

## **Defamation In The New Criminal Code: A Review Of Substantive Justice**

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### **Abstract**

*This research will discuss significant changes in defamation regulations in the New Indonesian Criminal Code with a focus on substantive justice aspects to understand their impact within the context of criminal law in Indonesia. The study employs a normative legal research method that centers on the analysis of legislation to comprehend and evaluate the regulation of defamation in the New Indonesian Criminal Code from a substantive justice perspective. Analysis is gathered from legal sources and official government documents through qualitative analysis. The research novelty is provisions for defamation in the New Indonesian Criminal Code raise questions about substantive justice. The broad scope of defamation offenses can potentially threaten freedom of speech, and the use of information technology must be monitored to avoid violating human rights. Additional penalties, such as the withdrawal of rights, must adhere to legal principles and human rights. Alignment with the principles of freedom of speech is crucial, and ongoing evaluation and reform in criminal law are necessary to uphold substantive justice. In the regulation of defamation, the protection of individuals should be balanced with safeguarding freedom of speech in a democratic society.*

**Keywords:** Criminal Law; Defamation; Substantive Justice.

### **1. INTRODUCTION**

Criminal law is one of the instruments used by the state to maintain order and justice in society.<sup>1</sup> Criminal law contains various regulations that regulate actions that can be considered violations of the law and determine the sanctions that apply to violators. In criminal law, there are various types of offenses, one of which is the offense of insult. In order to understand more deeply the offense of insulting, this research will examine the Offense of Insulting and the Principles of Criminal Law in the New Criminal Code with a focus on aspects of substantive justice. Insults are actions that can damage the reputation of a particular individual, group, or entity.<sup>2</sup> In criminal law, the regulation of insulting offenses is often related to insulting state symbols, the government, state institutions,

<sup>1</sup> Nurulhuda Ahmad Razali, Nazli Ismail Nawang, and Shariffah Nuridah Aishah Syed Nong Mohamad, "Cyberbullying in Malaysia: An Analysis of the Existing Laws," *International Journal of Law, Government and Communication* 7, no. 30 (2022): 124–35, <https://doi.org/10.35631/ijlgc.730011>.

<sup>2</sup> Mansure Madani et al., "Policy Considerations to Achieve Practical Ethics: Closing the Gap between Ethical Theory and Practice," *Journal of Medical Ethics and History of Medicine*, September 2020, <https://doi.org/10.18502/jmehm.v13i8.4075>.

or population groups. Insults have long been a concern in criminal law, and with the enactment of Law Number 1 of 2023 concerning the new Criminal Code (KUHP), there have been significant changes in regulations related to insults. The significant change in the new Criminal Code compared to the Criminal Code is that the new Criminal Code, apart from accommodating developments in criminal law, also substantively carries out substantive updates that are adapted to the legal culture of the Indonesian nation.

This research will detail and analyze aspects of the insult regulations in the new Criminal Code, with a focus on the criminal law perspective. Significant changes in the Criminal Code regarding insults raise important questions regarding substantive justice. Therefore, this research will dig deeper into these aspects and analyze the new Criminal Code in the context of substantive justice. With a deeper understanding and evaluation of the new Criminal Code, this research seeks to contribute to increasing understanding of the criminal law that applies in the context of insults in Indonesia. The regulation of insult offenses in criminal law is a complex issue and has broad implications, especially in relation to freedom of speech and human rights. The new Criminal Code reflects an effort to maintain a balance between protection of individuals and entities who are victims of insults and human rights, including freedom of speech. With these changes in regulations, this research tries to explain and analyze their impact on Indonesian criminal law in order to achieve substantive justice.

The problem formulation in this research is as follows: 1. What is the concept of insulting offenses regulated in the New Criminal Code?, 2. How is the regulation of insult offenses in the New Criminal Code viewed from a Substantive Justice Perspective?

This research will use normative legal research methods which focus on legislative analysis as the main approach. This approach allows researchers to understand and evaluate how the new Criminal Code regulates the offense of insult and the extent to which this reflects the principles of substantive justice. The main source of research legal materials is relevant legislation, especially Law Number 1 of 2023 concerning the new Criminal Code (KUHP), as well as official documents related to relevant criminal law. The main difference between the formulation of the old Criminal Code and the New Criminal Code regarding defamation is that the formulation of the New Criminal Code is more specific and determines the type of offense aimed at protecting human rights.

Data collection techniques in this research will be related to text analysis. Data will be collected from legal sources such as laws, implementing regulations and related legal literature. Apart from that, this research can also involve analysis of official government documents related to discussions and changes to the new Criminal Code, such as legislative council reports, presidential speeches, and similar documents. In the data analysis process, researchers will use a qualitative approach by identifying patterns in legislative texts, connecting findings with criminal law principles, and evaluating the implications of these legal changes in the context of substantive justice. The results of the analysis will be used to formulate conclusions that describe the extent to which the new Criminal Code reflects substantive justice in the regulation of insult offenses, as

well as providing recommendations if discrepancies or imbalances are found in these regulations.

## 2. ANALYSIS AND DISCUSSION

### 2.1. The Concept of the Offense of Insults Regulated in the New Criminal Code: What and How?

The concept of the offense of insult in the new Criminal Code (KUHP), which is regulated in Law Number 1 of 2023, has several important changes and adjustments that affect penalties and other related provisions. This law regulates insults to state symbols, government or state institutions, and population groups. This offense of insulting can be divided into three main parts: insulting state symbols, insulting the government or state institutions, and insulting groups of the population. *First*, Insult to State Symbols. The initial part of the offense of insulting in Indonesia's New Criminal Code specifically regulates insulting state symbols, such as the state flag, state emblem and national anthem. Article 234 outlines actions that are considered desecration of the state flag, including damaging, tearing, trampling, burning, or committing other acts aimed at tarnishing, insulting, or degrading the honor of the state flag.<sup>3</sup> In this case, the perpetrator of this kind of act can be subject to imprisonment for a maximum term of 3 years or a fine in category IV. This article provides a clear picture of the protection of the state flag as a national symbol which is highly respected and considered sacred

Furthermore, Article 235 regulates other actions that can be considered an insult to the state flag. This includes actions such as using the country's flag for billboards or commercial advertising, flying a damaged country's flag, or printing, embroidering, and writing letters, numbers, images, or other markings on the country's flag. The punishment that can be given for this action is a fine which is classified as category II. This shows that the law strictly prohibits misuse of the state flag for commercial purposes or actions that could damage the honor of the state symbol. Article 236 continues the regulation with a focus on insulting state symbols. This includes actions such as crossing out, writing on, drawing on, or damaging the state symbol with the intention of tarnishing, insulting, or degrading the honor of the state symbol. The punishment that can be given for this action is imprisonment for a maximum term of 3 years or a fine in category IV. Article 237 also regulates it in more detail, including using damaged state symbols, creating symbols that resemble state symbols, or using state symbols for purposes that are contrary to the provisions of the law. A fine in category II is the punishment that can be given in this case.<sup>4</sup>

Finally, Article 238 regulates insulting the national anthem, if someone changes the national anthem with a tune, rhythm, words or other composition with the intention of insulting or degrading the honor of the national anthem, then the perpetrator can

<sup>3</sup> Priyo Sayogo, "The Law Enforcement of the Criminal Act of Defamation through Social Media," *Ratio Legis Journal* 1, no. 4 (2022): 882–88.

<sup>4</sup> Tumiran Anang Cundoko Sunardi, Dedik Tri Istiantara, "Pemasangan Tiang Bendera Merah Putih Untuk Membangun Jiwa Nasionalisme Pada Pendidikan Anak Usia Dini," *Spoor Madiun: Jurnal Pengabdian Masyarakat* 1, no. 1 (2021): 67.

be subject to a maximum prison sentence of 3 years or a fine of up to many category IV. Apart from that, changing or playing the national anthem for commercial purposes can also be subject to a maximum fine of category II. These articles show the law's commitment to protecting the national anthem as a symbol of national identity that deserves respect. *Second*, Insults to the Government or State Institutions. The second part of the regulation of insult offenses in the New Criminal Code deals with insults against the government or state institutions. Article 240 of this regulation regulates verbal or written insults made in public against the government or state institutions. In this case, the perpetrator of the insulting act can be subject to a prison sentence of up to 1 year and 6 months or a fine up to category II. However, special attention is paid to actions that result in unrest in society.

Article 240(2) states that if the criminal act of insulting results in riots, the punishment given will be more severe, namely imprisonment for a maximum of 3 years or a fine of up to category IV. Article 241 further regulates insults that involve broadcasting, showing, or distributing content that insults the government or state institutions through information technology means. The punishment that can be given in this case is imprisonment for a maximum of 3 years or a fine of up to category IV. As noted previously, this insult can also only be prosecuted if a complaint is submitted in writing by government leaders or state institutions. This provision clearly outlines the protection of the honor of the government and state institutions in the New Criminal Code. Heavier penalties are given if the insulting act is deemed to have the potential to cause unrest in society. This reflects an effort to achieve a balance between protection of the government and state institutions and freedom of opinion and expression. On the one hand, this action clarifies the law's commitment to maintaining the integrity and authority of the government, while leaving room for constructive criticism. On the other hand, the complaint required to prosecute the criminal offense of insult places certain limitations on the implementation of this law, which can be the object of debate in the context of substantive justice.

*Third*, Insults to Population Groups. The third part of the insult offense in the New Criminal Code addresses the issue of insulting groups of the population. Article 242 in this provision explains that actions involving feelings of hostility, hatred, or humiliation towards one or several groups or groups of the Indonesian population based on certain characteristics, such as race, nationality, ethnicity, skin color, gender, mental disability, or physical disability, considered a criminal offence.<sup>5</sup> In this case, the punishment that can be imposed is imprisonment with a maximum penalty of 3 years or a fine of category IV as the maximum penalty. Furthermore, Article 243 provides further guidance regarding actions involving broadcasting, showing or distributing content containing hostile statements towards groups of the population based on certain characteristics such as race, nationality, ethnicity, skin color, religion, belief, gender, mental disability, or physical disability.

<sup>5</sup> Vina Salviana et al., "Gender Sensitivity among Political Parties in Indonesia and India," *World Conference on Gender Studies* 2020, no. 1 (2020): 81–92, <https://doi.org/10.18502/kss.v4i10.7394>.

The punishment that can be given in this case is imprisonment for a maximum of 4 years or a fine at category IV level as the maximum penalty. In addition, the requirement for a complaint from the offended party is a prerequisite for prosecuting this criminal act. Complaints must be submitted in writing by government leaders or state institutions, indicating the importance of formal complaints in cases of insults against groups of the population. This provision reflects the law's commitment to protecting social harmony and preventing acts of insult against segments of the population based on their personal characteristics. Through Articles 242 and 243, the New Criminal Code explains that the state acts firmly in punishing insulting acts that can divide society based on personal attributes, such as race, religion or gender. By threatening severe penalties, criminal law seeks to warn perpetrators of these acts of the serious legal consequences they will face if they commit acts of insult against a segment of the population. In addition, the requirement for complaints from government leaders or state institutions shows that acts of insult required by law must not only harm certain individuals or groups, but can also harm society more broadly.

The fourth part of the New Criminal Code regulates libel and slander, which is a lighter offense of insult compared to the previous provisions. Defamation is regulated in Article 433 and is defined as an attack on the honor or good name of another person by accusing someone of something with the intention of making it known to the public.<sup>6</sup> This reflects the criminal law's commitment to protecting individual honor and maintaining a person's good name. Article 433 also provides a definition of defamation which includes verbal elements in insulting or accusing someone of something that could harm someone's reputation. Apart from verbal defamation, Article 433 (2) also regulates written defamation involving writing or images broadcast, displayed or posted in public places. In this context, the punishment that can be given is imprisonment for a maximum of 1 year and 6 months or a fine of up to category III.

However, it should be noted that Article 433 also contains important considerations related to the purpose of pollution actions. The article notes that pollution is not subject to punishment if it is done for the public interest or because it is forced to defend itself. This arrangement reflects a commitment to substantive justice by considering the intent and reasons behind defamatory acts before imposing punishment. In this way, Part four of the New Penal Code provides a balanced framework for dealing with acts of defamation, recognizing the right of individuals to protect their good name and honor, while taking into account freedom of speech and the legitimate aims behind such acts. This reflects efforts to achieve substantive justice in handling acts of pollution in the context of Indonesian criminal law.

*Fifth*, slander. Article 434 in the New Penal Code regulates acts of slander, which refers to situations where a person is given the opportunity to prove the truth of accusations made against another person, but is unable to validate them.<sup>7</sup> Slander

<sup>6</sup> Kazuki Shimizu and Leesa Lin, "Defamation Against Healthcare Workers During COVID-19 Pandemic," *International Journal of Health Policy and Management* 11, no. 5 (2022): 720–21, <https://doi.org/10.34172/ijhpm.2020.184>.

<sup>7</sup> Ahmad Razali, Nawang, and Syed Nong Mohamad, "Cyberbullying in Malaysia: An Analysis of the Existing Laws."

occurs when the accusation also contradicts what the perpetrator actually knows. The punishment that can be given to perpetrators of slander is imprisonment for a maximum of 3 years or a fine of up to category IV. This provision reflects legal efforts to protect a person's reputation from false and detrimental accusations. However, it should be noted that proving the truth of the allegations in a defamation case can only be done in certain specified situations. First, when the judge deems it necessary to check the truth of the accusation. This reflects the understanding that courts must consider the specific context and circumstances in defamation cases. Second, proof of the truth of the accusation can be done when the defendant is able to provide convincing information that his actions were in the public interest or as a form of self-defense. It recognizes that in some situations, people are driven to come forward with true allegations in an effort to protect larger interests or to defend themselves against threats or attacks.<sup>8</sup>

Article 434 reflects legal efforts to achieve substantive justice in handling slander cases. This shows that the law not only emphasizes protecting the reputation of the individual who is the victim of defamation, but also considers the context in which the accusation is made. Thus, the regulation of defamation in the New Criminal Code reflects an attempt to maintain a balance between protecting an individual's reputation and the right to reveal the truth or defend oneself in cases of defamation..

*Sixth, Mild Insults.* Minor insults, regulated in Part Six of the New Penal Code, refer to insulting acts that do not create a serious or defamatory impact on a particular individual. In this context, insults committed by someone can refer to actions that insult or degrade a person's dignity, but do not reach the serious level as those imposed in cases of defamation or slander. This reflects the need for varying levels of punishment appropriate to the seriousness of the insult. Article 436 of the New Criminal Code specifically regulates light insults and determines the penalties that can be imposed.<sup>9</sup> In this case, acts of insult that are not in the nature of defamation or written defamation can result in a maximum prison sentence of 6 months or a maximum fine of category II. This shows that the punishment given in cases of minor insults is lighter compared to insults that create serious impacts, such as defamation or slander. Regulations regarding minor insults provide insight into how criminal law tries to strike a balance in punishing acts of insult that, although degrading to the dignity of the individual, do not have as serious an impact as other cases.

*Seventh, Complaints, Criminal Aggravations, and Additional Penalties.* Article 440 of the New Criminal Code underlines the important role of complaints from victims of criminal acts of insult. This article states that criminal offenses of insult, as regulated in Articles 433 to Article 439, will not be prosecuted by the authorities if no official complaint is submitted by the victim of the crime. This means that law enforcement in cases of insult requires concrete steps from the party who feels insulted or feels like they are a victim of defamation. This reflects the importance of protecting individuals' rights

<sup>8</sup> Khomotso Moshikaro, "Unjust Contempt as the Gist of Defamation Law," *Constitutional Court Review* 12, no. 1 (2022): 59–86, <https://doi.org/10.2989/ccr.2022.0002>.

<sup>9</sup> Ahmad Irzal Fardiansyah, "Why Indonesia Maintain Capital Punishment?," *Fiat Justisia: Jurnal Ilmu Hukum* 15, no. 1 (2021): 25–38, <https://doi.org/10.25041/fiatjustisia.v15no1.1904>.

to decide whether they wish to pursue defamation proceedings, in line with the principles of substantive justice that allow victims to have control over the legal process involving them.<sup>10</sup> Furthermore, Article 441 of the New Criminal Code provides the legal basis for criminal charges in insult cases involving the use of information technology facilities. This article shows legal awareness of the role of technology in the dissemination of potentially harmful content.

By adding 1/3 of the penalty if the crime of insult is committed by means of information technology, the law seeks to take into account the sophistication of technology that allows insults to spread more widely and more quickly through online platforms.<sup>11</sup> Apart from that, Article 442 of the New Criminal Code regulates additional penalties in the form of revocation of rights if a person is proven guilty in a case of insulting or slandering another person. Revocation of this right may include certain rights regulated in Article 86 letters a, b, c, and/or d. Revocation of rights is an additional sanction given to perpetrators of insult or slander who have been proven guilty. By imposing revocation of rights, criminal law seeks to provide heavier sanctions for perpetrators of insults, which can include civil rights, such as political rights or the right to serve in a public office.<sup>12</sup>

Overall, the concept of insulting offenses regulated in the New Criminal Code, as regulated in Law Number 1 of 2023, reflects efforts to maintain the honor and dignity of individuals, the government, state institutions and groups of the population. This law provides protection for state symbols, the national anthem and government honor, while still considering freedom of opinion and expression. In addition, heavier penalties are given if the insulting act has the potential to cause public unrest or involves information technology facilities. Thus, the New Criminal Code creates a balance between protecting individual honor and freedom of expression, as well as efforts to maintain social stability.

## **2.2. The Regulation of the Offense of Insults in the New Criminal Code from the Perspective of Substantive Justice**

The regulation of insult offenses in the New Criminal Code (KUHP), especially in Law (UU) Number 1 of 2023 concerning the Criminal Code, raises various questions about substantive justice. In the context of criminal law, substantive justice is an aspect that evaluates whether the legal regulations themselves are fair in terms of their objectives, impacts and sanctions imposed on violators. In this case, we will evaluate the regulation of insult offenses in the New Criminal Code by focusing on aspects of substantive justice. *First*, Broad Defamation Offense Limitations. The broad limits of insult offenses in the New Criminal Code, especially those regulated in Articles 234 to Article 243 of Law Number 1 of 2023, is one aspect that needs to be evaluated carefully. While it is important to maintain the honor of state symbols, governments, state institutions,

<sup>10</sup> Bartłomiej Krzan, "Admissibility of Evidence and International Criminal Justice," *Revista Brasileira de Direito Processual Penal* 7, no. 1 (2021): 161–88, <https://doi.org/10.22197/RBDPP.V7I1.492>.

<sup>11</sup> Rizka Rizka et al., "Criminal Liability of People with Mental Disorders: Health Law Perspective," *Open Access Macedonian Journal of Medical Sciences* 10, no. 1 (2022): 435–38, <https://doi.org/10.3889/oamjms.2022.8449>.

<sup>12</sup> Bambang Slamet Riyadi, Usman, and Elly Sudarti, "The Disparity in Criminal Prosecution against Acid Attack on Investigator of Corruption Eradication Commission: "novel Baswedan" Case," *International Journal of Criminology and Sociology* 9, no. 1999 (2020): 1676–87, <https://doi.org/10.6000/1929-4409.2020.09.191>.

and segments of the population, these broad restrictions may raise concerns regarding restrictions on freedom of speech. Although the main aim of criminal law is to protect social and community values, broad limitations can give the impression that criminal law is used as a tool to limit individual expression.<sup>13</sup>

The extensive provisions in the New Criminal Code regarding insults, especially when relating to insults against the government or state institutions, may raise questions about the extent to which the public has the freedom to criticize and voice their views on the government. This has given rise to a debate regarding the extent to which criminal law should be used to criminalize insulting acts, rather to observe whether these acts are truly detrimental to the public interest and social harmony. In addition, it is important to consider that the broad limitations of the offense of defamation may also create a risk of abuse of the law. The government or state institutions can take advantage of these articles to take action against individuals or groups who criticize them, hinder government transparency and accountability, and reduce freedom of speech in society.<sup>14</sup> Accordingly, an evaluation of the limits of this broad offense of defamation may provide an opportunity to review the role of criminal law in regulating acts of defamation. This could include changes in the legal framework to more appropriately address offensive acts that seriously undermine social order or societal harmony, while preserving the principles of free speech that are essential in a democracy. In this context, it is important to strike an appropriate balance between the protection of individuals, institutions and state symbols and human rights involving freedom of speech, as well as to avoid the misuse of criminal law as a tool of political pressure.

*Second, Use of Information Technology Facilities.* Article 441 in the Law on the Criminal Code which provides for a criminal increase of 1/3 if the act of insult is committed by means of information technology is a step that needs to be monitored carefully. While it is important to protect individuals and groups from online insults, we must consider the potential for misuse of this article to threaten free speech on the internet. Freedom of opinion and speech is a key principle in a democratic society, and the use of information technology is a key platform for such expression in the digital era.

The increase in crimes in the context of information technology has raised concerns about potential violations of the right to speak. Online insults must be identified and handled tactfully, without negatively impacting overall freedom of speech.<sup>15</sup> Therefore, authorities need to carefully assess the context, intensity and intent behind insulting acts carried out by means of information technology. Excessive restrictions or arbitrary use of this article could be a potential tool for authorities to stifle freedom of expression and censor opposing opinions. In this context, it is important to have clear and transparent guidelines for determining when a criminal increase is necessary. There

<sup>13</sup> Inggou David Purba, Hambali Thalib, and Syahrudin Nawi, "Restorative Justice in Enforcement of the Criminal Law of Defamation through Information Technology," *IOSR Journal of Humanities And Social Science* 27, no. 3 (2022): 33–38, <https://doi.org/10.9790/0837-2703023338>.

<sup>14</sup> Nana Raihana Askurny and Syihabuddin Syihabuddin, "Students' Linguistic Knowledge in Comprehending Defamation Text Corresponding Email Article's History," *Ethical Lingua* 9, no. 1 (2022): 2022, <https://doi.org/10.30605/25409190.388>.

<sup>15</sup> Rohit Ray, "Defamation and Social Media: The Parcel That Keeps on Being Passed," *Journal of Legal Studies & Research* 08, no. 03 (2022): 71–56, <https://doi.org/10.55662/jlsr.2022.8305>.



needs to be a policy that prioritizes the principles of justice, freedom of speech and human rights. In addition, public education and awareness regarding the wise and ethical use of information technology must also be improved. This will help society to better understand the consequences of insulting actions and how to avoid them without having to face excessive criminal penalties.

*Third, Subjective Justice and Protection of Population Classes.* Articles 242 and Article 243 of the New Criminal Code Law which cover insults against groups of the population are important steps in efforts to provide protection to vulnerable groups from insults and discrimination. This reflects Indonesia's legal commitment to respecting human rights and creating an inclusive society. However, as with any law governing free speech, these regulations need to be evaluated from the perspective of substantive justice. In the context of subjective justice, this regulation provides very important protection for groups that are often the targets of insults and discrimination. Race, nationality, ethnicity, color, religion, gender, and mental and physical disabilities are personal characteristics that should not be grounds for insults or discriminatory treatment.<sup>16</sup> This arrangement provides them with legal recourse against insults that harm them emotionally, psychologically, and socially.

In order to achieve substantive justice, these regulations must also strike the right balance between protecting vulnerable groups and preserving freedom of speech. Freedom of speech is a basic principle in democracy that must be maintained. A balance between protection of vulnerable groups and freedom of speech can be achieved through clear and proportional legal provisions. The law must set clear boundaries regarding what can be considered an insult, while also considering the context, intensity and intent behind the statement.<sup>17</sup> This would allow for substantive fairness, as individuals who speak lawfully can still engage in important and diverse discussions without fear of legal action. In addition, protection must be based on strong human rights principles, which include not only the prohibition of insults, but also the promotion of equality, non-discrimination and respect for the diversity of society.

*Fourth, Limitations of Complaints and Possibility of Abuse.* Article 240 and Article 241 in Law Number 1 of 2023, which regulates insults against the government or state institutions, lists the limitations of complaints as one of the aspects that must be considered in cases of insults against these institutions. Despite good intentions to protect the reputation and integrity of state institutions, these limitations have the potential to create opportunities for abuse of the law and restrictions on freedom of speech. One of the limitations of these complaints is that criminal acts of insulting the government or state institutions can only be prosecuted based on complaints from the insulted party, as regulated in Article 240 paragraph (3) and Article 241 paragraph (3). This means that the decision to file charges against someone who is deemed to have insulted the government or state institutions depends entirely on the decision of the

<sup>16</sup> Mazen Raad, "Defamation under Subarticle 3 ( 5 ) of the Saudi Arabian Anti-Cybercrime Law," *Journal of Law in the Middle East* 3, no. 2 (2022): 82–97.

<sup>17</sup> Raju Moh Hazmi, Asep Saepudin Jahar, and Nurul Adhha, "Construction of Justice, Certainty, and Legal Use in the Decision of the Supreme Court Number 46 P/HUM/2018.," *Jurnal Cita Hukum* 9, no. 1 (2021): 159–78, <https://doi.org/10.15408/jch.v9i1.11583>.

party who feels insulted. However, these limitations carry the risk of misuse of the law and can be used as a tool to suppress criticism or dissenting views of the government or state institutions.

For example, parties in positions of power or institutions with great authority can use these complaints as a way to silence criticism or opinions that are critical of their policies or actions. Therefore, in implementing complaint limitations in cases of insults against the government or state institutions, it is important to strike a balance between protecting the reputation of those institutions and safeguarding freedom of speech and expression.<sup>18</sup> This requires transparent and accountable policies and practices in assessing whether complaints have a solid basis and are not misused for political or power interests. The government and judicial system must serve as fair and independent watchdogs to ensure that these laws are not misused to limit free speech and arbitrarily punish individuals or groups. In addition, independent monitoring mechanisms can also play an important role in preventing abuse of the law related to insulting the government or state institutions.

*Fifth, Defilement of the Dead.* Article 439 in the New Criminal Code Law which regulates defamation of a deceased person creates questions about the relevance and substantive justice in regulating criminal actions for insults against individuals who are no longer able to feel the impact of the insult. This provision raises a dilemma surrounding the need to protect the good name of individuals who have died and at the same time consider the principles of substantive justice in criminal law. From one perspective, this provision is seen as an effort to preserve and honor the memory of deceased individuals. Insulting someone who is no longer able to defend themselves or feel the impact directly is considered an immoral act and damages the personal image of the deceased. In this context, Article 439 can be seen as part of efforts to safeguard the integrity of deceased individuals and avoid the spread of negative or damaging information about them.

However, from the perspective of substantive justice, this provision also creates questions about the relevance and urgency of criminal penalties in cases of defamation of deceased individuals. Article 439 provides for criminal penalties in the event of defamation of a dead person, even if the deceased individual would not feel the effects of the insult. Another consideration is the limited resources and time that can be used by the criminal justice system. By legislating criminal offenses against insulting the dead, the justice system must spend precious resources pursuing cases that, ultimately, do not have a significant impact on justice or the interests of society. This can disrupt law enforcement priorities and lead to diversion of resources from more urgent cases or those involving more serious conduct.

*Sixth, Additional Penalty.* Article 442 in the New Criminal Code Law gives the justice system the authority to impose additional penalties in the form of revocation of rights.<sup>19</sup> Additional penalties like this can be an effective instrument in punishing

<sup>18</sup> Rahmida Erliyani, "Examining Religious and Justice System in Indonesia to Prevent Cyberbullying," *International Journal of Cyber Criminology* 15, no. 2 (2021): 112–23, <https://doi.org/10.5281/zenodo.4766548>.

<sup>19</sup> Mika Hietanen and Johan Eddebo, "Towards a Definition of Hate Speech—With a Focus on Online Contexts," *Journal of Communication Inquiry* 47, no. 4 (2023): 440–58, <https://doi.org/10.1177/01968599221124309>.

violators and maintaining substantive justice in criminal law. Disenfranchisement as an additional penalty is a serious step that can have a long-term impact on the life of the convicted individual. Therefore, the decision-making process regarding revocation of rights must involve careful and fair consideration. Courts should seriously consider whether disenfranchisement is appropriate and necessary in a particular case. This decision must be based on strong facts and evidence, and must meet applicable legal standards. Additionally, in cases where disenfranchisement is applied in the context of contempt, there is a need to define clear criteria that enable courts to decide whether disenfranchisement is an appropriate measure. Revocation of rights must also be carried out in accordance with the principles of human rights law, such as the right to protection from arbitrary treatment.<sup>20</sup> A fair legal process, the right to self-defense, and justice must always be upheld in making decisions regarding revocation of rights. This will help maintain a balance between the protection of society and the rights of convicted individuals.

*Seventh, Alignment with the Principles of Free Speech.* In reviewing the regulation of insult offenses in the New Criminal Code, alignment with the principles of freedom of speech and human rights is an important factor that must be considered. The principle of freedom of speech is one of the fundamental rights that must be respected and protected in every legal system based on democracy and human rights.<sup>21</sup> Freedom of speech includes the right to express opinions, opinions and ideas without pressure, threats or limitations that are not in accordance with the law. In the regulatory context of insult offenses, there needs to be a good balance between protecting individuals or groups who are victims of insults and protecting society's freedom of speech. The involvement of civil society, human rights institutions and legal practitioners in the creation and evaluation of regulations is an important step in maintaining harmony with human rights principles.<sup>22</sup>

They can provide valuable insights and input to ensure that defamation laws are not misused to silence criticism, opinions or expressions that run counter to the government or a particular group. Active engagement from these various parties can help ensure that regulations not only comply with human rights standards, but also reflect democratic values that promote freedom of expression. In addition, complaints and monitoring of human rights violations related to insults must also be recognized and handled carefully by the justice system. This includes reviewing defamation cases subject to legal action, and judgments should reflect human rights considerations, including freedom of speech.

*Eighth, Protection of Free Speech.* The regulation of insult offenses in the New Criminal Code needs to reflect the principle of protecting freedom of speech, which is a basic right in a democratic system. Substantive justice in this context requires strict

<sup>20</sup> By Lindsey R Oakes et al., "The Photovoice Decision Tree: Legal Considerations and Ethical Implications for Photographs and Captions," *Health Promotion Practice* 23, no. 2 (2022): 257.

<sup>21</sup> Wael Mohammed Nusairat, "The Crime of Defamation and Slander and Methods to Prove It Via the International Information Network in the Saudi Regime and Jordanian Law," *International Journal of Innovation, Creativity and Change* 16, no. 2 (2022): 573–91.

<sup>22</sup> Christian Djefal, "Children's Rights by Design and Internet Governance: Revisiting General Comment No. 25 (2021) on Children's Rights in," *Laws* 25, no. 25 (2022): 6.

consideration to ensure that criminal sanctions are not used as a tool to unduly limit freedom of speech.<sup>23</sup> Criminal law must take into account the public interests that may be truly threatened by acts of insult. Insults regulated in criminal law should only include actions that can clearly endanger state stability, public order or public security.<sup>24</sup> These considerations are necessary to prevent misuse of criminal law in suppressing constructive criticism of the government or state institutions. Furthermore, the principle of proportionality of sanctions must also be upheld. This means that the punishment given must be commensurate with the seriousness of the insulting act committed. Imprisonment or very heavy fines for actions that are actually minor can be considered an imbalance that threatens individual human rights.

Finally, the regulation of insult offenses must comply with the principles of protecting human rights. This includes the right to freedom of speech and opinion as guaranteed by international human rights conventions. Substantive justice in this context means that criminal penalties for insults must not conflict with individuals' human rights to express opinions, speak or express their ideas.<sup>25</sup> These principles create important limitations in enforcing punishment for insults.

*Ninth, Handling Subjective Cases.* Handling subjective cases, such as acts of insult, is a challenge in the legal system. Often, the line between valid expression of opinion and insult is blurred, and subjective judgments can become a serious problem. In the context of defamation, clear and detailed legislation, such as that contained in the New Criminal Code, is essential. Protection of freedom of expression is an important value in law and a democratic society. In cases where there is doubt, efforts should be made to distinguish between legitimate criticism and insults. Criteria that can help in this regard are whether the act endangers the private life or rights of other individuals, whether the act incites violence or discrimination, or whether it constitutes a gross insult that has no basis in rational argument.<sup>26</sup> Apart from that, in subjective cases, it is important to prioritize the principle of the presumption of innocence. This means that a person should not be considered guilty without strong evidence that their actions constituted a legitimate insult.<sup>27</sup> Within the framework of criminal law, the law must meet a high burden of proof to support a charge of contempt. In dealing with subjective cases, a balanced approach, well-trained judges, and clear and detailed legal regulations are essential. Protection must be afforded to individuals who hold legitimate opinions, and actual acts of insult must be strictly punished. In this way, criminal law can strike the right balance between protecting human rights and maintaining social order.

<sup>23</sup> Prianter Jaya Hairi, "Menyerang Kehormatan Atau Harkat Dan Martabat Presiden: Urgensi Pengaturan Vis-a-Vis Kebebasan Berekspresi Dan Kebebasan Pers," *Jurnal Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan* 13, no. 2 (2022), <https://doi.org/http://dx.doi.org/10.22212/jnh.v13i2.3248>.

<sup>24</sup> Joseph Andy Hartanto, "The Philosophy of Legal Reason in Indonesian Law," *Beijing Law Review* 11, no. 01 (2020): 119–27, <https://doi.org/10.4236/blr.2020.111008>.

<sup>25</sup> Gehan Gunatilleke, "Justifying Limitations on the Freedom of Expression," *Human Rights Review* 22, no. 1 (March 2021): 91–108, <https://doi.org/10.1007/s12142-020-00608-8>.

<sup>26</sup> Yazid Bustomi, "The Relevance of Behavior of Law Theory to Law Enforcement in Indonesia," *Jurnal Hukum Prasada* 9, no. 1 (2022): 53–64, <https://doi.org/10.22225/jhp.9.1.2022.53-64>.

<sup>27</sup> Roberth Kurniawan Ruslak Hammar, "Exploring the Intersection of Common Law and Criminal Justice System: Implications for Protecting Freedom of Speech in Indonesia," *International Journal of Criminal Justice Sciences* 17, no. 2 (2022): 299–311, <https://doi.org/10.5281/zenodo.4756126>.

*Tenth*, Continuous Evaluation and Reform. To maintain substantive justice in the regulation of insult offenses, a continuous evaluation and reform mechanism is needed in criminal law. First of all, changes in regulations must be based on strong empirical evidence. Empirical evaluations must be carried out periodically to measure the effectiveness of existing regulations in achieving their objectives, namely protecting individuals and values that are considered important in society. In-depth research and analysis must be conducted to understand the extent to which defamation laws have impacted society and free speech.<sup>28</sup> Additionally, evaluating the impact on freedom of speech should also be a primary focus. The regulation of insult offenses must be balanced, namely protecting individuals and institutions from harmful insults without sacrificing freedom of speech which is essential in a democratic society. This evaluation should include the impact of punishment for insulting freedom of expression and critical discussion in society.<sup>29</sup>

Furthermore, ongoing reform must be an important part of this process. The results of in-depth evaluations must be used to formulate better and more balanced regulatory changes. Legal reform must be based on principles of substantive justice that ensure the protection of vulnerable individuals and groups from harmful insults. Overall, the regulation of insult offenses in the New Criminal Code reflects various efforts to achieve substantive justice in Indonesian criminal law. This can be seen in the protection of state symbols, government institutions, and individuals or groups that are vulnerable to insults. However, there are also considerations about the legal process, such as a complaint from the offended party, which can influence the extent of punishment imposed in a contempt case. Additionally, the presence of additional penalties, such as deprivation of rights, reflects efforts to ensure substantive fairness in dealing with acts of insult. Therefore, this regulation reflects the commitment of Indonesian criminal law to achieve substantive justice in the protection of individuals, groups and values that are considered important in society.

### 3. CONCLUSION

The research results confirm that the concept of the offense of insulting in the New Criminal Code, as regulated in Law Number 1 of 2023, includes insulting state symbols, the government or state institutions, and population groups. Insulting national symbols includes acts that damage the national flag, national emblem, or national anthem, with penalties of imprisonment or fines. Insulting the government or state institutions can have more serious consequences if it causes public unrest, and insults through information technology means are also prohibited. Criminal sanctions apply if the insult involves information technology, and additional punishment in the form of revocation of rights can be given to perpetrators of the insult who are proven guilty. This reflects

<sup>28</sup> Jerico Mathias and Rosamine Blessica, "Hate Speech and the Freedom Discourse," *Indonesia Media Law Review* 1, no. 1 (2022): 1–22, <https://doi.org/10.15294/imrev.v1i1.56673>.

<sup>29</sup> Anwar Sadat, Herman Lawelai, And Ansar Suherman, "Sentiment Analysis On Social Media: Hate Speech To The Government On Twitter," *Praja: Jurnal Ilmiah Pemerintahan* 10, no. 1 (2022): 69–76, <https://doi.org/10.55678/prj.v10i1.584>.

legal efforts to maintain a balance between protecting individual honor and freedom of expression, as well as considering technological developments in the dissemination of harmful content.

The regulation of insult offenses in the New Criminal Code, especially in Law Number 1 of 2023 concerning the Criminal Code, raises questions about substantive justice. Broad limits on the offense of defamation can threaten free speech, and the use of information technology must be monitored so as not to violate human rights. Protection of vulnerable groups is a positive step, but it needs to be balanced with freedom of speech. The limitations of complaints in cases of insulting the government can be misused, so they must be managed transparently. Additional penalties, such as deprivation of rights, must be based on legal principles and human rights. Alignment with free speech principles is important, and ongoing evaluation and reform in criminal law is necessary to maintain substantive justice. In the regulation of defamation offenses, individual protection must be balanced with safeguarding freedom of speech in a democratic society.

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