

Basic Considerations for Recriminalization of Criminal Acts of Insultation Against the President and Vice President in the Draft of Criminal Code

Recky Yachop Pardosi¹ R. Rahaditya^{1*}

¹*Faculty of Law, Universitas Tarumanagara, West Jakarta - 11440, Indonesia*

^{*}*Corresponding Author. Email: rahaditya@mku.untar.ac.id*

ABSTRACT

Indonesia as a democratic legal state as regulated in the 1945 Constitution of the Republic of Indonesia places the people as the highest sovereignty holders. The criminal act of insulting the President and Vice President is a provision in the Dutch Criminal Code which is considered to limit democratic rights and is contrary to the 1945 Constitution of the Republic of Indonesia, so that through the Constitutional Court Decision Number 013-022/PUU-IV/2006, Article 134, Article 136 bis and Article 137 of the Criminal Code are declared to have no binding legal force. Then the Government criminalized the article on criminal offenses against the President and Vice President in the RKUHP. The purpose of this study is to find out how the basic considerations for the recliminalization of criminal acts of insult to the President and Vice President in the Criminal Code. The research method used is normative research with legal, historical and conceptual approaches, and the legal materials used are sourced from primary, secondary, and tertiary legal materials. The results of the study found that the basic considerations of the Government and the Indonesian House of Representatives in conducting the criminalization of articles on criminal acts of insulting the President and Vice President did not have strong legal reasons because the substance formulated had similarities with Article 134, Article 136 bis, and Article 137 of the Criminal Code which had been declared unconstitutional. by the Constitutional Court through the Decision of the Constitutional Court Number 013-022/PUU-IV/2006 because it is contrary to the 1945 Constitution of the Republic of Indonesia and the principles of democracy, including human rights. The government in making laws and regulations is expected to always adhere to the 1945 Constitution of the Republic of Indonesia so that it does not appear to want to limit the democratic rights of the people and every legal product that is formed can reflect justice, benefit, and legal certainty.

Keywords: *Criminal Acts of Humiliation, President and Vice President, Criminal Code.*

1. INTRODUCTION

1.1. Background

Indonesia is a legal country that adheres to a democratic system. Democracy is a form or mechanism of a country's government system as an effort to realize people's sovereignty (citizen's power) over the country to be carried out by the state government.[1] So that it can be understood that Indonesia as a democratic country is a country with a people's government system, or better known as a government of the people, by the people, and for the people. In Indonesia, acts that threaten the public interest are regulated in the Criminal Code (hereinafter referred to as "KUHP"). The Criminal Code is a statutory regulation that regulates material criminal acts. One of the criminal acts regulated in the Criminal Code is an act related to insulting

the President and Vice President, which is contained in articles 134, 136 bis, and 137 of the Criminal Code.

During the validity period of Article 134, Article 136 bis, and Article 137 of the Criminal Code, many people have been ensnared by these articles for criticizing the government, in this case the President and Vice President, in demonstrations or other actions. Eggi Sudjana and Pandapotan Lubis are among the many critics charged with the crime of insulting the president and vice president.

Then in 2006, Eggi Sudjana and Pandapotan Lubis submitted a judicial review of Article 134, Article 136 bis, and Article 137 of the Criminal Code which regulates the Crime of Insulting the President and Vice President to the Constitutional Court. Judicial review is the process of examining, adjudicating, and deciding whether a law being tested is contrary to the 1945 Constitution of the Republic of Indonesia or not. In the Decision of the Constitutional Court Number 013-022/PUU-IV/2006, the Court is of the

opinion that Indonesia as a democratic legal state, in the form of a republic, and with people's sovereignty, and upholds human rights as stipulated in the 1945 Constitution, is no longer relevant if The Criminal Code still contains articles such as Article 134, Article 136 bis, and Article 137 which negate the principle of equality before the law, reduce freedom of expression of thoughts and opinions, freedom of information, and the principle of legal certainty. Thus, the Criminal Code which is an effort to reform the colonial legacy of criminal law must also no longer contain articles whose contents are the same or similar to Article 134, Article 136 bis, and Article 137 of the Criminal Code. Moreover, criminal threats for violating Article 134 of a maximum of six years in prison can be used to hinder the democratic process, especially access to public positions which requires a person to have never been convicted of a criminal offense punishable by imprisonment of five years or more.[2]

Based on these considerations, the Constitutional Court in its ruling No. 013-022/PUU-IV/2006 stated that Article 134, Article 136 bis, and Article 137 of the Criminal Code contradict the 1945 Constitution of the Republic of Indonesia and have no binding legal force. Articles insulting the President and Vice President are considered unconstitutional against the 1945 Constitution of the Republic of Indonesia. So based on the Constitutional Court Decision Number 013-022/PUU-IV/2006, Article 134, Article 136 bis, and Article 137 of the Criminal Code are revoked and declared to have no permanent legal force .

In September 2019, the House of Representatives (DPR) for the 2014-2019 term and the government are already planning to ratify the final draft of the Draft Criminal Code (hereinafter referred to as "RKUHP"), in which the government reiterates articles related to Humiliation. Against the President and Vice President who have been revoked based on the Constitutional Court Decision Number 013-022/PUU-IV/2006. Regarding the article on insulting the president and vice president, it is contained in Article 218, Article 219, and Article 220 of the RKUHP

The existence of the recriminalization of the Criminal Act of Humiliation Against the President raises many pros and cons in society because the article on the criminal offense of insulting the President and Vice President has previously been canceled by the Constitutional Court, so it is possible to cancel it again if it is considered contrary to the 1945 Constitution of the Republic of Indonesia.

Based on the description of the background, it is necessary to carry out a juridical analysis as outlined in the form of a thesis with the title "Basic Considerations for Criminal Acts of Humiliation to the President and Vice President in the Draft Criminal Code", the results of which are outlined in this script.

1.2. Problem

Based on the background explanation above, the legal issues in this paper is:

How is the basis for considering the criminal act of humiliation against the President and Vice President in the Draft Criminal Code?

2. ANALYSIS

The provisions governing acts of insult to the President and Vice President have indeed been stated in Article 134, Article 136 bis, and Article 137 of the Criminal Code, with the following provisions:

Article 134

Intentional insult to the President or Vice President is punishable by a maximum imprisonment of 6 (six) years, or a maximum fine of Rp. 4,500.00.- (four thousand five hundred rupiah).

Article 136 bis

The definition of humiliation as referred to in Article 134 also includes the formulation of an act in Article 315, if it is carried out outside the presence of the insulted, either by behavior in public, or not in public orally or in writing, but in the presence of more than 4 (four) people.) person, or in the presence of a third person, against his will and therefore feel offended.

Article 137

(1) Whoever broadcasts, displays, or puts up in public writings or paintings containing insults to the President and Vice President, with the intention that the contents of the insults are known or more publicly known, is threatened with imprisonment for a maximum of 1 (one) year four months or a maximum fine of Rp.4,500,00.- (four thousand five hundred rupiah).

(2) If the guilty person commits a crime while carrying out his search, and at that time 2 (two) years have not elapsed since the conviction that has become permanent due to a similar crime, he may be prohibited from carrying out the search.

The Constitutional Court considers that Article 134, Article 136 bis, and Article 137 of the Criminal Code do not contain a clear formulation of what constitutes an insult to the President or Vice President. The Constitutional Court considers that if there are allegations of violations committed by the President or Vice President, efforts to clarify the allegations can be considered as an act of humiliation. According to the Constitutional Court, the enforcement of Article 134, Article 136 bis, and Article 137 of the Criminal Code will reduce the freedom to express opinions and thoughts, the freedom to obtain and convey information, and result in legal uncertainty.

In the Draft Criminal Code, the provisions governing acts of humiliation against the President and Vice President were revived. In the final draft of the RKUHP dated September 15, 2019, the criminal act of insulting the President or Vice President was replaced with a criminal act of Assaulting the Honor or Dignity of the President and Vice President, as stated in Article 218, Article 219, and Article 220 of the RKUHP, with the following formula :

Article 218

- (1) Anyone who publicly attacks the honor or dignity of the President or Vice President shall be punished with imprisonment for a maximum of 3 (three) years and 6 (six) months or a maximum fine of category IV.
- (2) It does not constitute an attack on honor or dignity as referred to in paragraph (1) if the act is carried out for the public interest or for self-defense.

Article 219

Everyone who broadcasts, displays, or attaches writing or pictures so that they are visible to the public, listens to recordings so that they are heard by the public, or disseminates by means of information technology which contains attacks on honor or dignity against the President or Vice President with the intention that the contents are known or more known to the public, shall be sentenced to a maximum imprisonment of 4 (four) years and 6 (six) months or a maximum fine of category IV.

Article 220

- (1) Criminal acts as referred to in Article 218 and Article 219 can only be prosecuted on the basis of a complaint.
- (2) The complaint as referred to in paragraph (1) may be made in writing by the President or Vice President.

In terms of substance, the provisions in Article 218, Article 219, and Article 220 of the RKUHP are considered to still have similarities with the provisions in Article 134, Article 136 bis, and Article 137 of the Criminal Code which have been declared unconstitutional with the 1945 Constitution of the Republic of Indonesia by the Constitutional Court.

Criminal law policy can be interpreted as an effort taken by the state in tackling crime by utilizing criminal law as a means. In practice, criminal law policy is carried out through 3 (three) stages, namely formulation, application, and execution. The formulation stage is a legislative process, while the application stage is a judicial process, while the execution stage is an administrative process.

According to Wcipto Setiadi, the basis for consideration of the Drafting Team for the RKUHP in reformulating the article on criminal offenses against the President and Vice President is to protect the President and Vice President who are symbols of the state. The reformulation of the article on criminal offenses against the President and Vice President is not a form of anti-democratic behavior. All citizens are allowed to criticize the President and Vice President as long as the criticism is not accompanied by insults.[3]

According to the RKUHP academic text, the basic considerations in formulating or reviving the criminal act of insulting the President or Vice President are as follows:

- 1) The interest/legal object (*rechtsbelangen/rechtsgoed*) or the basic value that the criminal offense wants to protect is "human dignity" which is one of the universal values that is upheld;
- 2) Humiliation is essentially a very despicable act (seen from the aspects: morals, religion, social values and human rights values), because it "attacks/demeans human dignity" (attacks universal values), therefore, theoretically seen as *rechtsdelic*, intrinsically wrong,

mala per se, and therefore also prohibited (criminalized) in various countries;

- 3) Determination of the scope of the type of criminal offense of humiliation may vary for each society/country; this includes issues of criminal policy and social policy which are closely related to the socio-philosophical, socio-political, and socio-cultural values of each nation/state;
- 4) The scope of humiliation of ordinary people; certain people (who are worshiping or religious officers; judges/ judicials; population groups); symbols/ apparatus/ state institutions (flags/national anthems; state symbols; public officials/power holders; government; president or vice president; including from friendly countries); sanctified symbols/ institutions/ substances (God, the word, and His attributes; religion, apostles, prophets, holy books, religious teachings, or religious worship); even the dead;
- 5) It feels odd if insults against ordinary people, dead people, national flags/anthems, state symbols, public officers/officials, and heads of friendly countries are just criminal acts; while insults to the President or Vice President are not; especially the status/position. The position/function/duties of the President are different from ordinary people, viewed from the sociological, legal, and constitutional point of view;
- 6) Because the status/position of the President is different from that of ordinary people in general, it is inappropriate to confront/dispute this with the principle of equality before the law. If this is the case, all the different types of criminal acts based on different status/qualifications (such as those found in the types of insults, murder, persecution, and so on) also means that they must be abolished, because they are considered contrary to the principle of equality before the law.[4]

In Jimly Asshidiqie's opinion, the article on criminal offenses against the President or Vice President as regulated in the RKUHP is no longer needed with the following considerations:

- 1) Articles of criminal offenses against the President or Vice President have been annulled by the Constitutional Court;
- 2) The President is not a symbol of the state, as regulated in Article 36A of the 1945 Constitution of the Republic of Indonesia, namely the symbol of the Indonesian state is Garuda Pancasila;
- 3) The President is an institution that does not have the heart and feelings of a living being, so that if the President feels insulted, the President can follow up legally in his capacity as a person.

Jimly Asshidiqie also argues that the principle of a democratic state is to ensure the participation of the community in decision making so that every decision including the laws and regulations that are enforced can reflect justice. The logical consequence of Indonesia as a state of law is that it requires the supremacy of the constitution, namely placing the constitution as the highest law. The supremacy of the constitution is a form of

implementing democracy because the constitution is the highest social agreement. The substance of the social agreement regulates the common goals that must be achieved, including the limits of individual rights, and the parties responsible for achieving these common goals and carrying out the social agreement based on predetermined boundaries. The social agreement is implemented in the form of a constitution as the highest law in a country. Therefore, any applicable legal product should not be determined unilaterally especially for the interests of the authorities because this is contrary to the principles of democracy. Law aims to provide justice, benefit, and legal certainty for everyone, not just for a few people so that the state of law itself can develop as a democratic state of law. The criminalization of articles on criminal offenses against the President or Vice President raises pros and cons in society. Some legal experts argue that the President is not only the Head of State but also the Head of Government and a symbol of the state. In addition, the President is closely related to the power and interests of the state so that legal provisions are needed to protect the dignity and honor of the President and Vice President in order to maintain it.

According to Firman Wijaya, the form of respect for the King or Queen is different from the form of respect for the President or Vice President. In a country with a royal government system, the King/Queen is the head of state, so it is relevant to apply the article on the offense of insulting the King or Queen. However, the article on criminal acts of humiliation does not apply to heads of government. In Indonesia, the President is indeed the head of state but the President is also the head of government so that the concept of imposing a criminal offense against the King or Queen is not appropriate to apply to the President or Vice President. Mudzakkir gave an opinion about the difficulty of judging whether a statement is a criticism or an insult. Criticism and humiliation are 2 (two) different actions so it is necessary to distinguish between criticizing and insulting. The article on the criminal act of insulting the President or Vice President contains unclear provisions so that the formulation does not meet the *lex certa* principle.

Criticism is a form of freedom of expression which is a human right. Freedom to express opinions orally or in writing is a basic right that needs special attention in the life of the state in Indonesia. The right to freedom of expression is a human right that is protected as a constitutional right for all citizens. The right to express an opinion is a part of political civil rights or also known as negative rights. The negative right in question is the absence of state intervention in realizing these rights. This is in line with one of the obligations of the state in the concept of human rights law, namely the state is obliged to respect by not intervening, unless it is based on valid law.

Based on the description above, the reclamation of the article on the criminal act of insulting the President or Vice President does not have a strong and significant legal reason or basis for consideration. The government should, in carrying out its legislative function, be guided by the values contained in the 1945 Constitution of the Republic of Indonesia as the state's foundation and supreme law. The similarity in terms of substance found between Article 218,

Article 219, and Article 220 regarding the criminal act of insulting the President or Vice President in the RKUHP with Article 134, Article 136 bis, and Article 137 of the Criminal Code which have been declared unconstitutional by the Constitutional Court is a form of neglect of Decision of the Constitutional Court Number 013-022/PUU-IV/2006 which may result in legal uncertainty, given that the Constitutional Court's decision should be final and binding.

3. CONCLUSION

The basis for consideration of the Government and the DPR RI in re-criminalizing the criminal act of insulting the President or Vice President in the RKUHP does not have a strong legal reason because the substance formulated has similarities with Article 134, Article 136 bis, and Article 137 of the Criminal Code which have been declared unconstitutional by the Court. The Constitution through the Decision of the Constitutional Court Number 013-022/PUU-IV/2006 which in its legal considerations stated that the article on the crime of insulting the President and Vice President is contrary to the concept of a state of law and democratic principles, including guarantees of human rights, as regulated in the Constitution of the Republic of Indonesia. 1945 as the basis of the state as well as the highest constitution.

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REFERENCES

- [1] Aminuddin Ilmar, *Hukum Tata Pemerintahan*, (Makassar: Universitas Hasanuddin, 2013), pg. 271.
- [2] Moeljatno, *Asas-Asas Hukum Pidana*, (Jakarta: Sinar Grafika, 1993), pg. 122.
- [3] Satjipto Rahardjo, *Ilmu Hukum*, (Bandung: Citra Aditya Bhakti, 2000), pg. 52.
- [4] Adhari. A, *Konstitusionalitas Materiele Wederrechtelijk dalam Kebijakan Pemberantasan Tindak Pidana Korupsi*, Journal 2018, pg. 134.