

# THE REBIRTH OF THE LONG-REPEALED ARTICLES ON INSULT AGAINST PRESIDENT IN INDONESIA’S NEW CRIMINAL CODE

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| Article                                                                                                                                                                                                                  | Abstract                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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| <p><b>Article History:</b><br/>Submitted: September 2024<br/>Reviewed: March 2025<br/>Accepted: April 2025<br/>Published: April 2025</p> <p><b>Keywords:</b><br/>Freedom of Speech;<br/>Constitution; Criminal Code.</p> | <p><i>The current Indonesian Criminal Code, rooted in the 1915 Dutch Colonial Criminal Code, includes provisions that penalize insults against the president and vice president. Historically, Articles 134, 136 bis, and 137 were utilized to suppress freedom of speech. In 2006, these articles were deemed unconstitutional by the Constitutional Court, signaling a commitment to democratic values. However, the recent reintroduction of similar provisions through Article 218, 219, and 220 of Law No. 1/2023 raises critical concerns about the erosion of democracy and potential violations of constitutional rights, particularly freedom of speech as protected by Article 28E of the Constitution. This study formulates the problem of how these legal changes impact Indonesia’s democratic principles and human rights. Employing a normative legal research methodology, it analyzes relevant laws, including Articles 218, 219, and 220 of the new Criminal Code, alongside previous articles. Furthermore, a comparative study is conducted by examining similar regulations in Turkey and the United States to evaluate different legal frameworks in handling freedom of speech. The findings indicate that reintroducing these provisions, despite the court’s ruling, reflects authoritarian tendencies detrimental to Indonesia’s democratic progress. This research highlights the urgent need for vigilance in protecting democratic norms and human rights in the face of legislative shifts that threaten dissent, criticism, and offers comparative insights that may guide future legal reform.</i></p> |

## A. Introduction

The Criminal Code that is still applicable today in Indonesia is a 109-year-old criminal code compiled by the Dutch Colonial Government which was passed in 1915 through *Staatblad* 732 and enacted in 1918. The original *Wetboek van Strafrecht voor Nederland Indie* (WvSNI) was then enacted as a national law in 1946 through Law 1/1946 on Criminal Law, which now widely known as The Criminal Code.<sup>1</sup> One of the laws that was adopted from the Dutch Criminal Code is Article 134, 136 bis, and 137 of the Indonesian Criminal Code. Most people refer to these articles as the Articles on Insults Against the President.

<sup>1</sup> Anugerah Rizki Akbari, Nella Sumika Putri, and Widati Wulandari, *Terjemahan Beberapa Bagian Risalah Pembahasan Wetboek van Strafrecht dan Wetboek van Strafrecht voor Nederlandsch Indië (KUHP Belanda dan KUHP Indonesia)*, (Jakarta Selatan: Institute for Criminal Justice Reform (ICJR), 2021), 11.

For almost six decades, these articles have been applicable to all people as the *ius constitutum*, which is often used as a tool for suppressing freedom of speech. Concerns that the provisions on insults against the president and vice president in the Indonesian Criminal Code jeopardized freedom of speech in Indonesia have prompted the judicial review of these provisions. Articles 134, 136 *bis*, and 137 of the Indonesian Criminal Code were interpreted as methods for suppressing criticism of the president and vice president's administration.

Several notable examples show how these articles were utilized to prosecute individuals who criticized the government. In 2005, a student named Monang Johanes Tambunan, who was the presidium of the Indonesian National Student Movement (GMNI), was convicted of protesting and was imprisoned for criticizing the 100 days of President Susilo Bambang Yudhoyono's administration. He was prosecuted under Article 134 in conjunction with Article 136 *bis* of the Indonesian Criminal Code. In 2006, a student at UIN Syarif Hidayatullah, also known as Fahrul Rohman, was sentenced for making an insulting speech to President Susilo Bambang Yudhoyono. Both were sentenced to 6 months in prison.<sup>2</sup> These cases demonstrate how the Indonesian Criminal Code's provisions were utilized to punish persons who criticize the president or vice president. The charge of insulting the president was interpreted as a threat to freedom of speech and violated the constitutional rights given by Article 28E of the 1945 Constitution, which guarantees the right to knowledge and freedom of speech.

In 2006, two individuals, E.S. and P.L., filed judicial reviews regarding the constitutionality of Articles 134, 136 *bis*, and 137 of the Indonesian Criminal Code, claiming these provisions violated their rights to information and freedom of speech. E.S. was involved in a case for insulting the president, while P.L., an activist, faced prosecution for criticizing government officials. The Constitutional Court reviewed these articles and, in Ruling No. 013-022/PUU-IV/2006, declared that they were unconstitutional and no longer had legal force.<sup>3</sup>

After the Articles were annulled, the National Legislation Program (*Prolegnas*) discussed the legislative Draft of the New Criminal Code in 2020-2024. Although the New Indonesian Criminal Code does not have material content about insulting the president, the Article was reformulated into a norm of "attacking the dignity of the president and vice president" formulated in Article 218, Article 219, and Article 220 of the Criminal Code.

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<sup>2</sup> LBH Jakarta, "Pembelaan Terhadap Aktivis Mahasiswa Dibungkam dengan Pasal Penghinaan Presiden", <https://bantuanhukum.or.id/pembelaan-terhadap-aktivis-mahasiswa-dibungkam-dengan-pasal-penghinaan-presiden/>, accessed 1 September 2024.

<sup>3</sup> Constitutional Court Indonesia, "Decision No 013-022/PUU-IV/2006" (2006).

The Articles on Insult Against the President was finally passed on January 2, 2023, and is listed in Article 218, paragraph 1 of Act number 1 of 2023 concerning the Criminal Code, which reads:<sup>4</sup>

Every person who publicly attacks the honor or dignity of the President and/or Vice President, shall be punished with imprisonment of up to 3 (three) years or a maximum fine of category IV.

Some essential issues raised by this article include freedom of speech, overcriminalization, and the constitutional function of the Constitutional Court as a negative legislator. Freedom of speech in Indonesia has already been constitutionalized in Article 28E paragraph (3) of the 1945 Constitution, which states: "Everyone has the right to organize, assemble, and express opinions". This became the basis of every law and regulation that intersect with freedom of speech. The Articles on Insult Against President could also potentially limits all forms of critics which could led to a halt in democracy. There is a possibility that the Articles on Insult Against President could bring back the old *Orde Baru* (New Order) feudalism where the leaders are untouchable from critics, and people are scared to speak because of the possibility of being incriminated. This could set the democracy back to before the 1998 Reformation.<sup>5</sup>

Another important aspect of human rights implementation in Indonesia, is the principle of equality before the law, as stipulated on Article 27 of the Constitution, which stresses that all citizens shall be equal before the law and the government shall be required to respect it, with no exceptions. We argue that the existence of a specific provision regarding insults against the President and/or of the state ultimately means a clear violation towards the principle of equality before the law, this principle dictates that laws should apply equally to all citizens: simply put, no one is above the law. This principle, which is also one interpretation of the ambiguous term "rule of law," is widely accepted as a central tenet of a fair and just legal system and is a cornerstone of many contemporary constitutions.<sup>6</sup> Violating this notion also inevitably violates the amended Article 28D section (1) of the Constitution. This begs a very important question: how is the new Articles on Insult Against President's position in the eyes of the constitution, and what is the role of the Constitutional Court in addressing this issue of overcriminalization and freedom of speech?

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<sup>4</sup> Central Government Indonesia, "Law No. 1 of 2023 concerning Criminal Code" (2023).

<sup>5</sup> Trie Rahmi Gettari, Wira Okta Viana, and Meydianto Mene, "Hak Asasi Manusia dan Kebebasan Berekspresi di Indonesia", *Ensiklopedia of Journal* 5, no. 2 (2023): 228-232, <https://doi.org/10.33559/eoj.v5i2.1590>.

<sup>6</sup> Daron Acemoglu and Alexander Wolitzky, "A Theory of Equality Before the Law," *Economic Journal* 131, no. 636 (2021): 1429-1465, <https://doi.org/10.1093/ej/ueaa116>.

This issue becomes more relevant when we consider how other countries regulate similar matters. For instance, Turkey also criminalizes insults against the president under Article 299 of its Penal Code, which has drawn criticism for restricting freedom of speech. Meanwhile, the United States strongly protects freedom of expression under the First Amendment, where criticism of public officials, including the President, is not criminalized. These comparisons highlight the differing approaches in balancing respect for public officials and the right to free expression, and provide important context for evaluating Indonesia's own regulations.

## **B. Method**

This research uses normative legal research on principles, norms, rules from laws and regulations, court decisions, agreements and doctrine.<sup>7</sup> Article 218, 219, and 220 paragraph 1 of Act number 1 of 2023 concerning the Criminal Code, is the main material analyzed in discussing the issues raised by the author. The dissection of Articles 134, 136 *bis*, and 137 of The Indonesian Criminal Code also Article 218, 219, and 220 paragraph 1 of Law No. 1 of 2023 concerning the Criminal Code, is accompanied by other legal materials, such as related research results, books on International Law, and legal journals related to the issues raised by the author. The legal materials that have been collected and inventoried will then be processed and analyzed in depth so as to obtain the ratio legis of the legal problem under study.

In addition to normative legal analysis, this research also adopts a comparative law approach is undoubtedly a method of comparing legal systems, and such comparison produces results relating to the legal systems being analysed,<sup>8</sup> by examining regulations concerning freedom of speech in Turkey and the United States. The selection of Turkey serves to provide a relevant comparison due to the existence of a similar “insulting the president” provision (Article 299 of the Turkish Penal Code), which has been widely criticized for curtailing dissent. The United States, by contrast, is chosen as a benchmark for liberal democracy, where freedom of speech is protected under the First Amendment and strongly reinforced by judicial precedent. The comparative analysis aims to assess not only the legal framework but also the enforcement, limitations, and broader political context in which these laws operate, in order to derive lessons and best practices for improving Indonesia's legal protection of free expression.

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<sup>7</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Group, 2005), 45.

<sup>8</sup> Dean Deane, “Comparative Law”, <https://libguides.uclawsf.edu/ComparativeLaw#s-lg-box-32186257>, accessed 1 September 2024.

## C. Analysis and Discussion

### 1. Analysis of Article 218, Article 219, and Article 220 in the New Criminal Code

**Table 1.**

#### **Comparison Between Articles on Insult Againsts President in the Old Criminal Code and the New Criminal Code**

| <b>Articles on Insult Against President in the Old Indonesian Criminal Code<br/>(<i>Ius Constitutum</i>)</b>                   | <b>Articles on Insult Against President in the New Indonesian Criminal Code<br/>(<i>Ius Constituendum</i>)</b>                   |
|--------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------|
| <b>The Insult Against President Laws was regulated in Articles 134, 136 <i>bis</i>, and 137.</b>                               | Regulated in Articles 218, 219, and 220.                                                                                         |
| <b>Referring to the perpetrator as “Whoever” as one of its elements.</b>                                                       | Referring to the perpetrator as “Every Person.”                                                                                  |
| <b>The intention is specified using the term “intentionally” as one of its elements.</b>                                       | The intention is not formulated.                                                                                                 |
| <b>The victim, previously was called “Authority or Institution State/Government”</b>                                           | Becomes “Legitimate Government.”                                                                                                 |
| <b>The maximum imprisonment was 6 years.</b>                                                                                   | The maximum imprisonment is now 3 years 6 months.                                                                                |
| <b>The act is still considered an offense, even if it was carried out in the public interest or as a form of self-defense.</b> | The act contains an element that, if done in the public interest or as a form of self-defense, may be not considered an offense. |
| <b>It was originally considered as “a general offense”</b>                                                                     | Becomes “a complaint offense”                                                                                                    |

#### **Source: Author Self Analysis**

From a historical standpoint, Indonesia's constitution has always been established by the concept of Indonesia's state of law. Aligned with the development with the aspect of substantial and material law to one of which is an analysis towards applicable national law devices, for example, the currently applicable criminal code in Indonesia, which, until now, is still a relic of the Dutch colonial legal system. The current Indonesian Criminal Code is ahistorical as it does not represent the constant development of Indonesian society. The existence of this colonial criminal code, whether deliberately or not, has generated political

and sociological issues, as it rarely relevant to the conditions and dynamics of modern Indonesian society.<sup>9</sup> A comprehensive reform of the current positive criminal law is necessary to create a legal system that is more relevant and aligned with the contemporary needs of Indonesian society.

The law of defamation against the President and Vice President has its roots in a time when the government was considered paramount and any criticism was seen as a potential threat to national stability, a legacy of the colonial era when the Dutch imposed their values on the Indonesian people and viewed their monarch as a symbol of the nation, with criticism being seen as intolerable and potentially leading to turmoil.<sup>10</sup> According to the academic Draft Criminal Code, The Drafters of the Criminal Code defended the reintroduction of the provision on “insulting the President” for several reasons grounded in Indonesia’s social and legal values:

- a. Cultural and Social Values: The provisions in Chapter II of the current Penal Code are still considered relevant because they align with the Indonesian spirit of familial values. When the Head of State is attacked or insulted, society at large finds such actions unacceptable. Insults toward the President are seen as offenses that violate this collective sentiment.
- b. The President as a Symbol of the State: The President and Vice President are viewed as personifications of the state itself. While other countries, especially Western nations, may have different societal views, Indonesian society continues to uphold strong respect for its President and Vice President.
- c. Protection of Human Dignity: The legal interest (*rechtsbelangen/rechtsgood*) intended to be protected by the offense of insulting the President is human dignity, a universal value upheld across various cultures and legal systems.
- d. Moral and Legal Grounds: Insults are inherently reprehensible acts, from the perspectives of morality, religion, societal norms, and human rights. These acts degrade human dignity and are thus considered intrinsically wrong (*mala per se*), warranting criminalization across many countries.

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<sup>9</sup> Muhammad Alwan Fillah, “Politik Hukum Dalam Pembaruan Kitab Undang-Undang Hukum Pidana (KUHP) di Indonesia,” *Varia Hukum: Jurnal Forum Studi Hukum dan Kemasyarakatan* 5, no. 1 (2023): 52-64, <https://doi.org/10.15575/vh.v5i1>. See also, Mutia Sari et al., “Urgensi Pembaharuan Hukum Pidana di Indonesia,” *Jurnal IKAMAKUM* 3, no. 1 (2023): 347-354, <https://openjournal.unpam.ac.id/index.php/IKAMAKUM/article/view/36382/16858>.

<sup>10</sup> Lidya Suryani Widayati, “Tindak Pidana Penghinaan Terhadap Presiden atau Wakil Presiden: Perlukah Diatur Kembali Dalam KUHP? Defamation Against The President Or Vice President: Should It Be Regulated In The Criminal Code?,” *Negara Hukum* 8, no. 2 (2017): 215-34, <https://doi.org/10.22212/jnh.v8i2.1067>.

- e. Legal Policy and Social Context: The scope of what constitutes criminal insult can differ between societies, as it is closely tied to each country's socio-philosophical, socio-political, and socio-cultural values. Thus, criminal policy in this area is deeply contextual.
- f. Consistency and Logic in Legal Framework: It would seem inconsistent to criminalize insults toward ordinary people, the deceased, national symbols (such as the flag or anthem), public officials, and foreign heads of state—but not toward the President. Given the President's distinct status and function, treating insults against them as crimes is considered logical and consistent with broader legal norms.
- g. Legal Distinctions Based on Status: Since the President's role is different from that of ordinary citizens (from sociological, legal, and constitutional perspectives), the principle of "equality before the law" does not automatically negate the legitimacy of special legal protection. The law often distinguishes types of offenses based on the status or role of individuals (as seen in differentiated offenses for various forms of insult, murder, or assault).

In preparation for the discussion of a comprehensive reform of the current applicable criminal law, known as the Indonesian Criminal Code, several key considerations need to be taken into account in the effort to codify a new positive law, one of which is freedom of speech, as outlined in Article 28F of the amended 1945 Constitution. Reforming the current applicable criminal law in Indonesia is indeed a measure aimed at making the legal<sup>11</sup> system more relevant with the country's dynamics society and a step towards decolonization. However, the spirit of decolonization is compromised by authoritarian tendencies, particularly in the form of anti-criticism towards the President and Vice President.

The New Indonesian Criminal Code has been introduced as a response to this challenge. The discussions surrounding the reform of Indonesia's criminal code date back over 60 years, with initial drafts appearing as early as 1968. After numerous revisions and public debates, the new Criminal Code was approved by the People's Representative Council (DPR) on December 6, 2022, and officially enacted as Law No. 1 of 2023 on January 2, 2023. This new code aims to replace the colonial-era regulations with provisions that better reflect Indonesia's current socio-cultural landscape.

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<sup>11</sup> Badan Pembinaan Nasional, "Draft Naskah Akademik Rancangan Undang-Undang Tentang Kitab Undang-Undang Hukum Pidanan (KUHP)", [https://bphn.go.id/data/documents/naskah\\_akademik\\_tentang\\_kuhp\\_dengan\\_lampiran.pdf](https://bphn.go.id/data/documents/naskah_akademik_tentang_kuhp_dengan_lampiran.pdf), accessed 1 September 2024.

The New Indonesian Criminal Code, particularly Article 218, 219 and 220, blatantly contradicts the 1945 Constitution, which serves as the supreme and foundation for all laws in Indonesia. This contradiction arises because Article 218, Article 219, and Article 220 do not align with the principles of justice and human rights upheld in the 1945 Constitution, as it contains provisions that can be used as a tool for suppressing criticism against the President and Vice President inadvertently jeopardizing one of the most pivotal democratic practices and the basic human rights for a freedom of speech.<sup>12</sup> According to one of the most prominent legal principles, *lex superiori derogat legi lex inferiori* (the superior law derogates the inferior law), a new law cannot violate a law that is superior to it, which, in this case, is the 1945 Constitution.<sup>13</sup>

Prior to the New Indonesian Criminal Code Article 218, 219, and 220 the Constitutional Court (MK) had annulled similar provisions in the currently applicable Criminal Code governing insults against the President and Vice President. The annulled provisions were Articles 134, 136 *bis*, and 137 of The Indonesian Criminal Code. Reintroducing these provisions in the new Draft Indonesian Code, despite them being previously deemed unconstitutional and having no legal binding force, is a clear violation of *lex superior derogat lex inferiori*, as they were proven to violate the 1945 Constitution.

The inclusion of customary law and the principle of material legality in the new Criminal Code is intended to reflect the values and practices of Indonesian society, thereby aligning with the decolonization goals. However, we argue that the implementation of these principles is often hampered by the authoritarian nature of the state, which can lead to a suppression of human rights and community voices.<sup>14</sup> To address these challenges, it is essential to ensure that the legal reform process is inclusive, transparent, and respects the plural and dynamic nature of local customary law. This involves not only updating the legal system but also encouraging inter-agency cooperation and community engagement to ensure that the reforms align with the interests and values of the Indonesian people.

Following the Constitutional Court's (MK) ruling No. 013-022/PUU-IV/2006, which annulled several articles in the Indonesian Criminal Code related to insults against the president and vice president, cases of insults towards the president remain a relevant issue in

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<sup>12</sup> Human Rights Watch, "Indonesia: New Criminal Code Disastrous for Rights," <https://www.hrw.org/news/2022/12/08/indonesia-new-criminal-code-disastrous-rights>, accessed 1 September 2024.

<sup>13</sup> Mutia Sari *et al.*, *Loc.Cit.*

<sup>14</sup> Pusat Data dan Analisa Tempo, *RUU KUHP 2019 Dan Dampaknya Bagi Kehidupan Sosial Warga Negara* (Jakarta: TEMPO Publishing, 2020), 25.

Indonesia. One of the examples is the case of Ruslan Buton, a former member of the Indonesian Army (TNI AD), who in May 2020 made a voice recording containing severe criticism of President Joko Widodo. In the recording, Ruslan demanded that the president resign from office, citing policies that were not pro-people, particularly amid the COVID-19 pandemic. Ruslan's remarks were deemed provocative and insulting to the state, drawing the attention of law enforcement. After the recording went viral on social media, Ruslan was arrested by the National Police's Criminal Investigation Department (*Bareskrim*) on May 28, 2020. He was charged with violating Article 14 paragraphs (1) and (2) and Article 15 of Law No. 1 of 1946 on Criminal Law Regulations, related to the spread of false news and insults. Additionally, Ruslan was charged under Article 28 paragraph (2) of the Electronic Information and Transactions (ITE) Law, which regulates electronic information that is deemed harmful to others.

This case sparked controversy about the scope of freedom of speech and the application of the law. While Ruslan's acts could be interpreted as criticism of the government, the implementation of the law in this case shows that the provisions on insults against the president and vice president in the Indonesian Criminal Code are still in effect, despite the Constitutional Court's decision to annulled some of the prior provisions. In 2006, the Constitutional Court ruled that Articles 134, 136 *bis*, and 137 of the Criminal Code were unconstitutional and lacked binding legal force because they created legal uncertainty and were prone to abuse. Despite the fact that the verdict is definitive, its usefulness has been called into question, as articles disparaging the president and vice president continue to appear in the Draft Criminal Code. In the Draft Criminal Code, Articles 218, 219, and 220 regulate offenses against the honor or dignity of the president and vice president. Article 218 states that anyone who attacks the honor of the president and vice president can be sentenced to a maximum of 3,6 years in prison or fined up to IDR 200 million. Through the Ministry of Law and Human Rights, the government reintroduced these articles into the Draft Criminal Code to be discussed by the House of Representatives (DPR) during the August 2015 recess.

The Ruslan Buton case demonstrates how the articles on insulting the president continue to be applied, even after efforts to limit their use as a tool to suppress criticism. This highlights the legal dynamics in Indonesia following the Constitutional Court's ruling and underscores the importance of legal reform to maintain a balance between freedom of speech and respect for state institutions. The challenge of preserving the constitutional and human

right for freedom of speech amid fair and transparent law enforcement remains a crucial issue that requires further attention.<sup>15</sup>

## 2. Freedom of Speech in Indonesia, Turkey, and United States of America (A Comparative Study)

Freedom of speech is the right to seek, receive and impart information and ideas of all kinds, by any means.<sup>16</sup> This freedom allows individuals to express their opinions, ideas and views without fear of pressure or persecution from other parties, including the government.<sup>17</sup> Regulations governing freedom of speech, are present at both the international and national levels, with particular relevance to Indonesia. Internationally, the 1948 Universal Declaration of Human Rights (UDHR), explicitly upholds freedom of speech as the right to express opinions and ideas freely.<sup>18</sup> Contained in Article 19 of the Universal Declaration of Human Rights, which reads;<sup>19</sup>

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Similarly, the 1966 International Covenant on Civil and Political Rights (ICCPR) recognizes the right to seek, receive and impart information and ideas, through oral, written, or printed means.<sup>20</sup> Article 19 (2) of the International Covenant on Civil and Political Rights states that:<sup>21</sup>

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

In Indonesia, regulations promoting freedom of speech are enshrined in the 1945 Constitution. According to Article 28F of the 1945 Constitution, freedom of speech is regarded as a fundamental right, allowing individuals to communicate and develop their

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<sup>15</sup> Athallah Zahran Ellandra, Muhammad Faqih, and Kemal Azizi, "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* 3, no. 1 (2022): 1-12, <https://doi.org/https://doi.org/10.61084/jsl.v3i01.20>.

<sup>16</sup> Amnesty International UK, "What Is Freedom of Speech?," Amnesty International UK, <https://www.amnesty.org.uk/free-speech-freedom-expression-human-right>, accessed 1 September 2024.

<sup>17</sup> Elva Imeldatur Rohmah, "Pasal Penghinaan Presiden Dalam Bingkai Negara Demokrasi," *Jurnal Ilmiah Galuh Justisi* 9, no. 1 (2023): 16, <https://doi.org/10.25157/justisi.v8i1.3160>.

<sup>18</sup> Sayuti, Ghina Nabilah Effendi, and Illy Yanti, "Freedom of Speech Without a Direction: Criticism of the Promotion of Freedom of Speech in Indonesia", *Al-Risalah: Forum Kajian Hukum dan Sosial Kemasyarakatan* 23, no. 1 (2023): 121-144, <https://doi.org/10.30631/alrisalah.v23i1.1389>.

<sup>19</sup> United Nations, "Universal Declaration of Human Rights" (1948).

<sup>20</sup> Sayuti, Ghina Nabilah Effendi, and Illy Yanti, *Loc.Cit.*

<sup>21</sup> United Nations Human Right, "International Covenant on Civil and Political Rights" (1996).

personalities and social environments.<sup>22</sup>

Everyone has the right to communicate and obtain information to develop their personal and social environment, and has the right to seek, obtain, possess, store, process, and convey information using all available channels.

Act Number 39 of 1999 concerning Human Rights reinforces this protection in Article 14 paragraph (1):<sup>23</sup>

Everyone has the right to communicate and obtain the information necessary to develop their personal and social environment.

In Indonesia too, even though freedom of speech is stated in both the 1945 Constitution and Act Number 39 of 1999, there is no dedicated law that specifically regulates this right. Thus, there are still efforts to limit freedom of expression, which is a basic right that should be given to all people in a democratic country, especially a country based on popular sovereignty. For example, there is an article on insulting the president, which also exists in Turkey. In Turkey, the law governing insulting the President is Article 299 of the Turkish Penal Code. This article states that anyone who publicly insults the President can be punished with a prison sentence from 1 to 4 years. In 2016, Article 299 was amended after the attempted coup in Turkey, and the maximum sentence was changed from 4 years to 5 years in prison. In addition, other articles in Turkey's penal code have also been used to punish people deemed to have insulted the President, such as Article 125 on insulting public officials. However, the use of Article 299 has been controversial in Turkey, with some considering that it is used to suppress freedom of expression and violates human rights. The Turkish government under President Recep Tayyip Erdogan has been criticized by several human rights organizations for using Article 299 and other articles to restrict freedom of speech and expression.<sup>24</sup> This situation reflects a key weakness in Turkey's legal structure: while constitutional protection exists on paper, in practice the law is often used selectively and politically.

In contrast, the United States, is a country where freedom of speech is a fundamental right protected by the First Amendment of the U.S. Constitution, which prohibits the government from restricting free expression.<sup>25</sup>

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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<sup>22</sup> Central Indonesia Government, "1945 Constitution" (1945).

<sup>23</sup> Central Indonesia Government, "Law No 39 of 1999 Regarding Human Rights" (1999).

<sup>24</sup> Elva Imeldatur Rohmah, *Loc.Cit.*

<sup>25</sup> United States Government, "The Bill of Rights" (1789).

In the American context too, the right to freedom of expression and opinion is enriched or expanded by (through) judicial decisions. This principle was reinforced through various important court decisions, including the landmark case of *New York Times Co. v. Sullivan* in 1964. *New York Times Co. v. Sullivan* is a landmark U.S. Supreme Court decision holding that First Amendment freedom of speech protections limit the ability of public officials to sue for defamation. The case emerged out of a dispute over a full-page advertisement run by supporters of Dr. Martin Luther King, Jr., in *The New York Times* in 1960. The advertisement described civil rights protests in Montgomery, Alabama, lauded Dr. King's leadership, and criticized various Southern officials for violating the rights of African Americans. The advertisement contained several factual inaccuracies which became the basis for a suit for defamation by a Montgomery police commissioner. After a jury trial that found in favor of the plaintiff and a denial for the defendants' motion for a new trial, the Supreme Court of Alabama sustained the holding on appeal, stating that "the First Amendment of the U.S. Constitution does not protect libelous publications".

However, although freedom of speech is highly protected in the United States, there are some exceptions where restrictions may apply. Steven L. Emanuel in his book *Constitutional Law* determines that the right to freedom of expression is protected by distinguishing between content-based category and neutral based category. Content based category is distinguished between protected and unprotected. The right to freedom of expression that is not protected includes, among others, slander, defamation, unpleasant acts, advocating unlawful acts, and so-called fighting words. Expression beyond that which is not protected is classified as protected. Government action to restrict protected content-based will be considered unconstitutional, unless the government can show that the restriction is necessary as a compelling governmental objective and as an unavoidable necessity. Regarding the neutral based category, restrictions on freedom of expression, among others, must be able to demonstrate a significant governmental interest.<sup>26</sup>

At its core, the main difference between Indonesia, Turkey, and the United States in terms of free speech lies in the application and enforcement of the law. In both Indonesia and Turkey, freedom of expression is vulnerable to vague legal language and government interference. While both countries acknowledge this right in their constitutions, laws such as Indonesia's defamation provisions and Turkey's Article 299 show how speech can still

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<sup>26</sup> Muhammad Roqib, *et.al.*, "Hak Atas Kebebasan Berekspresi Dan Berpendapat di Indonesia Dengan di Amerika Serikat", *Perspektif Hukum* 20, no 1 (2020): 41–53, <https://doi.org/10.30649/ph.v20i1.76>.

be criminalized under loosely defined standards. Meanwhile, the U.S. system benefits from clearer judicial interpretation, an independent court system, and a deep-rooted culture of protecting dissent even when controversial.

These differences are rooted in several structural and historical factors. In Indonesia, the lingering influence of authoritarian rule during the New Order still shapes the legal culture, leaving behind vague that lead to confusion.<sup>27</sup> Often repressive laws, judicial independence remains inconsistent, and many of the legal reforms from the post-*Reformasi* (Reformation) era remain incomplete. In Turkey, a growing concentration of political power has weakened democratic institutions and judicial impartiality, allowing laws like Article 299 to be used as tools of repression.<sup>28</sup> In contrast, the United States has a long-standing tradition of constitutionalism, independent judiciary, and civil liberties advocacy, all of which help ensure that free speech is not only guaranteed, but actively protected.<sup>29</sup>

Nevertheless, all three countries face modern challenges such as combating hate speech, misinformation, and determining the appropriate regulation of digital platforms and tech companies. These evolving issues demand that each nation continues to adapt its legal framework in a way that balances individual rights with social responsibility. So when comparing Indonesia with Turkey and the United States, we begin to see not only the challenges that come with safeguarding this right, but also valuable lessons that Indonesia can adopt to strengthen its own legal framework. These include enhancing judicial independence, narrowing vague legal provisions prone to abuse, and fostering a culture of constitutionalism and rights-based governance. By adopting best practices from other democracies while accounting for local context, Indonesia can move toward a more coherent and democratic protection of free expression.

### **3. Overcriminalization and Freedom of Speech in Indonesia: Constitutional Challenges and the Role of the Court**

One of the fundamental pillars of a democratic state is freedom of expression, a right that enables individuals to convey opinions, ideas, and criticisms without fear of retribution.

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<sup>27</sup> Tim Lindsey, “20 Years after Soeharto: Is Indonesia’s ‘Era Reformasi’ Over?”, <https://pursuit.unimelb.edu.au/articles/20-years-after-soeharto-is-indonesia-s-era-reformasi-over>, accessed 1 September 2024.

<sup>28</sup> Defne Över and Irem Tuncer-Ebetürk, “Insult, Charisma, and Legitimacy: Turkey’s Transition to Personalist Rule”, *Sage Journals Sosial & Legal Studies* 31, no. 5 (2022): 773-795, <https://doi.org/10.1177/09646639211073652>.

<sup>29</sup> NCAC Staff, “The First Amendment in Schools”, <https://ncac.org/resource/first-amendment-in-schools>, accessed 1 September 2024.

This freedom is essential not only for individual liberty but also for holding governments accountable and fostering transparency.<sup>30</sup> In Indonesia, this principle is enshrined in Article 28E of the 1945 Constitution, which guarantees every person the freedom to express their thoughts in accordance with their conscience. However, recent developments in Indonesian law have raised concerns about the state's commitment to upholding this right, particularly with the introduction of Articles 218, 219, and 220 of the new Criminal Code.<sup>31</sup> The tension between safeguarding freedom of expression and the increasing reach of criminal law is not unique to Indonesia but reflects a broader global concern highlighted by legal theorist Douglas Husak. In his critique of modern legal systems, Husak argues that many contemporary societies suffer from "overcriminalization"—the excessive creation and enforcement of criminal laws that unnecessarily penalize behavior, often infringing upon individual rights.

Applying this lens to Indonesia's new Criminal Code, particularly Articles 218, 219, and 220, which criminalize insults against the President, Vice President, and state institutions, raises significant concerns. These provisions may not only suppress legitimate dissent but also reflect what Husak deems a misuse of criminal law to control speech rather than protect the public from genuine harm. By criminalizing expressions of criticism, the state risks undermining the democratic values enshrined in Article 28E of the 1945 Constitution and fostering a culture of fear that stifles civic engagement and transparency.<sup>32</sup>

These articles reintroduce the criminal offense of insulting the President and Vice President, a provision that had previously been struck down by the Constitutional Court as unconstitutional under Articles 134, 136 *bis*, and 137 of the old Criminal Code. The Court's decision in that case was rooted in the principle that such provisions violated freedom of expression and were incompatible with a democratic society governed by the rule of law. In its role as a negative legislator, as described by Hans Kelsen, the Constitutional Court does not create new law but has the authority to annul laws that contradict the Constitution—thus acting as a safeguard against the abuse of power.<sup>33</sup> The reintroduction of these articles into the new Criminal Code has reignited debates about the extent to which the government is committed to the principles of checks and balances and the separation of powers as proposed

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<sup>30</sup> Mansi Singh, "Freedom Of Expression And Online Speech", *International Journal Of Novel Research And Development (IjnRD)* 8, no. 7 (2023): 668-680, <https://ijnrd.org/viewpaperforall.php?paper=IJNRD2307083>.

<sup>31</sup> Central Government Indonesia, "Law No. 1 of 2023 concerning Criminal Code" (2023).

<sup>32</sup> Douglas Husak, *Overcriminalization the Limits of the Criminal Law* (New York: Oxford University Press, 2008), 85.

<sup>33</sup> Hans Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), 107.

by Montesquieu's *Trias Politica*. While the House of Representatives and the President hold legislative power as positive legislators, they are expected to respect the Constitutional Court's decisions in accordance with the rule of law. However, in this instance, their legislative action appears to directly contradict a prior Constitutional Court ruling, which deemed such criminal provisions on presidential insult to be unconstitutional.<sup>34</sup>

Judicial Review processes is essential for the good governance, Congress have the ability to create laws while Constitutional Court have the ability to repeal laws that are deemed unconstitutional through the judicial review process. Article 20 paragraph (1) of the 1945 Constitution of the Republic of Indonesia authorizes the House of Representatives to expressly carry out its legislative function. Based on this provision, the House of Representatives has legislative power over the President. This explains that the House of Representatives plays a very important role in the law-making process in Indonesia. The House of Representatives, as the people's representative directly elected by the people, is tasked with representing the people's voice in the law-making process. With this authority, the House of Representatives can initiate, design, discuss, and enact laws to become the foundation of state administration and community life. Meanwhile for the Constitutional Court, as regulated in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia and Article 10 of the Constitutional Court Law, the Constitutional Court (MK) has the authority to examine laws against the 1945 Constitution (judicial review). In principle, judicial review can only be carried out properly in a country that adheres to the rule of law rather than the supremacy of parliament. In a country that adheres to a parliamentary supremacy system, the resulting legal products cannot be challenged because parliament is a form of representation of popular sovereignty. This is in line with the teachings of Montesquieu's *Trias Politica*, which says that state power does not need to be concentrated in one hand or institution so that it is not centralized.<sup>35</sup>

This ongoing tension between the authority of the legislature and the Constitutional Court underscores a critical weakness in Indonesia's legal and political structure—the lack of enforcement mechanisms for judicial decisions, particularly those related to constitutional rights. While the Constitutional Court's decisions are formally final and binding, they often

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<sup>34</sup> Dian Adriawan DG Tawang and Rini Purwaningsih, "Criminal Legal Policy on Insults Against The President And Vice President Post Constitutional Court Ruling Number 7/Puu-Xxi/2023", *Pena Justisia: Media Komunikasi dan Kajian Hukum* 22, no. 3 (2024): 1, <https://doi.org/10.31941/pj.v22i3.4859>.

<sup>35</sup> Christine S.T. Kansil and Calinka Princess Belinda Laapen, "Kewenangan DPR Dalam Menjalankan Fungsi Legislasi Berdasarkan Pasal 20 Ayat (1) UU Dasar Negara Republik Indonesia 1945," *Jurnal Pendidikan Sejarah dan Riset Sosial Humaniora* 4, no. 2 (2024): 63-68, <https://doi.org/10.31078/jk1526>.

lack practical enforceability. In several notable instances, the legislature has reintroduced legal provisions that mirror those already invalidated by the Court. This legislative defiance effectively undermines judicial review and weakens the rule of law, especially in matters involving politically sensitive rights such as freedom of speech.<sup>36</sup>

The new provisions criminalizing insults against the President and Vice President offer a prime example. Despite the Court's earlier ruling declaring similar articles unconstitutional, the revival of these norms in the new Criminal Code reveals a troubling pattern of non-compliance. In theory, the separation of powers—rooted in Montesquieu's concept of *trias politica*—should ensure that each branch respects the limits of its authority. In practice, however, when the legislature and executive override or disregard the Constitutional Court's interpretations, the very fabric of constitutional democracy is strained. This concern is compounded by empirical evidence presented by Chief Justice Anwar Usman in 2020, which revealed that only around 50 percent of the Constitutional Court's decisions between 2013 and 2018 had been fully implemented. Approximately one-third were completely ignored. Such figures reflect not only a governance issue but a constitutional crisis of compliance, where rights protections are inconsistently honored depending on political will.<sup>37</sup>

Within this broader context, Douglas Husak's theory of overcriminalization becomes increasingly relevant. According to Husak, modern legal systems often suffer from an excessive proliferation of criminal laws that penalize behavior not clearly harmful to society. When applied to Indonesia's new Criminal Code, particularly Articles 218 to 220, this critique helps explain how legal mechanisms intended to preserve public order may instead serve to restrict legitimate democratic dissent. Husak argues that the moral credibility of criminal law diminishes when it is used to protect political figures from criticism, rather than to prevent actual harm. This misuse can erode public trust in the legal system and discourage meaningful participation in civic life.<sup>38</sup>

By criminalizing expressions of criticism directed at public officials, the state risks fostering a chilling effect that suppresses not only speech but also the broader democratic discourse essential to accountability and reform. The overextension of criminal law into areas of political speech places Indonesia at odds with the democratic commitments enshrined in its own Constitution and international human rights frameworks. As such, the Constitutional

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<sup>36</sup> *Ibid.*

<sup>37</sup> Nanda Herlinanur *et al.*, "Peran Amandemen UUD 1945 dalam Memperkuat Sistem Check and Balance", *Research Review Jurnal Ilmiah Multidisiplin* 3, no. 1 (2024): 111-117, <https://doi.org/10.54923/researchreview.v3i1.79>.

<sup>38</sup> Douglas Husak, *Loc.Cit.*

Court's function as a negative legislator—as conceptualized by Hans Kelsen—must be supported by a legislative and executive willingness to uphold its rulings. Otherwise, the Court's decisions, no matter how principled or constitutionally grounded, risk becoming symbolic gestures rather than enforceable safeguards. The continued disregard of rulings on freedom of expression provisions suggests a broader reluctance by state actors to prioritize fundamental rights over political expediency.<sup>39</sup>

In moving forward, Indonesia must address these systemic issues not only by ensuring greater compliance with Constitutional Court decisions but also by revisiting the substantive content of laws that criminalize speech. Legal reforms should be guided by the principle of proportionality and a commitment to protecting political expression as a core democratic value. Only through such reforms can Indonesia fulfill the promise of Article 28E and ensure that freedom of expression is not merely a constitutional ideal, but a lived reality for all its citizens.<sup>40</sup>

#### D. Conclusion

The reintroduction of provisions resembling Articles 134, 136 *bis*, and 137, despite the Constitutional Court's ruling, represents a significant threat to democratic values and human rights in Indonesia. The new Articles on Insult Against the President, now codified in Article 218 of Act Number 1 of 2023, clearly limit freedom of speech, potentially undermining the checks and balances system essential for a functioning democracy. The Constitutional Court's decision in 2006, which declared the previous articles unconstitutional, is final and binding, and disregarding it reflects an authoritarian tendency by the government.

Reintroducing similar provisions that had been annulled by the highest judicial authority demonstrates a concerning disregard for constitutional principles, weakening public trust in the judiciary and democratic processes. It creates an environment where government leaders may become immune to criticism, reminiscent of the authoritarian practices of the *Orde Baru* (New Order) era. This move poses serious risks to human rights, particularly the right to free speech, which is constitutionally protected under Article 28E paragraph (3) of the 1945 Constitution. Such actions indicate an attempt to erode democracy and institutionalize mechanisms that suppress dissent, setting the country back to pre-reformation times.

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<sup>39</sup> Hans Kelsen, *Loc.Cit.*

<sup>40</sup> Trie Rahmi Gettari, Wira Okta Viana, and Meydianto Mene, *Loc.Cit.*

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