulting the president is also considered not in line with the principles of democracy and the right to freedom of speech. This article is also thought to be used as a tool to silence criticism of the government. Some groups have requested that this article be revised or even abolished. However, the Indonesian government argues that the article on insulting the President is needed to protect the honor and dignity of the President as head of state. The process of revising this article is still ongoing in Indonesia (Tampi, 2016).

The Criminal Code is about to enter a new phase of recodification after the enactment of the new Criminal Code (National Criminal Code). This will be a new challenge after 3 (three) centuries of adopting colonial laws. The National Criminal Code reflects the hope of all Indonesians to have a national law that is culturally appropriate and in favor of the people for the sake of justice. Despite the best efforts in its preparation, of course the National Criminal Code passed yesterday still reaps the pros and cons for the

Problems with the Reformulation of the Article on Insulting the President and Vice President in the Context of a Democratic State

community. Particularly in the values of justice in some of the provisions of the articles imported, one of which is the regulation of insulting the President and Vice President which is very nuanced with political interests and is considered very excessive and violates the spirit of democracy.

Indonesia's presidential insult law has been applied in a number of cases in the past. Some of the most notable cases include the case against Papuan activist Filep Karma and the case against musician Ahmad Dhani. In the Filep Karma case, he was accused of insulting the President in 2004 and sentenced to 15 years in prison. However, some have reported that this case merely illustrates the repressive actions against Papuan activists fighting for human rights and Papuan independence. The case against Ahmad Dhani dates back to 2018, when he was accused of insulting President Joko Widodo on social media. He was subsequently sentenced to 1.5 years in prison and a fine of 10 million rupiah. Although the article on insulting the President is still in the Indonesian Criminal Code, some people still oppose the implementation of this article. Some groups comment that this article can be misused by the government to silence criticism and political opposition (Fernando et al, 2022).

Meanwhile, historically, the article on insulting the President and Vice President was previously declared unconstitutional by the Constitutional Court (MK). However, the government finally kept the insult article alive in the National Criminal Code with various considerations. One of the basic considerations is that the President and Vice President have the principle of *Primus Interpares* (first equal). This is what convinced the government to maintain this article. *Primus Interpares* is attached to the President and Vice President because of their status of serving and implementing the government of the Unitary State of the Republic of Indonesia, in other words they share dedication to the people so that special rights are natural to get. Therefore, the government thinks that the protection of dignity in Article 218 of the National Criminal Code is not a setback to democracy, but instead wants to strengthen democracy (Arrsa, 2014). Because it matches the characteristics of Indonesian society which upholds ethics and manners.

Based on the explanation above, the author wants to significantly review the portion of protection given to the President and Vice President in the legalized Criminal Code requirements. The implementation of the *Primus Interpares* principle is in accordance with the existing portion of the law, meaning that it does not discriminate against the rights of the people in expressing criticism of their country's leaders and is in accordance with the principles of democracy which are thick with criticism.

2.0 METHOD

The research method used in this research is normative juridical, with a statute approach and case approach. The statutory approach is carried out by examining all laws related to the legal issues discussed (Soekanto & Mamudji, 2003). Meanwhile, the problem approach is carried out by examining cases related to the issue at hand (Marzuki, 2006), especially overwriting the formulation of the article on insulting the President and vice pPresident. The method of data collection was literature research and internet research. Information analysis is attempted qualitatively, which is analyzing information by using legal principles, legal doctrines, and positive legal materials, which are carried out on the data that has been collected, carried out by describing data related to the object of research, analyzing data on the object of research and interpreting the data in order to draw conclusions about the problems of the Criminal Code regarding the formulation of articles on insulting the President and Vice President in the context of a democratic country.

3.0 RESULT

3.1 Article on Insulting the President and Vice President in the Criminal Code

Insult to the head of state, king or ruler in French terms is often called *lese majeste* or *lese majesty*. This term is used for an activity or crime that leads to a lack of respect or lack of respect for the king or queen or ruler in a monarchical state system (Haryanto, 1999). This is because in a monarchical order, the king or queen becomes a symbol in a country that must be respected and honored. Because the king or queen is a representative of God to lead a people in a predetermined area.

Insulting the President and Vice President after that was further discussed in article 111 of the old Criminal Code (KUHP WvS) which included arrangements regarding *opzettelijke belediging den Koning of der Koningin*. At that time, the applicable conditions for insulting the President and Vice President were subject to a maximum sentence of 5 (five) years or a maximum fine of 300 (three hundred) golden. After that, finally in 1915, more precisely coinciding on October 15, Koninklijk Besluit Number 33 was issued which regulates the enactment of the WvS Criminal Code (Hofweg 2013). Although in reality the law began to be officially enforced and binding after it was stated in Staatsblad 1915 Number 732. When the Dutch colonization ended, which then changed to the Japanese colonization. Despite the change in colonization, Dutch law was always applied in daily life in the Indonesian colony. This matter is contained in Osamu Seirei Number 1 of 1942, where in the provisions of article 3 of the Osamu Seirei provisions it reports that all government bodies and their powers, laws and laws of the previous government are declared valid and recognized within a certain time as long as they do not contradict and violate the military government.

The implementation of Dutch colonial law continued until after Indonesia declared its independence on August 17, 1945. Although there were some legal organs that had been harmonized with the legal needs of the country at that time, the legal provisions still adhered to Dutch heritage. As stated in Article 1 of the Transitional Rules of the 1945 Constitution, which reads "all existing forms

Problems with the Reformulation of the Article on Insulting the President and Vice President in the Context of a Democratic State

of legislation remain in force as long as there are no new provisions according to the Constitution". After that, it was not long before the provisions of Oendang-Oendang 1946 number 1 on Criminal Hoekoem Regulations known as the WvS Criminal Code was enacted until now, or which was still in effect before the National Criminal Code was implemented (Prodjodikoro, 2002).

The Indonesian state itself actually lacks the concept of the position of head of state as found in the Netherlands. Therefore, the article on the position of the next head of state is contextualized into an article on the protection of the President and Vice President. In the provisions of article 8 number 24 of the WvS Criminal Code, it is stated that the words "Koning of der Koningin" in article 134 of the WvS Criminal Code are replaced with President and Vice President. The change of mention is based on the fact that the position of the President in Indonesia is not only the head of government, but also the head of state. So next, article 111 of the Netherlands WvS which at that time was intended for the head of the king and queen of the Netherlands as a symbol of the state, was reduced to article 134, article 136 bis, and article 137 of the WvS Criminal Code which after that became the forerunner of the mention of articles or offenses against the President.

In terms of constitutional aspects, Indonesia and the Netherlands have clearly experienced a fundamental comparison. Because on the one hand the Indonesian state adheres to the presidential system and the Dutch state places the role of government on the Royal system. Automatic characteristics of this royal system share the role of a king or queen attached to the state. This means that the king or queen in the royal system is a symbol of the state that must be respected as a kind of respect for the state itself. Although the role of a king is part of the government of the Netherlands, however, a king does not have political power over the course of a government in the country. this provision is as stipulated in article 42 of the Dutch Constitution which reads: 1) The government consists of the King and the Ministers; and 2) The execution of the government is carried out by the Minister, not the King.

This significant comparison is considered to make the implementation of the article on insulting the President and Vice President in Indonesia seriously problematic. This is because not only the absoluteness of the Indonesian state adheres to the Presidential system that shares the people's right to oversee the course of government, as well as share reactions to the actions of its leaders (Wibowo, 2012). This provision will also affect the quality of government in the future, because the people who are supposed to be the *check and balance* of the government will be a little afraid to express their criticism. Because even though a clear line has been drawn between criticizing and insulting, the law runs according to the interpretation of the individual.

The decision to revive the article on insulting the President and Vice President in a presidential state is very dangerous. Because Indonesia's position is not like a country with a royal system like the Netherlands. Countries with a royal style often position the king or queen with the assumption that it will provide more protective power, because the king or queen in this government is believed to always be at the point of truth for his decisions and his decisions cannot be contested. This is the fundamental concept of the royal state which is clearly contrary to the Indonesian system of government where the head of state becomes one with the head of government, and also emphasizes the noble values of democracy.

A comparison of the Indonesian and Dutch constitutional systems can be concluded that the President in the Indonesian constitutional system is more dominant as head of government than as head of state. This means that the President's dominance in running the government is superior to the President as a symbol of the state, namely the head of state. From the aspect of the position is also different, the Presidential election system in Indonesia links the people directly, meaning that the people have the independence to determine the President. On the other hand, the Dutch descend in accordance with the provisions of the transition of office in a royal state. Therefore, the logic for correcting the revival of the article on insulting the President and Vice President makes little sense. Because the logic is, why are the people given the right to freely make their choices if the next is given a limit to criticize. Because it is always difficult to share the limitations or boundaries between insulting or criticizing, because the interpretation of the law will depend on the state of heart in ensuring or leading the narrative according to the subjective assessment of the President and Vice President concerned.

The article on insulting the President and Vice President in the Criminal Code, although it has been regulated in such a way, namely there is an explanation in each provision of what is called criticism and insult. However, in a dynamic political perspective, there are still opportunities for these articles to be used to reduce and curb political freedom and freedom of expression of citizens. Because this is related to emotional person to person, in this case the President is protected and the people in conveying their aspirations (Marpaung, 2018). This is in line with Haryanto in his book, which states that the restraint and limitation of the right to express opinions is actually to muzzle the voices of the people who disagree or contradict the interests of the state (Rahman, 2015).

In this context, the article initially explicitly aims to protect the dignity of the President and Vice President. Furthermore, in future political developments, it is feared that this article is only a cover to criminalize the voices of the people who are against the interests of the President. The legal logic is that when there are already provisions on insult articles in general, then in a democratic country there should be no need to regulate a specialist lex on insult articles against the President and Vice President. Although the government has its own rationalization regarding the protection of the dignity of the President and his Vice President, but if it is limited to mentioning the norms and noble culture of the Indonesian Nation that upholds politeness. It is even more ironic and barbaric to criminalize the indigenous people with an article that is said to represent national law. Which national law has the heart to sadistically kill its people when they aspire to advance the country through their leaders. Therefore, it is unfortunate that the

Problems with the Reformulation of the Article on Insulting the President and Vice President in the Context of a Democratic State

National Criminal Code, which was previously highly anticipated as an independent law in a country, has instead become a weapon for the people who want their country to progress and be better.

Materially, the National Criminal Code's regulation on general criminal provisions can be said to be much better than the WvS Criminal Code (Arief, 2021). However, appreciation of these advances will be hampered by the regulation of the Article on insulting the President and Vice President, which is considered too conservative and authoritarian. The provisions in this insult article will spur controversialism in the National Criminal Code, as it will cause conflicts in its enforcement in the future. Therefore, this insult article has been annulled by the Constitutional Court in the past. Therefore, the author feels that the revival of this insult article will not contribute much to the stability of national law.

In the National Criminal Code, namely in Article 218, it is stated that attacking in public the honor or dignity of the president and vice president is punishable by a maximum of 3 years 6 months / a maximum fine of category iv. Category iv here is worth 200 million (at most). Article 219 further states that if the act of insulting the President and Vice President is carried out using electronic media or information technology facilities, then the imprisonment will increase to a maximum of 4 years and 6 months, with a maximum fine of category iv. Furthermore, it is also mentioned that prosecution can be charged with Articles 218 and 218 only if there is a complaint offense (Widyati, 2017).

The government's considerations for retaining the Insult Article are several reasons. First, the President is a symbol of the state. Second, the abolition of the insult article will create a liberal democratization culture and third, it is impossible to abolish the article on insulting the President and Vice President, while the Presidents of other countries have their dignity protected. For the author, the government's reasons are very unfounded and unreasonable. In a country of Presidentialism, it is not appropriate to place the President as a symbol of the state, because the position of the President is different from that of a king or queen. Because the President was born from the embryo of direct election by the people. Therefore, in the Law on state symbols, the President is not included in it. Because it does not exist as a state symbol. Furthermore, regarding the reason for the liberalization of democracy if this article is deleted. The legal logic is that if there is already a general regulation of insults, then the limitations or limitations of liberalism on democracy can suffice. Rationally, the article on insulting the President and Vice President exists because it wants to get rid of the perspectives of people who are not in line with the government. Then the last one is about the regulation of the article on the protection of the dignity of foreign heads of state and their own countries. This statement is not appropriate if the government makes such a comparison. Because comparing the protection of the dignity of foreign heads of state is not apple to apple. It is not then rationalizing that insulting a neighbor is not allowed, and insulting a biological mother can be free and allowed.

These two comparisons are incompatible, because the logic of the law is rights and obligations. That is, the right of the people is to choose a leader who meets their expectations freely with the aim of a better and more prosperous country. Then the leader's obligation is to carry out the mandate entrusted by the people well. Automatically, if there are deviations, the people have the right to reprimand and warn. Because if the government is not implemented with good principles, it can make the stability of the country will deteriorate badly. That is why it is important to provide space for the people to provide stimulants to their leaders freely and proportionally.

3.2 The Decline of Democracy

The New Order period is clear evidence that at that time the country faced a massive democratic crisis. Authoritarian government became a distinctive characteristic of leadership during the Soeharto era. No wonder, then, that the atmosphere of the new order government was completely closed and the crisis of aspiration. The harshness of the pattern formed by Soeharto in carrying out his leadership made people worried about speaking out. Because silence for the people is one way to save life. So after this reformation, the Indonesian nation began to improve to create a democratic government, which means that the people participate in the government through criticism and suggestions. Therefore, it is unfortunate if the experience of the New Order cannot be used as a lesson, namely how to respect the people in their constitutional portion in democracy.

The article on insulting the President and Vice President in the National Criminal Code will make the President's position more comfortable. Because in his government actions there is an article that protects his dignity. Automatically, the framework of checks and balances between the people and the President will be increasingly porous. Because it is like, the people are given the right to criticize but on the other hand the people are also limited by the articles that regulate it. Although the government has tried to limit the definition of criticism and insult, the law always stands on person to person interpretation. If special protection for the President is the implementation of the *Primus Inter pares* principle, then the President's rights should be able to be the first of equals, namely protective rights that cannot be obtained by just anyone.

So for the author, this is a fatal mistake in understanding the principle of *Primus Inter pares*. Because the intention of this principle is the rights of the president in supporting his performance. For example, the President's right to obtain escorts and other state privileges. So that in legal analysis, distributing special articles to the President in terms of dignity is not included in *Primus Inter pares*. Because criticism in any form is legalized in a democratic country, provided that it is still related to his performance as President. If you dialogue about the treason article, it is still within the realm of reasonableness if treason is regulated by a special

Problems with the Reformulation of the Article on Insulting the President and Vice President in the Context of a Democratic State

article in the National Criminal Code. This means that the definitions of treason and insult are clearly two different things. This is because treason would have implications for the life of the state, while insult would have implications for the person of the President. This means that the affirmation of the treason article regulated in the National Criminal Code is still constitutional by considering the impacts that will occur in a country. As stated in the Constitutional Court's decision, the state has interests that must be protected by criminal law from acts that want to rape it.

Although there has been a tightening by the government in the article on insulting the President and Vice President through a shift in the offense, which was originally an abstract offense to a complaint offense. However, the Article on Insulting the President and Vice President will still cause fear in the future. Because the existence of this article can threaten the aspirations of the people in expressing their opinions in a democratic country. According to the author, the complaint offense presented in this article is not a solution to avoid criminalization of the insult article. Because the shift between these two offenses is only limited to distinguishing at the stage of how the complaint is made. But the facts in the field law enforcers will be able to provide interpretations according to the conditions they face. Imagine if the complainant is the President, whose political and social status is clear. Then it seems very impossible for law enforcers to be able to remain objective in providing interpretations of the criticism problem.

As Jimly Asshidiqy argues, the regulation of the Article on insulting the President and Vice President should not need to be revived, even with the various considerations mentioned earlier. Because in addition to the article having been abolished by the Constitutional Court, the president himself constitutionally is not included in the state symbol. As stated in the 1945 Constitution, the only symbols of the state are Garuda Pancasila and the motto Unity in Diversity. It is clear that the president here is an institution, not an entity that has an ego and feelings. So automatically, when the president is offended, it means that the president is in a position as a person, not an institution (Muladi and Sulistyani, 2021). It is clear, when in the future law enforcement officials do not have the moral awareness to carry out their responsibilities towards this article, then criminalization of the people is inevitable.

3.3 Reference Study on the Formulation of Articles on Insulting the President and Vice President in Other Countries

Many countries have laws against insulting the head of state, including the president. However, the treatment of such offenses varies from country to country. Some countries impose criminal penalties and heavy fines, while others only impose administrative sanctions or only give warnings. However, it is worth noting that insulting the head of state in the context of freedom of expression and democracy is still debated in many countries. Some groups argue that insulting the head of state is not in line with the principle of freedom of expression, while others comment that it is necessary to protect the dignity of the office of the president as head of state (Efridadewi et al, 2022). Some countries that practice sanctions for people who insult the head of state are United Arab Emirates (UAE), Russia, and Thailand.

Article Insulting the head of state and other rulers in the UAE is regulated in Article 16 of the UAE Federal State Security Law. This article states that any person who publicly insults, challenges or threatens the president, vice president, king or any other ruler in the UAE, is punishable by a minimum prison sentence of 3 (three) years and a maximum of 15 (fifteen) years. In addition, the UAE criminal law also has several other articles that can be used to take action against acts that are considered insulting the head of state, such as Article 373 which regulates insults against public officials and Article 378 which regulates insults against the nation or national symbols (Abdullah, 2020). However, as is the case with laws in other countries that regulate insulting the head of state, the use of Article 16 and other articles in the UAE is not free from controversy. Some believe that these articles can be used to suppress freedom of expression and human rights, and violate democratic principles. In the context of a democratic country, freedom of speech and expression are rights protected by law and the constitution. Therefore, the use of Article 16 and other articles in the UAE penal code should be done with caution and within a fair and proportionate framework. Criticism by citizens should be considered a normal form of political participation and should be valued as an effort to improve and correct government performance, provided that it is done in a manner that does not violate the law and ethics (Choiriyati and Windarsih, 2019).

Russia has a law that criminalizes insulting the head of state or other authorities. This law is called the "Law on Defamation of State Symbols or Public Authorities of Russia" and was enacted in 2013. Article 319 of the law states that any person who publicly expresses an opinion that displays contempt for Russian state symbols or public authorities is liable to a fine of up to 300,000 rubles (about \$4,000) or imprisonment for up to 15 days. If the offense is attempted in public or using mass media, the penalties can be more severe, with a fine of up to 1.5 million rubles (about \$20,000) or imprisonment for up to three years. Such sanctions can also be applied to foreigners who carry out the same actions on Russian territory (Nurasiah, 2022).

Some consider this law to be a violation of the right to freedom of speech and expression. Constructive and peaceful criticism should be protected in a democracy, as it is a human right recognized by law and the constitution. In the context of a democracy, the use of laws prohibiting insulting the head of state or other authorities must be regulated with proportionality in accordance with democratic values. Freedom of speech and expression must be safeguarded and protected, but must also be balanced with the need to maintain national security and public safety.

In Thailand, the law governing insulting the king or members of the royal family is the Lèse majesté Act. This law has existed since the early 20th century and has been updated several times. The Lèse majesté Law states that anyone who states or disseminates

Problems with the Reformulation of the Article on Insulting the President and Vice President in the Context of a Democratic State

data that is thought to be an insult to the king or members of the royal family can be punished with a maximum of 15 years in prison. Not only that, anyone found guilty of violating the *Lèse majesté* law can also be fined. However, in recent years, there has been a rise in criticism of the *Lèse majesté* law in Thailand, with many seeing it as a tool to suppress political opposition and violate human rights, including freedom of speech and expression (Rimandita, 2022). In 2017, the Thai government implemented improvements to the *Lèse majesté* law, reducing the maximum sentence from 15 years to 10 years in prison. However, this improvement was still considered inappropriate by many groups, and some human rights organizations requested that the law be repealed. In November 2020, the *Lèse majesté* law was tightened by the Thai government, with the maximum sentence increased to 20 years in prison. This action has raised further concerns about freedom of expression and political repression in Thailand (Rimandita, 2022).

In general, insulting a head of state abroad may be subject to criminal or administrative sanctions, depending on the laws and regulations of the country. Some countries impose severe criminal penalties and fines, while others only impose administrative sanctions or only give warnings (Hamzah, 2017). However, it is important to note that insulting the head of state in the context of freedom of expression and democracy is still debated in many countries. Some countries argue that insulting the head of state is not in line with the principle of freedom of expression, while others argue that it is necessary to maintain the dignity of the president's position as head of state.

Some countries do not have specific presidential insult laws, such as the United States, Canada, the United Kingdom, Australia and Germany. However, they still have laws prohibiting defamation, slander, and insults against individuals, including heads of state. Countries that do not have specific presidential insult laws have reasons to prioritize freedom of opinion and expression in their democratic systems. These countries believe that criticism of the government, including the head of state, is an important part of public participation and healthy political debate.

4.0 CONCLUSION

From some of the descriptions that have been described by the author, the conclusions that can be obtained are as follows: 1) In the principle of democracy, the relationship between the people and the leader is interrelated, because there is a *check and balance* mechanism. Therefore, any form of *lex specialis* protection of the President and Vice President cannot be justified in a country that adheres to the democratic presidential principle; and 2) Although the government considers this insult article as a representation of the application of the *Primus Inter pares* principle. However, in the *Primus Inter pares* principle itself, the president cannot be *Primus Inter pares* in matters relating to the democratization of power. Because the president has become *Primus Inter pares* in running his government.

From several descriptions that have been described by the author, the suggestion that can be obtained is the need for a massive and structured socialization to the public, especially to law enforcement officials to be able to understand this insult article in detail and objectively. This aims to minimize the criminalization of people who voice their concerns about their country's leaders. However, this does not only discuss the definition of criticism or insult, but rather the legal interpretation of the relevant parties in dealing with the phenomenon of the Presidential insult article in the future.

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Problems with the Reformulation of the Article on Insulting the President and Vice President in the Context of a Democratic State

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