



THE PROBLEM OF AMBIGUITY IN THE INTERPRETATION OF THE CRIMINAL OFFENSE OF INSULTING A STATE INSTITUTION IN CASES OF POTENTIAL ABUSE OF AUTHORITY

Firman Tri Wahyuono

Faculty of Law, Widya Mataram University

e-mail: firmantriwahyu_no@gmail.com

Said Munawar

Faculty of Law, Widya Mataram University

e-mail: said.munawar15@gmail.com

Roni Sulistyanto Luhukay

Faculty of Law, Widya Mataram University

e-mail: roniluhukay22@gmail.com

Abstract

The ambiguity in the interpretation of criminal offenses involving defamation of state institutions has the potential to trigger abuse of power in a democratic state governed by the rule of law. Freedom of expression, as a constitutional right of citizens, is often pitted against criminal provisions that protect the honor of state institutions. Problems arise when the element of “insult” is formulated vaguely and is open to various interpretations, thereby granting law enforcement officials broad discretion. The method used is normative legal research employing legislative and conceptual approaches. The research findings indicate that democracy requires guarantees of freedom of expression as the foundation for public participation and mechanisms for oversight of power. In this context, the criminal offense of insulting state institutions becomes problematic when it is formulated ambiguously and fails to meet the principles of legality and lex certa. The vagueness of the element of “insult” grants broad discretion to law enforcement officials and has the potential to lead to selective law enforcement. Philosophically, state institutions, as public entities, cannot be equated with individuals in terms of the protection of moral dignity, as state institutions are established to perform public functions that must, by their very nature, be open to criticism. In the new Criminal Code, the criminal penalty for insulting state institutions straddles the line between the goal of protecting institutions and the potential for repression. The state does indeed have an interest in maintaining the authority and functions of its institutions, but disproportionate penalties risk overstepping the bounds of what constitutes an ultimum remedium. If applied broadly and flexibly, this provision could have a chilling effect, limit the space for criticism, and open the door to abuse of power.

Keywords: *Freedom of Expression; Contempt of State Institutions; Abuse of Power.*

INTRODUCTION

A democratic legal state places freedom of speech as one of the main foundations in the life of the nation and state. This freedom is not merely an individual right, but rather a collective instrument to ensure accountability of power. In the Indonesian Constitutional system, the right to express opinions is constitutionally guaranteed as part of human rights. The right allows citizens to supervise, criticize, as well as evaluate the performance of state institutions that perform government functions.



However, in practice, such freedoms are often faced with criminal provisions regarding the insult to state institutions. This provision is basically intended to protect the honor and authority of state institutions from attacks that are considered degrading in public. Theoretically, this goal can be understood as part of an effort to maintain stability and public order. However, the fundamental problem arises when the formulation of the norm regarding “insult “ is vague, abstract, and opens up a wide space for interpretation.

In criminal law, the principle of legality requires that any act that can be punished must be clearly and unequivocally formulated (*lex certa*). Indonesian criminal law experts, such as Moeljatno, emphasized that the formulation of the offense must be clear so that the public can know for sure what actions are prohibited and criminal threats. The vagueness of the norm not only violates the principle of legal certainty, but also opens up opportunities for arbitrariness in law enforcement.¹ If the element of” insult “ has no objective boundaries, then law enforcement officials have too broad discretion in determining whether a criticism is classified as a criminal offense.

The problem becomes even more complex when the subject under protection is a state institution. Conceptually, contempt in classical criminal law is basically aimed at protecting the honor of the individual as a human being who has dignity and dignity. Honor in this context has to do with the intrinsic value inherent in a person as a moral and legal subject. However, state institutions are not human. It is a legal and political construct formed to carry out public functions.

In the perspective of the theory of law and Human Rights, harkat and dignity (human dignity) is inherent in humans as personal beings. Immanuel Kant in his moral philosophy stated that man has dignity because he is an end in itself, not a tool. It was this concept of dignity that later became the basis for the protection of human rights in various international instruments.² State institutions as abstract entities do not possess such moral qualities. Therefore, putting state institutions on an equal footing with man in the context of the protection of Honor becomes philosophically problematic.

A similar opinion is expressed by many scholars of constitutional law and modern criminal law, who assert that public officials and state institutions should have a higher degree of tolerance for criticism than ordinary individuals. In a democratic society, power comes from the people³. State institutions are formed by and for the public good. Therefore, criticism of state institutions is not just legitimate, but an integral part of the checks and balances mechanism.

Indonesian Constitutional law experts, such as Jimly Asshiddiqie, often emphasize that constitutional democracy requires active public participation in overseeing power⁴. Criticism of the policies or actions of state institutions cannot necessarily be considered an attack on the honor of the state. On the contrary, criticism is a form of popular sovereignty guaranteed in a democratic system.

At the international level, human rights court rulings also show a similar trend. In matters concerning freedom of expression, the International Court of justice affirms that the limits of criticism of governments and public institutions must be wider than

1 Moeljatno, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Cipta, 2008), hlm. 25–27.

2 Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1998), hlm. 37–45.

3 Jimly Asshiddiqie, *Hukum Tata Negara dan Pilar-Pilar Demokrasi* (Jakarta: Sinar Grafika, 2011), hlm. 299–302.

4 Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia* (Jakarta: Konstitusi Press, 2005), hlm. 145–148.

those of private individuals. This is because the government consciously enters the public sphere and exercises powers that have a direct impact on society at large.

The vagueness of interpretation in the offense of contempt of state institutions has the potential to blur the fundamental difference between criticism and contempt. Criticism is an evaluative expression of the policies, actions, or performance of an institution⁵. Criticism can be sharp, harsh, even satirical, without losing its legal legitimacy. Meanwhile, humiliation in the classical sense contains elements of an attack on personal honor with the intention of degrading the dignity of the individual. When these two concepts are not clearly differentiated, the democratic space is threatened.

Furthermore, the use of multi-interpreted norms has the potential to create a chilling effect in society. Citizens may choose to limit their expression for fear of facing criminal threats. In the digital context, this risk is even greater because statements made on social media are easily disseminated and interpreted variously. Without clear guidelines, legitimate criticism can turn into an object of criminalization.⁶

Criminal law expert Andi Hamzah emphasized the importance of limiting the use of criminal law as an ultimum remedium, the last resort after other legal means are inadequate⁷. When any expression of criticism of state institutions is directly responded to by criminal instruments, then criminal law loses its nature as the last means of protection and turns into a repressive means of control.

In the context of power relations, vague provisions also open up opportunities for abuse of authority. The state has a much stronger apparatus and legal instruments than individuals. If the criminal norm provides a wide interpretation space, then the potential for selective enforcement of the law cannot be ignored. Criticism coming from opposition groups or civil society can be treated differently to expressions of support for the government.

In fact, in the principle of the rule of law (*rechtstaat*), any use of authority must be based on clear and non-discriminatory laws. When the law is used to silence criticism of state institutions, what happens is not the protection of the dignity of the institution, but the protection of power itself. This is contrary to the democratic principle that places power as something to be watched, not sacred.

The emphasis that state institutions are not human beings who have dignity and dignity becomes important in this discourse. The honor of state institutions does not come from intrinsic moral values as human beings, but from public legitimacy and good performance. The authority of state institutions should be built through integrity, professionalism, and accountability, not through criminal threats against critics.

Thus, criticism of state institutions should be understood as part of the constitutional rights of citizens. As long as the criticism does not contain incitement to violence, discrimination-based hate speech, or slander that harms specific individuals, then the expression should be in a space protected by law. To criminalize criticism is to deny the essence of democracy itself.

Therefore, the vagueness of interpretation in the offense of insulting state institutions needs to be studied comprehensively, both from the perspective of criminal law, constitutional law, and Human Rights. A more precise formulation is needed regarding

5 Koriahningsih, A. (2024). Problematika Politik Hukum Penerapan Kriminalisasi Dalam KUHP Baru: Tinjauan Terhadap Pasal Penghinaan Presiden dan Wakil Presiden. *Jurnal Hukum Legalita*, 6(2), 205–217.

6 Ritonga, Z., Syam, S. A., & Lubis, F. (2024). Kebijakan Kriminalisasi dan Dekriminalisasi KUHP Baru. *Innovative: Journal Of Social Science Research*, 4(4), 3957–3967

7 Andi Hamzah, *Asas-Asas Hukum Pidana di Indonesia dan Perkembangannya* (Jakarta: Softmedia, 2010), hlm. 51–53.

the elements of the offense so as not to cause legal uncertainty. Furthermore, it is necessary to emphasize normatively that state institutions as public entities cannot be treated as equal to human beings in the context of the protection of dignity and dignity.

Ultimately, the quality of a country's democracy can be measured by the degree to which it tolerates criticism of power. Criminal law should not be an instrument to close the space of public discourse. Rather, the law should guarantee that freedom of expression remains protected, while abuse of power can be prevented through effective surveillance mechanisms. By affirming that state institutions are not dignified subjects like human beings, the line between legitimate criticism and prohibited insults can be drawn more rationally and proportionally.

This study uses the method of normative legal research (doctrinal research), which is research that puts the law as a norm or rule that applies in the system of legislation. Philipus M. Hadjon explained that normative legal research focuses on the assessment of legal principles, legal Systematics, and the degree of synchronization of regulations, so that the analysis is directed to the written norms and underlying principles.⁸ In the study of criminal threats for insulting state institutions, this approach is relevant because the object of study lies in the formulation of legal norms and their compliance with the principles of a democratic legal state.

Peter Mahmud Marzuki asserts that normative legal research aims to provide a prescription of what should be (*das sollen*), not just describe social practices.⁹ Therefore, this study uses legal materials as the main source consisting of primary, secondary, and tertiary legal materials. Primary legal material includes legislation and court decisions relating to insulting offenses and guarantees of freedom of expression. Secondary legal materials take the form of scientific literature and expert opinions, while tertiary legal materials such as legal dictionaries are used to clarify technical terms. The approach used includes statute approach and conceptual approach.¹⁰ The legislative approach is carried out by examining the consistency of the norms of insulting state institutions with constitutional principles. While the conceptual approach is carried out by referring to legal doctrines and theories, especially related to the principles of legality, proportionality, and protection of human rights. According to Soerjono Soekanto, analysis in normative legal research is carried out qualitatively through a systematic and logical interpretation of the law.¹¹ Thus, the study uses methods of grammatical and systematic interpretation to assess the clarity of the norm, as well as teleological interpretation to understand the purpose of its formation. The results of the analysis are expected to provide a juridical argument about the relevance and proportionality of criminal threats in the context of democracy.

DISCUSSION AND RESEARCH RESULTS

1. Democracy in the shadow perspective offense contempt of state institutions.

Modern democracies converge on the principle of popular sovereignty and development through law. In the struggle for the rule of law, freedom of expression is a fundamental right that not only individuals have, but also structurally for the

8 Philipus M. Hadjon dan Tatiek Sri Djatmiati, *Argumentasi Hukum* (Yogyakarta: Gadjah Mada University Press, 2005), hlm. 3–5

9 Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2016), hlm. 35–38.

10 Peter Mahmud Marzuki,., hlm. 133–136.

11 Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif* (Jakarta: RajaGrafindo Persada, 2001), hlm. 14–16

construction of democracy. Robert A. Dahl argued that democracy requires effective partitioning and an enlightened understanding of The Citizen, which is only possible if his freedom meets the widely needed needs.¹² Without these freedoms, the mechanism of control over power will weaken and the government runs the risk of running without accountability.

In the context of criminal law, the existence of the offense of contempt of state institutions presents serious problems when formulated in a multi-interpreted manner. Theoretically, criminal law is aimed at protecting certain legal interests that are considered important for society. However, as emphasized by Jan Remmelink, the formulation of the offense must meet the principles of clarity and assertiveness so as not to open up opportunities for arbitrary interpretation.¹³ When the element of “contempt” for state institutions does not have clear boundaries regarding the form, intention, and consequences, there is legal uncertainty that can potentially harm the freedom of citizens.

The fundamental problem lies in the expansion of the concept of humiliation from the protection of the individual to the protection of state institutions. In the doctrine of classical criminal law, the offense of contempt is designed to protect the honor of the human person as a subject of law possessing dignity. Barda Nawawi Arief explained that criminal law must protect fundamental values of society, including personal honor, but such protection must be proportionate and not excessive.¹⁴ The institution of the state, as a public entity, does not have the dignity and dignity in a moral sense as a human being. He is a legal construction that performs the functions of power. Therefore, positioning the state institution as a subject whose honor is equal to human raises philosophical and juridical problems. In the theory of constitutionalism, Brian Z. Tamanaha asserted that the rule of law requires the limitation of power and the protection of basic rights of citizens.¹⁵ Criticism of state institutions is part of the mechanism of such restrictions. If criticism is criminalized on the basis of insults, then the state has the potential to place itself above the people, not as a public servant. Constitutional democracy requires a public space that is open to the evaluation and correction of government policies.

Furthermore, the principle of legality in criminal law demands a definite formulation (*nullum crimen sine lege certa*). Sudarto emphasized that criminal norms should not be formulated vaguely because they can cause uncertainty and injustice.¹⁶ When the term “insult” is not clearly delimited, law enforcement officials have a very wide area of discretion to determine whether a criticism is classified as a criminal offense. Excessive discretion opens up the possibility of selective enforcement of the law, especially in a political context.

In modern democratic practice, public officials and state institutions are actually required to have a higher tolerance for criticism than ordinary citizens. Ronald Dworkin argues that freedom of speech is a condition of political legitimacy; governments are only legitimate if they are willing to listen to and tolerate criticism from their citizens¹⁷ If the state uses criminal law to silence criticism, then its moral legitimacy can be questioned. Criticism, even sharp ones, is part of a healthy public discourse.

12 Robert A. Dahl, *On Democracy* (New Haven: Yale University Press, 1998), hlm. 37–38

13 Jan Remmelink, *Hukum Pidana* (Jakarta: Gramedia Pustaka Utama, 2003), hlm. 287–289

14 Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Jakarta: Kencana, 2010), hlm. 33–36

15 Brian Z. Tamanaha, *On the Rule of Law* (Cambridge: Cambridge University Press, 2004), hlm. 91–94.

16 Sudarto, *Hukum Pidana I* (Semarang: Yayasan Sudarto, 1990), hlm. 42–44.

17 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), hlm. 200–205

The impact of the widespread application of contempt of state institutions is the emergence of chilling effect. Frederick Schauer explains that the threat of legal sanctions can make individuals limit their expression even if the expression is legitimate. (Schauer, 1978)¹⁸ When citizens feel that criticism of state institutions has the potential for criminal consequences, they tend to self-censor. In the digital age, this condition is increasingly complex because social media is the main space for public participation. Without the clarity of the norm, society lives in uncertainty regarding the boundary between criticism and contempt.

In parsing the issue of the offense of contempt of state institutions in the Criminal Law Code, the analysis of criminalization as a political approach to criminal law is important to look at not only its normative aspects, but also the political configuration that underlies it¹⁹. Insult offense of state institutions in the new criminal code is a form of criminalization policy, namely the process of determining an act as a criminal offense through the formulation of legislation. Therefore, its discussion cannot be separated from the principles and criteria of criminalization in modern criminal law.

One of the fundamental problems in the offense of contempt of state institutions is the vagueness of interpretation (vagueness) in the formulation of norms. Terms such as "insult", "assault on Honor", or "degrading" are often formulated without objective and measurable parameters. In the perspective of the principle of legality, especially the principle of *lex certa*, every formulation of criminal offense must be prepared clearly and not multi-interpreted so as not to cause legal uncertainty. When a criminal norm has blurred boundaries, then the potential for expanding the meaning by law enforcement officers becomes very open²⁰.

In the context of the offense of contempt of state institutions, the vagueness of the interpretation has serious implications. First, the boundary between legitimate criticism in a democratic system and punishable insults becomes indecisive. State institutions as public institutions basically carry out the functions of Service and management of public interests, so conceptually they must be open to public scrutiny and criticism²¹. If criticism of the policies, performance, or decisions of state institutions can be easily interpreted as an insult, then there is a shift in the function of criminal law from an instrument of protection of legal interests to a means of limiting expression.

Second, the lack of clarity of interpretation has the potential to give birth to abuse of power (abuse of power). A wide interpretation space allows for selective enforcement or law enforcement that is inconsistent and influenced by certain interests. In such situations, criminal law can be used as a means of silencing criticism, especially of a sharp or controversial nature²².

From the point of view of criminalization theory, an act deserves to be punished if it meets certain criteria, such as the existence of clear legal interests to be protected, the existence of real harm (harm), and the proportionality between the act and the sanction. If the insult to state institutions is not formulated Strictly and objectively, then the basis

18 Frederick Schauer, "Fear, Risk and the First Amendment," *Boston University Law Review* Vol. 58 (1978): 685-732.

19 Saputro, L. A., & Anwar, A. S. (2023). Menyoal Pasal Penghinaan Presiden Dalam Kuhp: Antara Proporsionalitas Prinsip Primus Interpares Atau Kemunduran Demokrasi. *WICARANA*, 2(1), 14-26

20 Rahmasari, N. S. N., & Soeskandi, H. (2022). Penghidupan Kembali Pasal Terhadap Penghinaan Presiden Dan Wakil Presiden Dalam Rancangan Kitab Undang-Undang Hukum Pidana. *Mimbar Keadilan*, 15(1), 27-49.

21 Pradana, H. S. A., & Haq, M. I. D. (2023). The Regulation of Articles on State Institutional Insults to The Right to Freedom of Expression in Indonesia: A Critical Review. *Mulawarman Law Review*, 8(1), 21-31

22 Yanis, T. Z. A., Muhtadi, Saleh, A., & Yanis, A. M. (2025). The unconstitutionality of the offence of insulting the government in the 2023 Criminal Code: A critical review of freedom of expression. *As-Siyasi: Journal of Constitutional Law*, 5(1). Hlm 26

for justifying its criminalization becomes problematic. Moreover, in a Democratic state of law, the reputation of public institutions cannot be equated with the honor of private individuals, since state institutions are entities inherent in the functions of power and must be ready to accept public control.

Arguments in favor of the existence of contempt offenses of state institutions are often based on the need to maintain the authority and stability of the state. However, according to Gustav Radbruch, the law must always be tested on the basis of its value of justice and expediency.²³ If a norm causes more fear and restrictions on freedom than it provides fair protection, then it is worth reevaluating it. The authority of state institutions is not built through criminal threats to criticism, but through integrity and good performance.

In the perspective of international human rights, the restriction of freedom of expression must meet the principles of legality, legitimate goals, and urgent needs in a democratic society. The Siracusa Principles affirm that restrictions on rights should not be applied arbitrarily or discriminatively.²⁴ Criticism of public policy that does not contain incitement to violence cannot be categorized as a threat to national security or public order. Therefore, the use of criminal law to respond to such criticism could potentially violate the principle of proportionality.

A mature democracy is precisely measured by the extent to which it is able to tolerate criticism of power. John Rawls in his theory of justice emphasized the importance of equal basic freedoms for every citizen, including freedom of speech.²⁵ Without these freedoms, it is impossible to achieve a just and rational society. Criticism of state institutions is not a form of hostility towards the state, but a contribution that is expressed in the expression of participation in the management of the government bureaucracy.

2. Criminal threats for insulting state institutions in the perspective of legal protection or acts of repression.

The regulation regarding the criminal threat of contempt for state institutions raises fundamental debates in legal theory and democratic practice. On the one hand, the state has an interest in maintaining the authority of public institutions so that they are not weakened by attacks that undermine legitimacy²⁶. But on the other hand, the criminalization of expression directed at state institutions has the potential to curb freedom of expression and open up space for repression against critics. This debate is not solely normative, but also touches on the philosophical, constitutional, and policy dimensions of criminal law.

In the Criminal Code (new Criminal Code), the regulation regarding contempt for state institutions is placed as part of the offense against the dignity and authority of Public Power. Normatively, the criminal threat imposed against acts of contempt of state institutions in the form of imprisonment and / or fines with certain categories according to the system of punishment in the new criminal code. This arrangement of criminal threats indicates that the formers of the law view contempt for state institutions as an act that attacks the interests of the law in the form of the honor of public institutions.

23 Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law," *Oxford Journal of Legal Studies* Vol. 26 (2006): 1–11.

24 Borysov, E. E. (2018). The UN international covenant on civil and political rights: mechanisms of derogation from commitments. *Заснований у 1993 Році Періодичність Випуску–4 Номери На Рік*, 25(4), 61.

25 John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), hlm. 53–54.

26 Agustina, R. A., Madjid, A., & Noedajasakti, S. (2023). Freedom of expression in regulating criminal acts of defamation against the government and state institutions. *Path of Science*, 9(8), Section "Law and Security". Hlm 1008

However, the problem arises when the criminal threat is associated with the formulation of a general offense and potentially multi-interpretive. When the element of “insult” is not formulated limitatively and objectively, the accompanying criminal threat has the potential to become an instrument of excessive expression restriction. In addition, the system of criminal threats in the new criminal code adheres to an alternative approach to the categorization of fines and penalties. Theoretically, the existence of criminal fines as an alternative can be viewed as a form of moderation of sanctions. However, if the basic norms remain vague, then the moderation of sanctions does not necessarily eliminate the potential for abuse of authority in law enforcement.²⁷

In the Criminal Code (new criminal code), contempt for state institutions is punishable by imprisonment and/or a fine under the sanctions categorization system. This arrangement indicates an effort to protect the honor of public institutions, but becomes problematic when the formulation of the offense is general and potentially multi-interpretive. Conceptually, criminal law is an instrument of ultimum remedium. Herbert L. Packer’s theory of limits of the criminal sanction asserts that criminal sanctions are the harshest form of state intervention against individual freedom and should therefore be used with caution. If the element of “insult” is not clearly formulated, the criminal threat is potentially disproportionate and causes a chilling effect on freedom of expression. Therefore, the application of sanctions must meet the principles of legality, proportionality, as well as be strictly based on the presence of real harm protected by law.²⁸ When an expression is criminalized without a clear and proportionate basis of legal interest, the state has expanded the area of punishment excessively.

Moeljatno stressed that criminal acts must meet elements against the law and harm concrete legal interests.²⁹ The institutions of the state as public entities have no honor in the moral sense as human beings. It is an organ established to carry out public functions based on constitutional mandates. Thus, criticism of state institutions is essentially a form of social control inherent in democratic systems. Equating criticism with contempt has the potential to blur the line between legal protection and restriction of freedom.

From the perspective of the theory of freedom of expression, Alexander Meiklejohn argues that freedom of speech has a central function in democracy because it allows the people to supervise the government.³⁰ Criticism of state institutions, even harsh ones, is part of the protected public discourse in a Democratic state. If the state criminalizes expressions that attack the policies or performance of public institutions, the function of public oversight is threatened. In such a situation, criminal law no longer serves as a protector of public interests, but rather as a means of maintaining power.

In the analysis of Criminal policy (criminal policy), Marc Ancel emphasizes the importance of rationality and proportionality in the formation of criminal law.(Ancel, 1998)³¹ Sentencing should consider its effectiveness and social impact. When the offense of contempt for state institutions is formulated broadly and elastically, the potential for abuse of power increases. Law enforcement officers can use the article to ensnare criticism of a political nature, so the law turns into a veiled instrument of repression.

27 Sari, R. M., Ridlwan, Z., & Natamiharja, R. (2025). Pelembagaan delik penghinaan terhadap pemerintah dalam KUHP baru: Antara perlindungan simbol negara dan kebebasan ekspresi. *Indonesian Journal of Law and Justice*, 2(3), 1–9

28 Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), hlm. 250–253.

29 Moeljatno, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Cipta, 2008), hlm. 54–56

30 Alexander Meiklejohn, *Political Freedom* (New York: Harper & Brothers, 1960), hlm. 24–28.

31 Marc Ancel, *Social Defence: A Modern Approach to Criminal Problems* (London: Routledge & Kegan Paul, 1965), hlm. 112–115.

A similar view can also be found in the thought of Lon L. Fuller on the inner morality of law. Fuller emphasizes that the law must meet the principles of clarity, consistency and predictability.³² Blurred and multi-interpreted norms contradict the internal morality of the law because they open up the space of arbitrariness. In the context of the humiliation of state institutions, the vagueness of the definition of “humiliation” gives rise to legal uncertainty and fear in society. Citizens cannot predict whether a criticism will be considered legitimate or, on the contrary, punished.

Furthermore, Satjipto Rahardjo in a progressive legal perspective reminded that the law should be in favor of the interests of society and substantive justice.³³ If criminal law is used to protect the symbol or image of a state institution from criticism, while the interests of society to convey aspirations are limited, then the law has lost its social orientation. In this framework, the criminal threat of humiliation of state institutions can be viewed as a form of formalization of power that moves away from the democratic spirit.

From a constitutional point of view, Miriam Budiardjo emphasized that democracy requires freedom of opinion and freedom of the press as the main pillars.³⁴ Such restrictions on freedom must be strictly enforced and only to protect truly urgent interests, such as national security or public order. Criticism of state institutions does not automatically threaten the stability of the state, unless it is accompanied by incitement to violence or real hatred. Therefore, the use of criminal threats should be tested on the principle of necessity and proportionality.

Within the framework of comparative law, many democratic countries tend to reduce or even remove the offense of contempt for the state or state symbols because they are considered not in line with modern standards of freedom of expression. Jeremy Waldron does admit that speech that undermines the dignity of certain groups can be restricted, but he emphasizes that such restrictions are related to the protection of human dignity, not abstract institutions.³⁵ State institutions do not have the experience of suffering or personal reputation that can be tainted as individuals. For this reason, extending the concept of contempt to state institutions requires a very strong justification.

On the other hand, the arguments in favor of the existence of this offense often proceed from the need to maintain the authority of the state. However, authority is not synonymous with immunity from criticism. Montesquieu in the theory of separation of powers emphasized the importance of control mechanisms to prevent tyranny.³⁶ Public criticism is one form of such control. If state institutions are excessively protected from negative expression, then the balance of power can be disturbed.

In practical terms, criminal threats for insulting state institutions have the potential to lead to self-censorship. Individuals and the media may choose not to present criticism for fear of legal consequences. This condition creates a narrow and homogeneous public space, where dissent is suppressed. In the long run, democracy may suffer a setback due to the lack of critical participation from the public.

Based on this analysis, criminal threats for insulting state institutions have the potential to become an instrument of repression rather than protection, if they are not formulated and applied very strictly. The protection of the state should be focused on the

32 Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), hlm. 33–39

33 Satjipto Rahardjo, *Hukum Progresif: Hukum yang Membebaskan* (Jakarta: Kompas, 2009), hlm. 5–8

34 Miriam Budiardjo, *Dasar-Dasar Ilmu Politik* (Jakarta: Gramedia Pustaka Utama, 2008), hlm. 120–123.

35 Jeremy Waldron, *The Harm in Hate Speech* (Cambridge: Harvard University Press, 2012), hlm. 105–109

36 Montesquieu, *The Spirit of the Laws* (1748), terj. Anne M. Cohler (Cambridge: Cambridge University Press, 1989), hlm. 157–160.

protection of the functioning and security of institutions, not on the protection of the image or feelings of offense. Criticism of state institutions is an inherent part of democracy and cannot be punished solely for being sharp or unpleasant. Therefore, normative evaluation and reformulation based on the principles of legality, proportionality and protection of human rights are an urgent need for criminal law to remain a means of justice, not an instrument of repression of power..

CONCLUSION

Democracy demands guarantees of freedom of expression as a prerequisite for participation and control over power. Contempt offense of state institutions becomes problematic when formulated in a multi-interpretation and does not meet the principles of legality and *lex certa*. The vagueness of the “insult “ element opens up a wide space for discretion and potentially leads to selective enforcement of the law. Philosophically, state institutions as public entities cannot be equated with individuals in terms of the protection of Honor. Disproportionate criminalization risks creating a chilling effect and shifting criminal law from an instrument of protection to a means of limiting criticism. In a democratic rule of law, the authority of institutions should be built through accountability and openness, not through criminal threats to the expression of citizens.

The criminal threat of humiliation of state institutions in the new criminal code is at the intersection of legal protection and potential repression. Normatively, the state does have an interest in maintaining the functions and authority of public institutions. However, when the formulation of the offense is multi-interpretive and does not meet the principles of legality and proportionality, the conviction risks exceeding the limits as an *ultimum remedium*. State institutions as public entities cannot be equated with individuals in terms of the protection of moral honor, so criticism of them is part of the mechanism of Democratic control. If used widely and elastically, criminal threats can create a chilling effect, open up space for abuse of power, and shift criminal law into a tool for restricting freedom of expression. Therefore, restrictions must be formulated strictly, rationally and in accordance with the principles of human rights.

BIBLIOGRAPHY

- A. Koriahningsih, “Problematika Politik Hukum Penerapan Kriminalisasi dalam KUHP Baru: Tinjauan terhadap Pasal Penghinaan Presiden dan Wakil Presiden,” *Jurnal Hukum Legalita* 6, no. 2 (2024): 205–217.
- Alexander Meiklejohn, “The Balancing of Self-Preservation Against Political Freedom,” *California Law Review* 49 (1961): 4.
- Andi Hamzah, *Hukum Pidana Indonesia* (Jakarta: Sinar Grafika, 2017).
- Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Jakarta: Prenada Media, 2016).
- Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).
- Charles de Montesquieu, *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989).
- E. E. Borysov, “The UN International Covenant on Civil and Political Rights: Mechanisms

- of Derogation from Commitments,” *Заснований у 1993 Році Періодичність Випуску—4 Номери На Пік 25*, no. 4 (2018): 61.
- Frederick Schauer, “Fear, Risk and the First Amendment: Unraveling the Chilling Effect,” *Boston University Law Review* 58 (1978): 685.
- Gustav Radbruch, “Statutory Lawlessness and Supra-Statutory Law (1946),” *Oxford Journal of Legal Studies* 26, no. 1 (2006): 1–11.
- H. S. A. Pradana and M. I. D. Haq, “The Regulation of Articles on State Institutional Insults to the Right to Freedom of Expression in Indonesia: A Critical Review,” *Mulawarman Law Review* 8, no. 1 (2023): 21–31.
- Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).
- Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. M. Gregor (Cambridge: Cambridge University Press, 1998; orig. pub. 1785).
- J. Asshiddiqie, *Hukum Tata Negara & Pilar-Pilar Demokrasi* (Jakarta: Sinar Grafika, 2011), 198–234.
- J. Remmelink, *Pengantar Hukum Pidana Material 3: Hukum Penitensier*, vol. 3 (Jakarta: Maharsa Publishing, 2017).
- Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012).
- Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia* (Jakarta: Sinar Grafika, 2021).
- John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).
- L. A. Saputro and A. S. Anwar, “Menyoal Pasal Penghinaan Presiden dalam KUHP: Antara Proporsionalitas Prinsip Primus Inter Pares atau Kemunduran Demokrasi,” *WICARANA* 2, no. 1 (2023): 14–26.
- Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964).
- M. Ancel, *Social Defence: A Modern Approach to Criminal Problems*, vol. 199 (London: Psychology Press, 1998).
- Miriam Budiardjo, *Dasar-Dasar Ilmu Politik* (Jakarta: Gramedia Pustaka Utama, 2003).
- Moeljatno, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Cipta, 2002a).
- Moeljatno, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Cipta, 2002b).
- N. S. N. Rahmasari and H. Soeskandi, “Penghidupan Kembali Pasal terhadap Penghinaan Presiden dan Wakil Presiden dalam Rancangan Kitab Undang-Undang Hukum Pidana,” *Mimbar Keadilan* 15, no. 1 (2022): 27–49.
- P. M. Hadjon and T. S. Djatmiati, *Argumentasi Hukum* (Yogyakarta: Gadjah Mada Press, 2005).
- Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media, 2005).
- R. A. Agustina, A. Madjid, and S. Noedajasakti, “Freedom of Expression in Regulating Criminal Acts of Defamation Against the Government and State Institutions,” *Traektoriâ Nauki = Path of Science* 9, no. 8 (2023): 1008–1018.

- R. M. Sari, Z. Ridlwan, and R. Natamiharja, "Pelembagaan Delik Penghinaan terhadap Pemerintah dalam KUHP Baru Antara Perlindungan Simbol Negara dan Kebebasan Ekspresi," *Indonesian Journal of Law and Justice* 2, no. 3 (2025): 9.
- Robert Dahl, *On Democracy* (New Haven, CT: Yale University Press, 1998).
- Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1999).
- Satjipto Rahardjo, "Hukum Progresif: Hukum yang Membebaskan," *Jurnal Hukum Progresif* 1, no. 1 (2005): 1–24.
- Sri Mamudji and Soerjono Soekanto, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Rajawali Pers, 2001).
- Sudarto, *Hukum Pidana Indonesia* (Semarang: Yayasan Sudarto dan Fakultas Hukum UNDIP, 1990).
- T. Z. A. Yanis, A. Saleh, and A. M. Yanis, "The Unconstitutionality of the Offence of Insulting the Government in the 2023 Criminal Code: A Critical Review of Freedom of Expression," *As-Siyasi: Journal of Constitutional Law* 5, no. 1 (2025): 111–119.
- Z. Ritonga, S. A. Syam, and F. Lubis, "Kebijakan Kriminalisasi dan Dekriminalisasi KUHP Baru," *Innovative: Journal of Social Science Research* 4, no. 4 (2024): 3957–3967.