

PERSON THROUGH VIRTUAL WORLD , AFTER THE CONSTITUTIONAL COURT DECISION, IN TEST CASE Nomor 13-022 / PUU - IV / 2006 ¹

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ABSTRACT

*Legal counsel of the MA (24) , suspected cases spread Jokowi images containing pornography , Abdul Aziz , hoping letter requesting his client be granted suspension of detention . With the support of the wider community , continued Abdul , it hoped the detention may be suspended . Muhammad Arsad (24) detained since 24 October. He allegedly contains , distribute , reproduce and Megawati Jokowi images containing pornography . The problem in this paper : 1) What is the effect of law related to the same conduct Article 136bis of Article 134 and Article 137 of the Criminal Code after the decision of the Constitutional Court in Case Number 013-022 Testing / PUU - IV / 2006 ? 2) What is the legal basis that can be used in case of defamation through cyberspace ? In conclusion : 1) The legal consequences related to the same conduct Article 136bis of Article 134 and Article 137 of the Criminal Code after the decision of the Constitutional Court in Case Number 013-022 Testing / PUU - IV / 2006 are : Judges of the Constitutional Court of Article 134 and Article Article 135bis 137 of the Criminal Code creates legal uncertainty (*rechsonzekerheid*) 2) the legal basis which can be used in case of defamation in cyberspace are : Article 310 of the Criminal Code and article 27 paragraph (3) of the Act ITE , to be categorized as a crime of defamation , it must proved the following elements :*

1. *The existence of intent ;*
2. *Without the right (without permission) ;*
3. *Aim to attack the good name or honor ;*
4. *To be known by the public .*

Keyword: Defamation, Cybers, Criminal code.

I. INTRODUCTION

A. BACKGROUND

Legal counsel MA (24), suspected cases of image deployment Jokowi containing pornographic, Abdul Aziz, hoping letter requesting the suspension of detention his client be granted. With public support, continued Abdul, it hoped the detention may be suspended.

"We hope that the police can lighten the case or be released," said Abdul after filed a letter of suspension in front of the Criminal Investigation office, Thursday (30/10). Abdul said he and the suspect's family is planning to create a letter and send it to Jokowi. In fact, they intend to meet Jokowi directly. "We tried to see him, may be forgiven," ujarnya. Muhammad Arsad (24) was detained since 24 October. He allegedly had been loading, distribute, reproduce images Jokowi and Megawati are pornographic. For his actions, the suspect threatened to Article Pornography Law No. 44 of 2008 and Act Section 310-311 Criminal Code on defamation in writing or defamation with the threat of 12 years in prison.

On one hand, the act of insult or defamation through the Electronic Systems (Internet) can be easily done, while the culprit is very difficult to know and explore. On the other hand, those who insulted or the name contaminated difficult to prove that the perpetrator was the one who did it because it was blocked by the privacy provisions stipulated in the Act ITE, and may be hampered by proprietary technologies. therefore, only law enforcement officers was, in this case the police, who have the responsibility and authority, and discover or reveal who the perpetrators should be held responsible.

B. PROBLEM FORMULATION

1. Is the legal consequences of the same conduct by the Article 134 Article 136bis and Article 137 of the Criminal Code after the release of the decision of the Constitutional Court in the Test Case Number 013-022 / PUU-IV / 2006?
2. What is the legal basis which can be used in case of defamation through cyberspace?

II. LITERATURE REVIEW

A. Definition of Defamation good

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Up to now there is no legal definition in Indonesia precise and clear about what is called defamation. According to the phrase (in English), defamation interpreted as defamation, slander, libel which in Indonesian (Indonesian translation) translates to libel, slander (oral), libel (written) is oral defamation (slander verbally) while libel is written defamation (libel in writing). In the Indonesian language itself until now no term to distinguish between slander and libel.

Until now, there has been no legal meaning or definition of what constitutes Hate speech and defamation in Indonesian. In English, defamation is defined as as defamation, libel, and slander which if translated into Indonesian is slander (defamation), oral defamation (slander), written defamation (libel). In the Indonesian language, there is no legitimate term to distinguish three words, if roughly translated from English:

1) Slander

Slander is a humiliation published in a form that is less obvious, for example, of speech, sound, changing language, gestures and more.

2) libel

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Libel is written in the form of humiliation, or in the form of pictures as long as it is not from the words and body language.

B. The provisions in the Criminal Code

In the Criminal Code libel termed as an insult / defamation against a person contained in Chapter XVI, Book I Criminal Code in particular on Article 310, Article 311, Article 315, Article 317 and Article 318 Penal Code. Article Criminal contempt against a crime against a person, it is generally stipulated in Article 310, Article 311 paragraph (1), Article 315, Article 317 paragraph (1) and Article 318 paragraph (1) Criminal Code which states:

Article 310

(1) Whoever intentionally damages the honor or reputation of a person by way of charging him with a deed with real intent will tersiarnya charges, convicted despised, by imprisonment for ever nine months or a fine of up to Rp 4.500, -.

(2) If this is done with writing or pictures broadcast, performed in public or taped, then do it convicted despised by writing with a prison sentence forever one year and four months or a fine of up to Rp 4.500, -.

(3) Excludes despised or despised by writing, if it turns out that sipembuat doing it in the public interest or because of the forced need to defend himself.

Article 311 paragraph (1)

Whoever commits a crime despised or despised by writing, in which case he is permitted to prove and if the allegations are being doneknowing it is not true, punished for any defamatory by imprisonment for ever four years.

Article 315

Each insult intentionally that is not despised or despised by the writing, which was done to someone either in common with oral, or by writing, or in front of the man himself orally or in deed, as well as with text that is sent or are received by him, punished insult lightly, with imprisonment for ever four months and two weeks or a fine of up to Rp 4.500, -.

Article 317 paragraph (1)

Whoever willfully enter or send a letter of complaint for false notification to the ruler of one's country so the honor or reputation of people were so offended, then convicted pitted by smearing, to imprisonment for a four-year-old.

Article 318 paragraph (1)

Whoever deliberately doing something deeds, cause others with fake defendant committed a deed that could be punished, then convicted of defamation by imprisonment for ever four years.

R. Susilo explain what is meant by "insulting", which is "attacking the honor and good name of a person" where are attacked usually feels "ashamed". "Honor" is being attacked here only about the honor of the "good name", instead of "honor" in the sexual field.

According to R. Susilo, defamation in the Criminal Code there are six kinds:

1. despised orally (smaad);
2. despised by letter / writing (smaadschrift);
3. defamatory (laster);
4. insult lightly (eenvoudige belediging);
5. pitted be defamatory (lasterlijke aanklacht);
6. The allegations are defamatory (lasterlijke verdachtmaking)

All insults above can only be prosecuted if there is complaint of people who suffer / insulted / humiliated (in criminal law known as to a complaint), unless the insult was made against a public servant at the time was running a job legally and in such case the basically not necessary or dibutuhak complaints from victims.

The object of contempt must be the human individual, that is not a government agency, the board of an association, a class of residents and others. If the object is not an individual, it is subject to provisions specifically as: Article 134 and Article 137 of the Criminal Code (insult to the President or Vice-President) which has been abolished by the Constitutional Court decisions, as well as Article 207 and Article 208 of the Criminal Code (insult to the powers that be in Indonesia).

Pursuant to Article 310 paragraph (1) Criminal Code, humiliation may be liable to be done by way of "accused person has committed a certain act", with the intention of charges will be spread (known people). Acts alleged do not need an act that should be punished as stealing, embezzling, adultery, and so forth. The act fairly ordinary act, which of course is a shameful act, for example, alleged that someone has had an affair. In this case not the act that should be punished, but quite embarrassing for concern when it was announced. The allegations must be done orally, if done with the writing (letters) or picture, then insult was called "despised / insults with a letter (written)", and subject to Article 310 (2) Penal Code.

Humiliation according to Article 310 paragraph (1) and (2) above may be waived (can not be punished) if the accusation or insult was made to defend the "public interest" or forced to "defend themselves". Like this or not public interest defense and self-defense filed by the alleged lies in the consideration of judges.

For defamatory crime under Article 311 of the Criminal Code, does not need to be done in public, it was enough that it can be proven that there is no intention to broadcast the allegations. If the insult in the form of a complaint containing slander addressed to Authorities / official authorities, then it can be subject to criminal Article 317 Penal Code.

According Muladi, Professor of Criminal Law, University of Diponegoro that can be reported defamation as listed in Article 310 and 311 of the Criminal Code is the one who attacked his honor, dignity demeaned, so that his name be reprehensible in public. However, still no defense for those accused of defamation if convey information to the public. First, the delivery of information was aimed Secondly, to defend themselves. Third, to reveal the truth. So people who convey information, secularlisan written or given a chance to prove that his aim was true. If you can not prove it, it's called defamation or slander.

As previously described, the Articles in Chapter XVI of Book I of the code is only set insult or defamation against any person (individual / individuals), whereas insult or defamation against government agencies, board of an association, or a class of people, then arranged in special chapters, namely:

Other than as set out in the Code of Penal (Penal Code), relating to "defamation" is also stipulated in Law No. 32 of 2002 on Broadcasting and Law No. 11 Year 2008 on Information and Electronic Transactions.

According to the Indonesian General Dictionary "Humiliation" is derived from the word "Hina" which means low position (both in terms of the rank of dignity or deed behavior). "Humiliation" means slander or act of humiliation or it humiliating, so insults can be given as a deed derogatory good position rank, dignity, actions and behavior of a person

According a.b Loebis, the definition of insult is "aanranding van eer of geode naam" which means violating the honor and good name.

As also mentioned in Article 134 of the Criminal Code, there is the word "intentionally" According to Indonesian dictionary "accidentally" or intentionally meaning was intended, intended or desired, it is with an intention or purpose in advance.

"Accidentally" (opzet) means de (bewuste) richting van den will open bepaald misdrieff (which will be realized are indicated for certain crimes). Insults (violating the honor and reputation) is done by sipelakunya deliberately, meaning that it must require violating the honor and reputation of a person he despised.

As explained by the NII a.b Loebis, that an insult directed at a person's honor and good name, honor is the value of a person as a human being, and a good name is a name that is not dishonorable given society by taking into account the person.

C. The forms of humiliation and nature

As known in addition to Article 134, Article 136 bis and Article 137 of the Criminal Code there are also some forms of humiliation stipulated in Chapter XVI of the Criminal Code, from Article 130 to Article 321.

In his a.b Loebis argue, that there is some form of humiliation, such as;

- 1) Smaad (insult), Article 310 paragraph 1 of the Criminal Code
- 2) Smaadrift (insult with writing), Article 130 paragraph 2 of the Criminal Code
- 3) An insult to State employees who are or have anything to do with carrying out job duties lawfully, Article 316 of the Criminal Code
- 4) Lasterlijke aanklack (false complaints to the authorities, which can pollute baiak someone's honor or reputation), Article 317 paragraph 1KUHP
- 5) Lasterlijke Verdachtmaking (complaints to the authorities so as suspected of committing a crime), Article 318 paragraph 1 of the Criminal Code

Insults are set out in the Second Book of Chapter XVI of the Criminal Code is included into different delikaduan with Article 134; Article 136 bis and 137 of the Criminal Code that is not a complaint-based offense (klachdelict) except as stipulated in Article 316 of the Criminal Code, It can be seen in Article 319 which reads;

"Insults were threatened with criminal under this chapter, is not required if no complaints from people affected by the crime, except for Article 316."

Complaints defined as an unequivocal statement (oral or written or written) from a person who is entitled to complain that tells the official investigator or investigators about has committed a criminal offense by a person, accompanied by a request for examination and for further prosecution to the court.

To a complaint in the present in two forms:

- a) Absolute (absolute), which by its nature can only be prosecuted if there is complaint
- b) Relative, which is classified as a complaint-based offense just along between actors with a close connection to the victim.

According to Article 72 of the Criminal Code menyebt that, for the offenses of complaint, the victim or against crimes directed will have the authority to complain, but these powers are an exception, according to the provisions of Article 320 Criminal Code insult to the deceased person gives authority to the family of blood relatives by marriage in line straight.

III. DISCUSSION

1. The legal consequences of the same conduct by the Article 134 Article 136bis and Article 137 of the Criminal Code after the release of the decision of the Constitutional Court in the Test Case Number 013-022 / PUU-IV / 2006adalah:

Based on its authority, the Constitutional Court has given its ruling on judicial review of Article 134, Article 136bis and Article 137 of the Criminal Code on defamation against the President and / Vice President.

Judges of the Constitutional Court assesses Article 134 Article 135bis and Article 137 of the Criminal Code to legal uncertainty (rechsonzekerheid) and is no longer relevant to implemented in a democratic country such as Indonesia, the State Republican form and sovereign people.

a) The interpretation of the Constitutional Court

On Wednesday, December 6, 2006 the Constitutional Court has given its verdict. Court's decision stated that Article 134, 136bis and 137 of the Criminal Code is contrary to the Constitution of the Republic of Indonesia Year 1945 and declared not legally mengikiat. In the decision, there are four people of the Constitutional Court had a different opinion (Opinion Disenting) diantaranya, Constitutional Court Justice I Dewa Gede Palguna, Sudarsono, H.A.S, Natabaya and H. Achmad Roestandi.

According to the Constitutional Court Justice I Dewa Gede Palguna and Sudarsono consideration that there were insufficient grounds to declare the provisions petitioned Tests in the petition as the provisions that are contrary to the Constitution of 1945, so that the petition should be rejected.

According to the Constitutional Court HAS, Natabaya and H. Achmad Roestandi also stated the same thing, that from the reasons outlined by the applicant in his application to Article 134, Article 136bis and Article 137 of the Criminal Code does not conflict with the Constitution of the Republic of Indonesia Year 1945 ,

This diversity of opinion is one characteristic of the decision in the Constitutional Court, because each judge is authorized to provide imterpretasi constitution based on the knowledge and thoughts on the subject perkara. Interpretasi are set forth in the legal considerations on the decision of the Constitutional Court.

The interpretation given by the Constitutional Court against Article 134, Article 136bis and Article 137 of the Criminal Code in accordance with the arguments put forward by the applicant that the articles are contrary to the Constitution of the Republic of Indonesia Year 1945.

Court argued that Indonesia as a democratic constitutional state, a republic the sovereignty of the people and uphold human rights as defined in the Constitution of the Republic of Indonesia Year 1945, it is not relevant in the Code of Penal Code still contains Article -Pasal such as Article 134, Article 136bis and Article 137 which confirms the principle of equality before the law, reducing the freedom to express ideas and opinions, freedom of information and the principle of legal certainty.

Thus, in the draft Penal Code which is a renewal and the Code of Penal colonial legacy also must not contain clauses that are identical or similar to Article 134, Article 136bis and Article 137 of the Criminal Code. Moreover, the threat of punishment for violation of Article 134 of the longest six years in prison can be used to inhibit the democratic process, especially access to public offices which require a person never convicted of a criminal offense punishable by imprisonment of five years or more.

When viewed from nature, Article 134, PSAL 136bis and Article 137 of the Criminal Code does not constitute a crime on complaint (klachtdelict). King's dignity does not justify the King to act as pengagdu (aanklager) ". Article 134 (as the concordance of Article 111 WvS Nederland) is the connection-specific article imposing criminal defamation against the King (or Queen) Dutch. "Private King is closely related (verweven) with the interests of the state (staasbelang), so that the dignity of a king requires Special protection.

The threat of a prison sentence in Article 134 of the Criminal Code (formerly Article 134WvS Nederlands - Indie) more enduring constant threat of imprisonment set forth in Article 111 WvS Nederland, the penalty of imprisonment of six years or a maximum fine of three hundred rupiahs in Article 134 of the Criminal Code, while threats imprisonment contained in Artikel111 WvS Nederland is a maximum of five years or a maximum fine of three hundred guilders. more enduring constant threat of punishment imposed in the colonies than the penalty imposed in negeri Netherlands.

Definition of humiliation (belediging) according to Article 111 WvS Nederland have the same meaning with the understanding belediging according to Article 261 WvS Nederland, or Article 310 of the Criminal Code. WvS Nederland that Article 111 (or Article 134 of the Criminal Code) is the specificity of the offenses in Chapter XVI WvS Nederland on defamation, or Chapter XVI of the Criminal Code. So the sense of humiliation under Article 134 of the Criminal Code relating to defamation in the sense of Article 310-321 KIHP. But according to Mardjono Reksodiputro, treatment laws are different (discriminating) where the offender (dader) Article 134 of the Penal Code carries a penalty of more enduring constant (most lamaenam years) compared with the threat of a heavier sentence (a maximum of six years) compared with the threat of imprisonment for the perpetrators of defamation pursuant to Article 310 Penal Code which is punishable by a maximum imprisonment of nine months or a maximum fine of four thousand five hundred rupiah and the perpetrators will be prosecuted on the basis of the complaint (klacht).

In addition to the above, the Constitutional Court also considers the opinion of the experts, Mardjono Reksodiputro, and J.E Sahetapy, who view these Articles do not need to be applied anymore. Mardjono Reksodiputro, found, the sense of humiliation must use a growing understanding in the community about the Article 310-321 Criminal Code. Taking into account the developments, the social values of the fundamental (social values) in a democratic society that is modern, then the defamation offense should no longer be used to inhibit criticism and protest against the policy of the government (central and local), as well as government officials (central and local). No more special defamation offense against the President or the Vice President, in a republic where the state's interests can not be associated with personal or Vice-President, as is the case for a King in a kingdom. According Mardjono Reksodiputro, found in Article V Oendang-Oendang No. 1 of 1946 states: "The criminal provisions that are entirely or partially unenforceable, or contrary to the position of the Republic of Indonesia as an independent state, or do not have meaning again, must be entirely or as invalid."

In addition, the expert also stated, necessary to distinguish between criticism and defamation, slander and insult. Democracy can function when balanced with reforms. Without reform, democracy will become a 'dead letter'.

The Court also present expert witness, namely: Andi Hamzah, who think that, the problem is not the norm, but rather on the application of these norms by the Attorney. In the Book of the Law of Criminal Law adheres to the principle of opportunity, so that whether to charge or not is up to the prosecutor, as well as whether one does it is an insultor criticism is the authority of the prosecutor or the judge criminal court, not the authority of the Constitutional Court. If Article 134, Article 136bis and Article 137 of the Criminal Code was abolished, the perpetrators could still be convicted there of Article 310, although less severe sanctions and a complaint-based offense.

Third Amendment Act of 1945 Article 1 Paragraph (2) reads:

"Sovereignty belongs to the people and carried out according to the Constitution. "

Sovereignty or sovereignty be on people and the President or Vice President is elected directly by the people, so therefore responsible to rakyat. Martabat President or Vice President is entitled to be respected in protocol terms, but can not be given privileges resulting status and treatment as a human whose dignity is substantively different from the citizens before the law lainnya. Presiden or Vice President should not be given preferential treatment in a discriminatory law privilege different from the position of the people as the holder of sovereignty. Except as procedural in order to support specific functions privilege can be given to the President and / or Vice President

In the application of Article 134, Article 136bis and Article 137 of the Criminal Law Act could create legal uncertainty (rechtsonzekerheid) because it is very susceptible to the interpretation whether a protest, statement or opinion constitutes a criticism or insult against the President or Vice President. It is constitutionally contradictory to Article 28D Paragraph (1) of the 1945 Constitution can inhibit communications and efforts to obtain information, as guaranteed by Article 28F of the Act of 1945. Defamation offense against the President and / or Vice President according to the law should be applied to Article 310. Article 321 of the Code Penal, when humiliation (belediging) addressed in his personal qualities. And Article 207 of the Code of Penal Code in the case of insults addressed to the President and / or Vice Presidents as officials (als ambtsdrager).

With the ruling of the Constitutional Court judges are above the constitution have difference of opinion (Opinion Disenting). Hakim Constitution states that have disagreements, the petition of the applicant must be rejected and the view that there were insufficient grounds to declare the provisions unconstitutional petitioned OF 1945.

According to them, the article still need to protect the dignity of the President and Vice Presiden. Mereka rate, the case at hand Eggy and Income is a matter of application of the law of the investigator is not a form of violation of Constitutional Rights. The disenter also confirmed that it is in the responsibility of the Parliament together with the Government to undertake a legislative review of the legislation. All that will be is up to the discretion of law (legal policy) of the legislators in this Parliament and the Government, if the defamation offense against the President which is a stand-alone offense (zelfstandigedelict) will be to a complaint (klacht delict). Likewise, the threat of punishment directed against defamation offense against the President will receive a (strafvermindering) or not.

From the view of the Constitutional Court relied upon as legal considerations in the Decision Test Case Number 013-022 / PUU-IV / 2006 related to insults against the President and the Vice President uses the interpretation of the historical approach. Bhawa insult according to history of the formation of the code by the colonial government was intended to protect the future King or Queen of the Netherlands which is a chapter of special treatment because of the dignity of a king or queen that does not justify the King or Queen to act as complainant.

According to the authors that the view of the Constitutional Court makes the historical approach as the basis of legal considerations in Test Case Decision Number 013-022 / PUU-IV / 2006 related to an insult against the President or Vice President is right, because through history approach the Constitutional Court can determine the purpose and articles of interest why the special treatment applied to the colonial rule. so that the historical reasons the Constitutional Court in its decision stated that *pasa-article* with contempt of the President or Vice President of Article 134, Article 136bis and Article 137 of the Criminal Code is contrary to the Constitution of the Republic of Indonesia Year 1945 and no longer have binding legal force ,

In the application of Article 134, Article 136 bis and Article 137 of the Criminal Code used to protect the President and the Vice President, in this case the contempt shown to his position as President and Vice President was not indicated on his personal qualities, this provision applies since established by Act 1946 No. 1 of the Criminal Code until finally declared contrary to the Constitution of the Republic of Indonesia Year 1945 and no longer have binding legal force by the Constitutional Court in its Decision Testing Case no: 013-022 / PUU-IV / 2006.

Thus the application of Article 134 of the Criminal Code is not a complaint-based offense, which means that without a complaint from the President or the Vice President, then insult to them may be filed by the prosecutor to the court because of his position (*ambtshalve*).

If the position of he who he despised it, he did not know, that means he does not know that the person he despised it is the president or vice president, the Articles shall not be applicable to it, but that can only be applied is the Articles of Chapter XVI Books Second Criminal Code.

In the case of contempt shown to someone *yangbukan* the President or the Vice President then apply to him the provisions of Chapter XVI Criminal Code on defamation are adjusted from the Criminal Code Article 310-321.

The provisions of the act in contempt shown to "someone" who is a broader scope of application, in contrast to the case with Chapter II of the Criminal Code of crimes against the President and Vice President in its provisions specifies that insult is addressed only to the President or Vice President.

The words contained in Article 134 of the Penal Code also contained in Article 310 paragraph 1 of its provisions in the Criminal Code that reads as follows:

Whoever intentionally violating the honor and reputation of a person, accusing a certain fact, the real purpose of spreading, deemed guilty of insult and is punishable by a maximum imprisonment of nine months or a maximum fine of five hundred thousand rupiah *empar*.

Aside from what is contained in Article 144 of the Criminal Code application required additional elements.

a) by alleging a certain fact

b) The real purpose for spreading

Whereas in the application of Article 134 of the Criminal Code only enough to meet only two elements:

a) Violating the honor and reputation

b) Deliberately

Selanjutnya Menurut Simons opinion, an insult it is considered to occur if:

a) If the elements of a good name, if speech that violates someone's good name has been known by others, not necessary by the person's good name has been violated.

b) If the elements of a person's dignity, the violation of a person's dignity it had happened, when the speech that violates the honor it has been to her own.

Another case in Noyon, in terms of Chapter II second book of the Criminal Code he argued, that's a violation of honor, did not need to be the person himself knows, AB Loebis agree with what it says by Noyon that for offenders honor or reputation of a person is quite the utterance to ear or known by others (third parties) need not be well known by those who are disadvantaged, this means that such humiliation if spoken and heard by a third party on the same day that insult was considered to have occurred, although the injured party just found out another day.

With the enforcement of the principle of non-retroactivity and the Act is deemed valid until declared contrary to the Constitution of the Republic of Indonesia Year 1945, the articles of the draft Penal Code is still valid until December 6, 2006.

Constitutional Court decision related to the review of Article 134, Article 136bis and Article 137 of the Criminal Code binding legal force since completed pronounced on Wednesday, December 6, 2006 in a plenary session open to the public. Since the judgment is read, the investigators and prosecutors will no longer be able to sue a person who committed acts or acts that can be charged under Article 134, Article 136bis and Article 137 of the Criminal Code, because those articles are otherwise contrary to the Constitution of the State Republic of Indonesia Year 1945 and no longer have binding legal force.

But before those articles are otherwise contrary to the Constitution of the Republic of Indonesia Year 1945 and does not have binding legal force, the defendant who became applicant had been charged with the act of insulting the President and submitted to court the country. The defendant prosecuted and sentenced by the judge after the decision of the Court Konstitusi.106

In this case the prosecutor and district court judge based his opinion on the stance that the decision is not retroactive and does not have the legal consequences of the actions of the defendant committed before the Court's decision Konstitusi.107

Such thoughts are not in accordance with the provisions of the Criminal Justice Act which regulates the First Book of Common rules in Chapter I of the boundary with the entry into force of criminal law in the legislation contained in Article 1 Paragraph (1) and (2). Sebagaimana contained in paragraph (1) that an act can not be convicted unless *kekuatan* Based on the provisions of the criminal law that has ada. bahwa provisions concerning defamation against the President or Vice-President is the basis for the prosecution and sentencing by the judge was initially set at the Second Book of the Criminal Code regulating the crime in Chapter II of the crimes against the dignity of the President and Vice President, but the conditions being tested has been declared contrary to the Constitution of the Republic of Indonesia Year 1945 and no longer have binding legal force.

Similarly, contained in paragraph (2) that, bilaman there is a change in the law after the deed is done, then the defendant applied the provisions of the most favor. So the actions taken by prosecutors and judges who prosecute and convict the defendant with a provision that has been declared contrary to the Constitution of the Republic of Indonesia Year 1945 and has no legal binding, contrary to Article 1 Paragraph (2) Criminal Code.

In terms of loss of protection of the dignity of the President or the Vice President does not mean humiliation (*beledaging*) against him be legalized. Article 310-312 Criminal Code can be used as the basis for the prosecution of people who intentionally insults or other acts that are considered unpleasant for President or Vice President as Personal qualities. And also Article 207 of the Code of Penal Code against the President as officials (*als ambtsdrager*). Only difference is, Salain criminal who threatened not weighing the articles of insult against the President and Vice President, this article is also a "complaint-based offense" (*klacht delict*) rather than "offense usual" Prosecutions can only be performed where previously there should be reporting in advance of the party feels insulted by taking into account the responsibility of reporting time.

The mentioned above in accordance with the views Andi Hamzah, as an expert witness that, despite the aforementioned articles were removed, in case of the same conduct after the decision of the Constitutional Court, the perpetrator insults can still be charged with Article 310 of the Criminal Code although less severe sanctions and a complaint-based offense.

2. The legal basis which can be used in case of defamation through cyberspace is:

A. Send electronic mail (e-mail) directly addressed to the Privacy Policy Facebook to inform the other party that makes a duplicate with the account (account) on behalf of your friends with the intent of the creator of the series for defaming the school, and asked to close account (account), so that the offender no longer be able to repeat his actions, and

B. Reporting to authorities on suspicion of the crime of defamation and insult.

While in Law No. 11 of 2008, Article 27 paragraph (3) which states:

"Any person intentionally and without right to distribute and / or transmitting and / or make the inaccessibility of Electronic Information and / or Electronic Documents which have a charge of insult and / or defamation.

"Related to report to the authorities, there are two (2) a legal basis which can be used as the basis of a report that is defamatory under Law No. 11 Year 2008 on Information and Transactions

Electronics ("EIT Law") and insults by the Code of Penal ("Criminal Code"), which in principle can be combined.

1. Defamation Based UU ITE

In the ITE Law, defamation stipulated in Article 27 paragraph (3) jo. Article 45 paragraph (1), each of which is cited as the following:

Clause 27 (3): "Any person who deliberately and without rights to distribute and / or transmitting and / or make the inaccessibility of electronic information and / or electronic documents laden insult and / or defamation".

Article 45 paragraph (1): "Any person who meets the elements referred to in Article 27 paragraph (1), paragraph (2), paragraph (3), or paragraph (4) shall be punished with imprisonment of 6 (six) years and / or a fine of 1,000,000,000.00 (one billion rupiah) "

Thus, the provisions of Article 27 paragraph (3) of the Act ITE mentioned above, defamation by means duplicate account (account) facebook fulfilled the "made inaccessibility of electronic information and / or electronic documents", thereby including the criminal act.

2. Insult Under the Criminal Code

If the IT Act governing defamation, Penal Code regulates article of insult.

Article 310 of the Criminal Code, which is quoted as follows: "Any person who deliberately attacking the honor or reputation of someone alleges something, which means the light so that it is generally known, is threatened because of contamination with a maximum imprisonment of nine months or a maximum fine of four thousand five hundred rupiah "

So that the provisions of Article 310 of the Criminal Code above, must prove the following elements:

- a) The element of intent;
- b) Elements attacking the honor and good name;
- c) The element in public.

To prove the allegations, is not easy to present evidence such as the crimes are virtual (cyber crime). However, preliminary evidence can be presented with a proof print (print-out) which shows the defamation of the school, so that investigators can perform data processing and further information. To be sure, indispensable presence of experts in the field of information and technology that can help us translate the facts in the virtual world has become a legal fact.

In terms of civil law, with evidence of a permanent legal decision *berkuatan* (*inkracht van gewijsde*) regarding the intended criminal, so it can be filed a lawsuit against the law that is based on the provisions of Article 1372 Book of the Law of Civil Law, was quoted as follows:

"Civil claim about humiliation is intended redress the loss and recovery of honor and good name."

Article 310 of the Criminal Code and article 27 paragraph (3) of the Act ITE, to be categorized as a crime of defamation, it must prove the following elements:

1. The existence of intent;
2. Without the right (without permission);
3. Aim to attack the reputation or honor;
4. To be known by the public.

Crime in cyberspace is an emerging modern crime along with the development of science and teknologi.Kejahatan in the virtual world have different characteristics with conventional kejahatan offenses contained in the Criminal Justice Act (Criminal Code)

IV. COVER

A. Conclusions

1. Effects Against Same Deeds Related Article 134, Article 136bis and Article 137 of the Criminal Code after the Constitutional Court's decision is that, the provisions of Article 134, Article 136bis and Article 137 of the Criminal Code regulating defamation against the President or the Vice President has been declared contrary to Constitution of the Republic of Indonesia Year 1945 and does not have binding legal force that can no longer be used as the basis for prosecution by the prosecution and sentencing by the judge. Nevertheless, the act of humiliation is still possible to be prosecuted under the Criminal Code Article 310-312 as personal qualities and also Article 207 of the Criminal Code against the President as officials (als ambtsdrager).
2. Article 310 of the Criminal Code and article 27 paragraph (3) of the Act ITE, to be categorized as a crime of defamation, it must prove the following elements:
 - a. The existence of intent;
 - b. Without the right (without permission);
 - c. Aim to attack the reputation or honor;
 - d. To be known by the public.

Crime in cyberspace is an emerging modern crime along with the development of science and teknologi.Kejahatan in the virtual world have different characteristics with conventional kejahatan offenses contained in the Criminal Justice Act (Criminal Code)

B. RECOMMENDATION

Actions of prosecutors and judges to prosecute and sentenced to the applicant as defendant-related provisions of Article 134, Article 136bis and Article 137 of the Criminal Code regulating defamation against the President or the Vice President has been declared contrary to the Constitution of the Republic of Indonesia Year 1945, should be freed on appeal or cassation, given the base which is required by the prosecution and sentencing by the judge contrary to the Constitution of the Republic of Indonesia Year 1945 and does not have binding legal force.

READING LIST

1. Books

- A.B. Loebis, Contempt Against the President / Vice President, National Library, Jakarta, 1983
Achmad Ali, Raising the Curtain Law, Gunung Agung, Jakarta Matter to two, 2002
Achmad Roestandi, the Constitutional Court In the FAQs, First Edition
Adami Chazawi, Lesson Criminal Law: Interpretation of the Criminal Law, the Basic Punishment, weighting and Mitigation, Crime Complaints, Perbarengan And the Doctrine of Causality, Part Two, King Grafindo, Jakarta, in 2005
Johnny Ibrahim, Theory and Research Methodology Normative Legal Matter Second, Bayumedia, Malang 2006
January Rammelinnk, Criminal Law: comments Over the articles Foremost From the Book of Law Criminal Law Dutch counterpart in the Code of Penal Indonesia.
W. J. S Poerdarwarmita, General Indonesian Dictionary, Moulds Fifteenth, Balai Pustaka, Jakarta. 1996
Wirjono prodjodikoro, Azaz Azaz-Constitutional Law In Indonesia, Prints Fifth, Dian Rakyat, Jakarta, 1983

2. Regulation Legislation:

- Constitution of the Republic of Indonesia Year 1945
Law Number 24 Year 2003 Jo Law Number 8 Year 2011 tentang Amendment Constitutional Court.
Law Number 48 Year 2008 on Judicial Authority
The draft Civil Code (Burgerlijk Wetboek, Staatsblad 1847 No. 23)
The Code of Criminal Code (Wetboek van Strafrecht, Staatsblad 1915 No. 73)
Law Number 11 Year 2008 on Information and Electronic Transactions

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