

CHAPTER ONE

INTRODUCTION

A. Background of Research

In the new Criminal Code of Indonesia, attacking President's honor and dignity has become a criminal act, which can be seen as indication that the state leads to an authoritarian regime. Within the new Criminal Code, Law No. 1 of 2023, there are some Articles which might seem to be contradictive with the concept of democracy, mainly Articles 218 (1) and 240 (1), where the Articles criminalize people who throw an insult towards government and President. These Articles, of course, seem to be oppressive towards people in sense that from now on, government has to be 'protected' from critics by defending themselves to protect their 'dignity'. Surely, this calls to the human rights law to protect the dignity of people so that people are becoming more responsible to what they say towards others. However, National Commission of Human Rights stated that there are some cases which attack the right of people to freedom of opinion and expression. It is also rather hard to have an objective definition from the concept of 'freedom of expression' since this concept might have to fit with nation's culture.¹

This might be a serious problem since Indonesia is considered as legal state that use democratic system, it means that the government has to listen to what people want as the consequences of democratic system where a

¹ Zico Junius Fernando, *et al*, "The Freedom of Expression in Indonesia", *Cogent Social Sciences*, Vol. 8, No. 1, (July, 2022), p. 1 – 3.

government is of the people, by the people, and for the people. With that in mind, democracy should also guarantee the freedom of expression as well. Freedom of expression can be in multiple forms, and one of the form of freedom of expression is criticism. Criticism from the people towards government must be protected since it is also part of human rights as well.² Moreover, the limitation of freedom of expression might also breach the *grundnorm* of 1945 Constitution Article 28E Paragraph 3 stated “ Every person has the right to unite, assemble, and expressing opinion.” There is also an indication that if government is ‘protected’ from critics, they will also tend to make arbitrary actions which might also breach Article 17 of Law No. 30 of 2014 stated “Government bodies and/or officials are prohibited from abusing authority, this prohibition includes prohibition on exceeding authority, prohibition on mixing authority, and/or prohibition on acting arbitrarily.” If the government limit the critics from the people towards them, then there will be indication that the state will move towards authoritarian regime.

The problem of this freedom of expression occurs when a President is being the one who gets the insult. In 2021, the government of Indonesia was concerned on making a new policy on insulting President as the head of state and government in order to preserve his/her honor and dignity. The government also stated that throwing an insult towards the President has to be

² Recky Yachop Pardosi, and R. Rahaditya, “Basic Considerations for Recriminalization of Criminal Acts of Insultation against the President and Vice President in the Draft of Criminal Code,” *3rd Tarumanagara International Conference on the Applications of Social Sciences and Humanities (TICASH 2021)*, Atlantis Press (April, 2022), p. 1134-1137.

considered a criminal action, which shall be regulated within the new Criminal Code of Indonesia.³ Surprisingly, in the new Criminal Code of Indonesia, Law No. 1 of 2023, the Article of banning insult towards the President and even the state institutions have already been regulated.

Article 218 of Law No. 1 of 2023 stated: “Every person in public, who attack the honour and dignity of President and or Vice President, receive a penalty of imprisonment of maximum 3 (three) years or a fine maximum of category IV”.

Article 240 of Law No. 1 of 2023 stated: “Every person in public, orally or textually insults government or state institution, receive penalty of maximum 1 (one) year 6 (six) months of imprisonment or fine maximum of category II”.

The idea of anti-critics government may have a connection with ‘take down’ phenomenon. This ‘take down’ phenomenon happens whenever people express their opinion but then their social media, or their opinion written in social media is being taken down by the government without a clear clarification. This phenomenon creates a certain fear in society that Indonesia might leads to a totalitarian state. Totalitarianism can be defined as a governmental system which emphasizes on the basic principles of the

³ Adi Bayu Mahadian and Rohani Hashim, “Political Internet Memes in Indonesia: Insulting the President in the 2019 Presidential Election”, *Journal of Contemporary Issues in Media and Communication*, Vol. 2, No. 1, (Desember, 2022), p. 28 - 29.

absolute power of the state that government are able to 'take down' any opinions that oppose them.⁴

If take a step back few years ago, Articles of insult towards President and Vice President had actually been regulated within Article 134, 136, and 137 of Criminal Code. However, the Constitutional Court of Indonesia decided to revoke these Articles on December 6th, 2006, within Constitutional Court Decision Number 013-022/PUU-IV/2006 due to the consideration that these Articles might be unconstitutional since these Articles tend to limit the freedom of expression, which against democracy.⁵ Surely, this criminalization of insult against President causes pros and cons from society.

Referring to the foundation of Indonesia's source of law, 1945 Constitution, Article 28E Paragraph (3) states that: "Every person has the right to freedom of association, assembly, and expression". Freedom of expression can also be translated as freedom of opinion in which people are free to state what they feel and what they want, especially when the opinion is related to the matter of state and government.⁶ Judging from this perspective, the idea of criminalizing people who insult government might be contradictive with the state's source of law.

⁴ Harrel Ciddan, *et al*, "Limitation of Opinion with Social Media Take Down System, is Indonesia Toward to Totalitarianism?", *Metafora: Education, Social Sciences and Humanities Journal* Vol. 6, No. 2, (November, 2022), p. 29.

⁵ Wiwin., *et al*, "The Regulation of Articles on State Institutional Insults to the Right to Freedom of Expression in Indonesia: A Critical Review", *Mulawarman Law Review*, Vol. 8, No. 1, (June, 2023), p. 24 – 25.

⁶ Lusty Shine La Juwi, Andi Pangerang Moenta, and Hamzah Halim, "Restrictions on Freedom of Expression in Indonesia from A Human Rights Perspective", *Jurnal Cahaya Mandalika*, Vol. 4, No.3, (June, 2023), p. 496 – 497.

Even without the regulation banning the insults of state's government, Indonesia has yet to provide an adequate medium for people to express their opinion to the government as a form of public participation. Currently, freedom to participate in government in Indonesia is only defined as the freedom to involve in voting in general elections. Which means people shall have the right to vote the people they choose to lead the state organs. This is also a crucial problem for the state since the policy making of the states mostly do not involve citizen, so that people are unable to express their opinion on a particular regulation which, of course, contradicts the idea of democracy.⁷

An expert of consitutional law, Kevin Evans, in his interview with Refly Harun, stated that it might be wiser to separate the function of President from the head of government and state to the head of state only while the head of government shall be handled by Prime Minister to stabilize the political situation of the state. Currently, Indonesia is adopting the presidential system of government where the head of state and the head of government is on the hand of the President. However, there are also some countries which apply the concept of presidential system but also having prime minister, which means that the country some kind of mix system between presidential and parliamentary. Take South Korea for instance, South Korea, also known as Republic of Korea, is a state with the system of presidential and parliamentary system. President of South Korea is elected by

⁷ Ramadhan Dwi Saputra, Kania Venisa Rachim, and Vicko Taniady, "Empowering Voices: Building an Electronic Petition System for Strengthening Freedom of Speech in Indonesia", *Journal of Judicial Review*, Vol. 25, No. 1, (June, 2023), p. 72.

the majority vote from the people, but only has one term of governing. Interestingly, South Korea's President also appoints Prime Minister as the head of government to run the country.⁸ If the insult towards President is a criminal action, then it might be better to separate the function between President as the head of state, while having Prime Minister as the head of government so that people may be able to express full critics toward the Prime Minister.

Different with presidential system, in parliamentary system, the parliament is the one who nominates Prime Minister and may overthrow the Prime Minister whenever the Prime Minister is considered as incompetent as the head of government. In parliamentary system, based on its hierarchy, parliament has the power over executive so that the parliament is able to overthrow the Prime Minister. However, the executive is also able to ask the head of state to dissolve the parliament if the parliament is considered incompetent as well. Therefore, the check and balances in the parliamentary system is secured. In presidential system however, there is a tendency that the President may abuse its power since the President is the head of government as well as the head of state. Countries such as Indonesia, and Philippines using presidential system, the president has the big power over the state and might be able to excessively use the position to run the state.⁹

⁸ Dwi Putri Cahyawati, *et al*, "Comparative Presidential's Role, System and Constitutional Practice between Indonesia and South Korea", *Jurnal Dinamika Hukum*, Vol. 23, No. 1, (January, 2023), p. 143 – 146.

⁹ Putu Gede Arya Sumerta Yasa, "The Form of the Presidential System in Indonesia: A Comparative Study of Several Countries", *Jurnal Magister Hukum Udayana*, Vol. 10, No. 2, (July, 2021), p. 281 – 283.

Another example of presidential system-based state is Turkey. Since 2018, Turkey has changed its political system from parliamentary system to presidential system under the leadership of Recep Tayyip Erdoğan. The shift in political system of government has been criticized for raising the possibility of authoritarian regime within government. One of the reasons for this statement is due to the expanded involvement of government in state's economy which makes the government has more control over the state.¹⁰

The question arises of whether this policy of criminalizing people who insult President is constitutional or not. The undergraduate thesis is mainly aimed to find the answer to the phenomenon that arises in Indonesia's current political situation.

In addition, it is important to be remembered that law is perceived as a set of regulations or standards, and its execution in practice is regarded as the embodiment of these regulations. In essence, law is akin to any external factors that impact its implementation, which is governed by its rules. Undoubtedly, both the practical application of the law (law in action) and the legal provisions outlined in legislation (law in book), which represent the ideal standard to be attained as the ultimate goal of the desired law are definite. The objective of law is to attain justice.¹¹

¹⁰ Ümit Akçay, "Authoritarian Consolidation Dynamics in Turkey", *Contemporary Politics*, Vol. 27, No. 1, (November, 2020), p. 3.

¹¹ Serlika Aprita, and Rio Adhitya, 2020, *Filsafat Hukum*, Depok, Rajawali Pers, p. 372.

B. Statement of Problem

The statement of problem for the research can be formulated as whether the Article 218, which criminalize individuals who attack the honor and dignity of the President in the new Criminal Code, poses a threat to freedom of expression?

C. Objectives of Research

Some main objectives of the research are as follows :

1. To understand the concept of attacking the President's honor and dignity in Criminal Code.
2. To analyze whether the Article 218 of the new Criminal Code is a threat to freedom of expression or not.

D. Benefits of Research

1. Theoretical Benefit

The theoretical benefit of the research is to provide an accurate analysis relating to the concept of how restriction of attacking President's honor and dignity might poses a threat to democracy in order to enrich the field of Constitutional Law. In this case, the analysis will make a more precise concept of freedom of expression in Indonesia that must be guaranteed.

2. Practical Benefit

Practically, the research provides a form of suggestion to the House of Representative and President to make a constitutional review of the Article 218 which criminalize people who might attack the honor and dignity of the head of state and government.