DECISION

Number 013-022/PUU-IV/2006

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing and deciding upon constitutional cases at the first and final level, has passed a Decision on the Petition for Judicial Review on the Criminal Code against the 1945 Constitution of the Republic of Indonesia, filed by:

I. Petitioner of Case Number 013/PUU-IV/2006

Dr. Eggi Sudjana, SH., M.Si., Advocate, residing at Villa Indah Padjajaran, Jalan Sultan Agung No. 1, Bogor Tengah, West Java and/or Kuningan Mansion, Jalan Perintis No.16, Mega Kuningan, Jakarta 12950, in this case granting a power of attorney to Firman Wijaya, SH., Nurlan HN, SH., Welliam Suharto, SH., Tina Tamher, SH., M. Hadrawi, SH.; Dorel Almir, SH., Mkn., David M. Ujung, SH., Weadya Absari, SH., Hasraldi, SH., advocates at the Law Firm “EGGI SUDJANA & PARTNERS”, having its office at Kuningan Mansion

Jalan. Perintis No.16, Mega Kuningan, Jakarta 12950, based on a Special Power of Attorney dated 23 July 2006;

As ---------- **Petitioner I**;

II. Petitioner of Case Number 022/PUU-IV/2006

Pandapotan Lubis, Private Entrepreneur, residing at Jalan Cikopak Perumahan Mulia Mekar, Rt. 002/Rw. 02, Desa Cikopak, Kecamatan Sadang, Kabupaten Purwakarta, Jawa Barat, in this matter granting a power of attorney to Irma Hattu, SH., Marolop Tua Sagala, SH., Sattu Pali, SH., Brodus, SH., Nixon Gans Lalu, SH., and Sabar Sigalingging, SH., Advocates and Legal Consultants at Law Clinic "Merdeka", having its address at Kompleks Bina Marga, Jalan Pramuka Raya Number 56, Jakarta 13140, based on A Special Power of Attorney Number 01/SK/JR-MK/IX/2006, dated 23 September 2006;

As ---------- **Petitioner II**;

Hereinafter shall be referred to as ---------- **Petitioners;**

Having read the petitions of the Petitioners;

Having heard the testimonies of the Petitioners;

Having heard and read the affidavits of expert witnesses presented by the Petitioners;

Having heard the testimonies of witnesses presented by the Petitioners;

Having heard and read the affidavits of expert witnesses presented by the Constitutional Court of the Republic of Indonesia;

Having examined the evidence;

LEGAL CONSIDERATIONS

Considering whereas the purpose and objective of the Petitioners are as described above;

Considering whereas before entering the main issue of the case, the Constitutional Court (hereinafter the Court) must first consider the following matters:

1. Whether or not the Court has the authority to examine, try and decide upon the petition for judicial review on Article 134, Article 136 *bis*, and Article 137 of the Criminal Code;

2. Whether or not the Petitioners have the legal standing for filing the petition for judicial review on Article 134, Article 136 *bis*, and Article 137 of the Criminal Code;

With regard to the aforementioned three matters, the Constitutional Court is of the following opinions:

1. THE AUTHORITY OF THE COURT

Considering whereas based on Article 24C paragraph (1) of the Constitution of the Republic of Indonesia of 1945 (hereinafter the 1945 Constitution) in conjunction with Article 10 Paragraph (1) of Law of the Republic of Indonesia Number 24 of 2003 concerning Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316, hereinafter the CC Law), the Court has the authority to try at the first and final level, the decision of which shall be final, as well as to conduct judicial review on laws against the Constitution, to settle disputes on authorities between state institutions whose authorities are bestowed by the Constitution, to decide upon the dissolution of political parties and to decide upon electoral disputes;

Considering whereas the petitions of the Petitioners are regarding judicial review on the Criminal Code, which is originated from *Wetboek van Strafrecht voor Nederlandsch – Indie (Staatsblad 1915* Number 732), which has been enacted under Law Number 1 Year 1946 concerning Criminal Code in conjunction with Law Number 73 Year 1958 concerning Declaration of the Applicability of Law Number 1 Year 1946 concerning Criminal Code Throughout the Territory of the Republic of Indonesia, and to amend the Criminal Code;

Considering whereas even though the law being petitioned for judicial review has been enacted long before the issuance of the Amendments to the 1945 Constitution, which according to Article 50 of the CC Law is beyond the jurisdiction of the Court, however since the issuance of the Decision of the Court Number 066/PUU-II/2004 dated 12 April 2005 in the case of judicial review on Article 50 of the CC Law and Law Number 1 Year 1987 concerning Indonesian Chamber of Commerce (KADIN) against the 1945 Constitution, Article 50 of the CC Law has been declared as no longer having binding legal force, and therefore the Court has the authority to examine, try and decide upon the petition of the Petitioners;

2. LEGAL STANDING OF THE PETITIONERS

Considering whereas pursuant to the provision of Article 51 paragraph (1) of the CC Law and the Elucidation thereof, the Petitioners for judicial review on laws against the 1945 Constitutions are the parties who deem that their constitutional rights and/or authorities are harmed by the establishment of a law, namely:

(a) Indonesian Citizen individuals (including group of people having common interest);

(b) units of customary law communities insofar as still in existence and in accordance with the development of the community and the

principle of the Unitary State of the Republic of Indonesia regulated in a law;

(c) public or private legal entities; or

(d) state institutions.

Considering also that since the issuance of Decision Number 006/PUU-III/2005, the Constitutional Court has determined 5 (five) requirements for the existence of constitutional losses as intended in Article 51 paragraph (1) of the CC Law as follows:

a. Petitioners must have constitutional rights granted by the 1945 Constitution;

b. such constitutional rights shall be deemed to have been harmed by the coming into effect of a law;

c. the constitutional right losses shall be specific and actual in nature or at least potential in nature which pursuant to a logical reasoning will take place for sure;

d. there is a causal connection (*causal verband)* between the constitutional right losses and the law against which review is petitioned;

e. there is a possibility that upon the granting of a petition, the constitutional right losses argued shall not come into existence or shall not occur any longer;

Considering whereas there are two Petitioners in this case whose case numbers are as follows:

I. Case Number 013/PUU-IV/2006

The Petitioner Dr. Eggi Sudjana, S.H., M.Si, has filed a petition for judicial review on Article 134 and Article 136 *bis* of the Criminal Code which are deemed contradictory to Article 28F of the 1945 Constitution. The Petitioner is of the opinion that Article 134 in conjunction with Article 136 *bis* of the Criminal Code fail to ensure legal certainty, especially for obtaining information as intended in Article 28F of the 1945 Constitution. The Petitioner deems that his constitutional right has been harmed by the application of Article 134 and Article 136 *bis* of the Criminal Code, as he is being tried by the Central Jakarta District Court, for alleged intentional defamation against the President. Whereas actually, according to the Petitioner, as an Indonesian Citizen, his visit to the office of the Commission for Corruption Eradication (KPK) on Tuesday, January 3, 2006, was for meeting the Chairperson of the KPK in order to obtain clarification as to the rumors about the gifts of Jaguar cars to the President's family. According to the Petitioners, Article 134 and Article 136 bis of the Criminal Code is a copy of the W*etboek van Strafrecht*

Nederland applicable in the colonies of the Netherlands, for safeguarding the dignity and honor of the King (or Queen) of the Netherlands. The two articles are deemed no longer in line with the developments in a democratic environment, especially during the reform era;

II. Case Number 022/PUU-IV/2006

The Petitioner Pandapotan Lubis has filed a petition for judicial review on Article 134, Article 136 *bis* and Article 137 of the Criminal Code, which are deemed contradictory to Article 27 paragraph (1), Article 28, Article 28E paragraphs (2) and (3), Article 28J paragraphs (1) and (2) of the 1945 Constitution. The Petitioner is of the opinion that the application of the aforementioned criminal provisions harms his constitutional rights as he is now being tried by the Central Jakarta District Court for violating the three criminal articles, in relation to the conveyance of views and opinions together with several activists at the Hotel Indonesia traffic circle, Jakarta, by also displaying flags, banners and posters, on May 16, 2006, at around 11:00 West Indonesia Time, in order to convey criticism to President Susilo Bambang Yudhoyono and Vice President Jusuf Kalla, and also to ask them to step down. According to the Petitioner, the aforementioned criminal provisions are adaptation from W*etboek van Strafrecht* (WvS), in which the position of the previous ruler, the Queen of the Netherlands, including the Governor General of Netherlands East Indies, has been replaced by the President and Vice President of the

Republic of Indonesia, so that if these articles are applied on Indonesian people who have claimed their independence, it would like saying that Indonesian people are still under the subjugation of their own people (i.e. Indonesian Government);

Considering whereas based on the aforementioned matters, it has been proved that the Petitioners qualify to file petition for judicial review on the Criminal Code, namely as individual Indonesian citizens whose constitutional rights bestowed by the 1945 Constitution are deemed as having been harmed by the application of the *a quo* articles of the Criminal Code. The loss suffered by the Petitioners is specific and actual, and constitutes a causal relationship between the loss of constitutional rights and the application of the *a quo* articles of the Criminal ode, in which such loss would not occur if their petition is granted;

Considering whereas accordingly, The Court is of the opinion that the Petitioners have the legal standing in this case;

Considering further, as the Court has the authority to examine, try and decide upon the *a quo* petition and the Petitioners have the required legal standing, The Court will consider the principal issue of the Petitioners' petition;

3. THE PRINCIPAL ISSUE OF THE PETITION

Considering whereas the Petitioners have filed a petition for judicial review on the following articles in the Criminal Code:

- Article 134 which reads, "*Intentional defamation against the President or Vice President, shall be subject to a maximum imprisonment of six years, or a maximum fine of four thousand five hundred Rupiah*";

- Article 136 bis which reads, "*The intentional defamation as intended in Article 134 shall also include the deed as intended in Article 315, when this is committed in the absence of the defamed person, either in public through acts of outrage, or not in public but in the presence of more than four persons, or otherwise in the presence of a third person, who, even though being there at his own will, feels offended, by acts of outrage, also verbally or in writing*";

- Article 137 paragraph (1) which reads, "*Any person who distributes, openly exhibits or puts up a writing or depiction which contains a defamation against the President or Vice President, with the intent to make the defaming contents widely known or increase the publicity thereof, shall be subject to a maximum imprisonment of one year and four months, or a maximum fine of four thousand five hundred Rupiah";* Paragraph (2) "*In the event that the guilty person commits the crime in his profession and that, during the commission of the crime two years have not yet elapsed, since that an earlier conviction for a similar crime has become irrevocable, he can then be deprived from practicing that profession";*

Considering whereas the Petitioner Dr. Eggi Sudjana, S.H., M.Si. argued that Article 134 and Article 136 bis of the Criminal Code are contradictory to Article 28F of the 1945 Constitution which reads "*Every person shall have the right to communicate and obtain information for the development of his personal life and his social environment, and shall have the right to seek, acquire, possess, keep, process and convey information by using all available channels".* Whereas the Petitioner Pandapotan Lubis argued that Article 134, Article 136 bis, and Article 137 of the Criminal Code are contradictory to the principle of equality before the law [Article 27 paragraph (1)], the principle of freedom of expression [Article 28 in conjunction with Article 28E paragraphs (2) and (3)], and the principle that a person must respect the human rights of other person (Article 28J) as set forth in the 1945 Constitution;

Considering whereas to support his arguments, the Petitioner Dr. Eggi Sudjana, S.H., M.Si. presented written evidence (Exhibit P.1 – P.5), and also presented expert witnesses Sutito, S.H., M.H. and Effendi Ghazali, Ph.D., whose complete affidavits are included in the description of the State of the Case, but principally stated that Article 134 and Article 136 bis of the Criminal Code are contradictory to Article 28F of the 1945 Constitution, and an expert witness dr. Hariman Siregar who stated that Article 134 and Article 136 *bis* of the Criminal Code are *lex specialis* of Article 310 of the Criminal Code, which is a *lex generalis* and their interpretation is very flexible (rubber provisions) so as to cause legal uncertainty. In addition, the Petitioner also presented witnesses, namely Yeni Rosa Damayanti, Andrianto, S.IP., and Bambang Beathor Suryadi,

who described their experience as victims of Article 134 and Article 136 *bis* of the Criminal Code, which are deemed as having harmed their freedom to express their opinions and convey criticism to the Government;

Considering whereas the Petitioner Pandapotan Lubis, in addition to written evidence (Exhibits P.1 – P.4), also presented a witness Dr. Ir. Sri Bintang Pamungkas, who conveyed his experience as a victim of the aforementioned articles of the Criminal Code and an expert witness Prof. Dr. JE. Sahetapy, S.H., M.A., whose testimonies will be considered in the explanation about the Court's opinion along with the testimonies of the expert witnesses presented by the Court, namely Prof. Mardjono Reksodiputro, S.H., M.A. and Prof. Dr. Andi Hamzah, S.H.;

Considering whereas in the principal issue of the case, the Petitioners conveyed their request for judicial review on Article 134, Article 136 bis, and Article 137 of the Criminal Code and by considering also the testimonies of the Experts, witnesses, and the evidence presented, the Court has the following considerations;

Considering that according to the history, Article 134 of the Criminal Code being petitioned for judicial review by the Petitioners is an adaptation of Article 111 of *Nederlands Wetboek van Strafrecht* (WvS Nederlands, 1881) providing for *opzettelijke beleediging den Koning of der Koningin* with a sanction of maximum imprisonment of five years or maximum fine of 300 gulden. Based on *Koninklijk Besluit* (KB) dated 15 October 1915 Number 33, the W*etboek van Strafrecht voor*

Nederlands – Indie (WvS Nederlands – Indie) was enacted, but it did not have binding legal force until 1 January 1918, as intended in *Staatsblad 1915* Number 732. Article 134 of the WvS Nederlands - Indie reads as follows, "O*pzettelijke beleediging den Koning of der Koningin aangedaan, wordt gestraf van ten hoogste zes jaren of geldboete van ten hoogste driehonderd gulden*". Meanwhile, pursuant to Article 7 of Law Number 1 Year 1946 concerning *Peratoeran Hoekoem Pidana* (Criminal Code), the name *Wetboek van Strafrecht voor Nederlandch – Indie* was changed into *Wetboek van Strafrecht* or *Kitab Oendang-Oendang Hoekoem Pidana* (Criminal Code). Article 8 point 24 of Law umber 1 Year 1946 provides that the words *Koning of der Koningin* in Article 134 of the Criminal Code shall be replaced with *President of den Vice – President* (H. Soerjanatamihardja, *Kitab Undang-Undang Hukum Pidana*, 1952), or presently *President of Vice President*;

Considering whereas when *Wetboek van Strafrecht voor Nederlands – Indie* (1915) was applied in the Netherlands East Indies, the region was a colony of *Het Koninkrijk der Nederlanden*. Article 1 of the *Grondwet van Koninkrijk der Nederlanden* (since *Grondwet* 1813, the latest was 1938) reads, "*Het Koninkrijk der Nederlanden omvat het grondgebied van Nederland, Nederlands – Indie, Suriname en Curacao*". The highest level of the government (*oppergezag*, *opperbewind*) was *de Kroon der Nederlanden*, namely *de Koning* (*of der Koningin) van het Rijk*. The position of the King (or Queen) of the Netherlands is passed from one generation to another (*erfopvolging*). *Grondwet regelt de*

troonopvolging, waarbij is uitgegaan van Koning Willem I (*M. Spaander*, 1938: 11);

Considering whereas Article 134, Article 136 bis, and Article 137 of the Criminal Code are not complaint-based offenses (*klachtdelict*). *Deze beleediging zonder klachte vervolg* (*W.L.H. Koster Henke* et al, 1930: 92). According to *CPM Cleiren et al* (as quoted by the Expert Prof. Mardjono Reksodiputro in the hearing), "…. the dignity of the King does not allow the King to act personally as a complainant (*aanklager*)". Article 134 of the Criminal Code (as the concordance of Article 111 of WvS Nederland) is an article imposing special criminalization of defamation against the King (of Queen) of the Netherlands. "…. the individual person of the King is closely related (*verweven*) to the state's interests (*staatsbelang*), so that the King's dignity requires special protection", said *Cleiren et al*. The term *Koningin* is not limited only to the ruling Queen. *Met Koningin word zoowel de regeerende, als de niet regeerende Koningin bedoeld* (*W.L.H. Koster Henke et al*, ibid). It is said that, "*iemand die op straat uitroept, 'Weg met Koningin Wilhelmina' kan straafbaar zijn volgens artikel 134 WvS Ned. – Indie*." Furthermore, the Expert Prof. Mardjono Reksodiputro said in the hearing, "There is no reference can be found as to whether similar reasoning can be accepted in Indonesia, which has replaced the word 'King' with 'President and Vice President";

Considering, whereas the imprisonment sanction set forth in Article 134 of the Indonesian Criminal Code, (previously Article 134 *WvS Nederlands – Indie*) is

more severe than the imprisonment sanction stated in Article 111 *WvS Nederland*, namely imprisonment for a maximum period of six years or a maximum fine of three hundred Rupiah in Article 134 of the Indonesian Criminal Code. Meanwhile, Article *111 WvS Nederland* sets forth an imprisonment for a maximum period of five years or a maximum fine of three hundred gulden. The sanction is more severe for common people (*onderdaan*) of colonies compared to the sanction imposed for *burger* in the Netherlands. Common people (*onderdanen*) are demanded more to preserve the dignity of *de persoonlijke macht des Konings* (*of der Koninginen*) to maintain public order (*rechtsorde*) in colonies. Meanwhile, according to *W.A.M. Cremers* (*et al*, 1980), the definition of defamation (*belediging*) in Article 111 *WvS Nederland* has the same meaning with the definition *belediging* in Article 261 *WvS Nederland*, or Article 310 of the Indonesian Criminal Code. Likewise, *C.P.M. Cleiren* (*et al*, 1994) states that Article 111 *WvS Nederland* (or Article 134 of the Indonesian Criminal Code) constitutes the specificities of the offenses in Chapter XVI of *WvS Nederland* regarding Defamation, or Chapter XVI of the Indonesian Criminal Code. Therefore, according to expert Prof. Mardjono Reksodiputro, the meaning of defamation according to Article 134 of the Indonesian Criminal Code relates to the meaning of defamation in Article 310 – 321 of the Indonesian Criminal Code. However, the legal treatment is different (discriminative) in which the violator (*dader*) of Article 134 of the Indonesian Criminal Code is threatened with more severe sanction (six years maximum) while the imprisonment sanction for the perpetrator of defamation in Article 310 of the Indonesian Criminal Code is for a

maximum period of nine months or a maximum fine of four thousand and five hundred Rupiah, let alone that the perpetrator can only be prosecuted based on an complaint (*klacht*);

Considering, whereas with respect to the petition for review on Articles 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code filed to the Court by the Petitioners, it is now deemed necessary to consider whether or not the three criminal Articles setting forth the defamation offenses particularly against the President or Vice President are still necessary to be applied in the system of the Indonesian Criminal Code;

Considering, whereas two experts, namely Prof. Mardjono Reksodiputro, S.H., M.A. and Prof. Dr. J.E. Sahetapy, S.H., M.A., consider that the aforementioned criminal Articles not need to be applied any longer. In the hearing, the expert Prof. Mardjono Reksodiputro was of the opinion that with respect to the enforcement of Article 134 of the Indonesian Criminal Code and Article 136 bis the Indonesian Criminal Code, the meaning of defamation must correspond to the meaning applicable in the society concerning Article 310-321 of the Indonesian Criminal Code (*mutatis mutandis*). According to the expert Mardjono Reksodiputro, by considering the development of fundamental social values in a modern democratic society, the offense of defamation may no longer be used to obstruct critics and protests against government policies (central and regional), and against government officials policies (central and regional). In his opinion, there is no need for another regulation on the defamation offense

particularly against the President and Vice President. Articles 310-321 of the Indonesian Criminal Code alone are sufficient. The expert Mardjono Reksodiputro confirms that in a republic, the state's interests cannot be associated with the President (and Vice President), in contrary to a King in a Monarchic state. In the hearing, the expert Prof. Dr. J.E. Sahetapy, S.H., M.A. was of the opinion that in relation Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code, it was necessary to take into account Article V of Law Number 1 Year 1946 serving as the *toets steen* (testing stone) regarding the relevance and *raison d'etre* of the Articles in the Indonesian Criminal Code. The aforementioned Article V of Law Number 1 Year 1946 states: *"Criminal regulations that are entirely or partially inapplicable or contradictory to the status of the Republic of Indonesia as an independent state, or no longer have meaning, must be considered as temporarily inapplicable, entirely or partially.*" He considers that Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code are no longer relevant and lost their *raison d'etre* in the reformed democracy era. It is said that Article 28E Paragraph (3) of the 1945 Constitution needs to be recalled and implemented at present. Furthermore, the Expert states, "*It is necessary to differentiate critics from libels, slanders, and defamations. Democracy may only function if balanced with reforms. Without reforms, democracy will only become meaningless*";

Considering, Prof. Dr. Andi Hamzah, S.H. (an expert presented by the Court) states that the Indonesian Criminal Code reflects the civilization of a nation. Whether or not a nation allows defamations to its head of state is

reflected in the availability/absence of the norm in its Criminal Code. According to the Expert, the problem does not lay in the norm, but in the application of such norm by the Public Prosecutors. In the Indonesian Criminal Code, we adhere to the principles of opportunity. Therefore, it is up to the Public Prosecutors to press charges or not. Likewise, the authority to determine critics or defamations are held by Public Prosecutors or criminal court Judges, not the Constitutional Court. The expert Prof. Dr. Andi Hamzah, S.H further states that, "*It is okay to revoke Article 134 of the Indonesian Criminal Code. Sanctions can still be imposed based Article 310 of the Indonesian Criminal Code but it must be born in mind that Article 310 of the Indonesian Criminal Code sets forth less severe sanctions and constitutes an complaint-based offense";*

Considering, whereas at the time the Petitioners' petition for the substantiation of Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code was submitted, the third amendment to the 1945 Constitution had been drawn up (and binding). Article 1 Paragraph (2) of the 1945 Constitution reads: "*Sovereignty is held by the people and implemented pursuant to the Constitution*." Sovereignty is held by the people and the President and/or Vice President are directly elected by the people. Therefore, they are responsible to the people. The dignity of the President and/or Vice President is entitled to be respected in protocol terms, but the two leaders elected by the people may not be granted the privileges resulting in their status and treatment as human whose dignity is substantively different from other citizens. Moreover, the President and Vice President may not obtained discriminative legal privilege different from the

status of the people as the holder of the highest sovereignty, except in a procedural term in which special privileges may be granted to the President and/or Vice President to support their functions. Therefore, the aforementioned matter is constitutionally contradictory to Article 27 Paragraph (1) or the 1945 Constitution;

Considering, whereas Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code may result in legal uncertainty (*rechtsonzekerheid*) because they are extremely prone to the interpretation whether or not a protest, statement, or opinion constitutes a critic or defamation against the President and/or Vice President. The aforementioned matter is constitutionally contradictory to Article 28D Paragraph (1) of the 1945 Constitution and may one day obstruct communications and efforts to obtain information, as guaranteed Article 28F of the 1945 Constitution;

Considering, whereas Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code are potential to violate the right to freedom to state opinions both verbally and in writing, and expressions at the time such criminal Articles are used by legal apparatuses against momentums of demonstration on the field. The aforementioned matter is constitutionally contradictory to Article 28, Article 28E Paragraph (2), and Paragraph (3) of the 1945 Constitution;

Considering, therefore, with regard to the defamation offense against the President and/or Vice President pursuant to the law, Article 310-Article 321 of the Indonesian Criminal Code should be applied to defamations (*beleediging*) to the

personality of the President and Vice President, and Article 207 of The Indonesian Criminal Code should be applied to defamations against the President and/or Vice Presidents as officials (*als ambtsdrager*);

Considering, whereas in relation to the application of Article 207 of the Indonesian Criminal Code for the defamation offense against the President and Vice President as for defamations against other authorities or public agencies (*gestelde macht of openbaar lichaam*), the prosecution should indeed be made based on an complaint (*bij klacht*). In several countries, such as Japan, defamation against the Emperor, Queen, Royal Grandmother, Royal Mother or other heirs to the empire may be prosecuted based on complaints. Article 232 (2) of t*he Penal Code of Japan* sets forth that the Prime Minister shall file an complaint on behalf of the Emperor, Queen, Royal Grandmother, Royal Mother for prosecution, and if such defamations are directed to the king or president of a foreign country, the representative of the interested country shall file an complaint on behalf of the king or president. The prosecution of the violators of Article 207 of the Indonesian Criminal Code by state administrators requires future adjustments in line with the Court's considerations on Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code above;

Considering, whereas in addition to that, the existence of Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code will also hamper and/or obstruct the possibilities to clarify whether or not the President and/or Vice president has committed the violation(s) as intended in Article 7A of the 1945

Constitution that reads: ”*The President and/or Vice President may be terminated during their terms of office by the People’s Consultative Assembly based on the recommendation by the People’s Legislative Assembly if they have been proven of committing legal violations in the forms of treason against the state, corruption, bribery, and other serious criminal* offense*s or disgraceful acts or if proven that they are no longer meeting the requirements to serve as the President and/or Vice President*”, because the efforts to make such clarifications may be interpreted as defamations against the President and Vice Presidents;

Considering, whereas based on the aforementioned matters, the Court is of the opinion that Indonesia as a democratic rule of law state in the form of a republic, the sovereignty of which is held by its people, and that highly respects human rights as stated in the 1945 Constitution, it is not relevant to have articles such as Article 134, Article 136 bis, and Article 137 in its Criminal Code that negate the principle of equality before the law and decrease the freedom to express ideas and opinions, the freedom to obtain information, and the principle of legal certainty. Therefore, the Draft Indonesian Criminal Code constituting an effort to reform the Indonesian Criminal Code colonially inherited must not contain any Article the provisions of which are identical or similar to Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code. Moreover, the six-year maximum imprisonment sanction for violations against Article 134 may be used to obstruct the democracy processes, especially accesses to public positions requiring that persons applying for such positions must have not been

sentenced for committing criminal acts threatened with imprisonment for five years or more;

Considering, whereas based on all the reasons in the considerations stated above, the Court is of the opinion that the arguments of the Petitioners are reasonable and the petition must be granted;

In view of Article 56 Paragraph (2) and Paragraph (3) as well as Article 57 Paragraph (1) and Paragraph (3) of the Law of the Republic of Indonesia 24 Year 2003 regarding Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316);

PASSING THE DECISION

- **Declaring that the entire petition of the Petitioners is granted;**
- **Declaring that Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code are contradictory to the 1945 Constitution of the Republic of Indonesia;**
- **Declaring that Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code have no binding legal force;**
- **Ordering the proper announcement of these Decisions in the Official Gazette.**

Hence, this decision was made in the Consultative Meeting of Constitutional Judges on Monday, December 4, 2006 by nine Constitutional Judges, namely Jimly Asshiddiqie as the Chairperson, acting also as a Member, H.M. Laica Marzuki, H.A.S. Natabaya, Maruarar Siahaan, Abdul Mukthie Fadjar, H. Achmad Roestandi, Harjono, I Dewa Gede Palguna and Soedarsono, respectively as members, and was announced in a Plenary Session opened for public that is held today, Wednesday, December 6, 2006, in the presence of Nine Constitutional Judges, namely Jimly Asshiddiqie as the Chairperson, acting also as a Member, H.M. Laica Marzuki, H.A.S. Natabaya, Maruarar Siahaan, Abdul Mukthie Fadjar, H. Achmad Roestandi, Harjono, I Dewa Gede Palguna, and Soedarsono, respectively as members, accompanied by Cholidin Nasir as the Substitute Clerk and in the presence of the Petitioners/their Attorney-in-Fact, Government or its representatives, and the People's Legislative Assembly or its representatives;

CHAIRPERSON,

SGD.

Jimly Asshiddiqie.

MEMBERS

SGD.	**SGD.**
H. M. Laica Marzuki.	**H.A.S. Natabaya.**

SGD.	**SGD.**
Maruarar Siahaan.	**Abdul Mukthie Fadjar.**
SGD.	**SGD.**
H. Achmad Roestandi.	**Harjono.**
SGD.	**SGD.**
I Dewa Gede Palguna.	**Soedarsono.**

DISSENTING OPINIONS

With respect to the decision of the Court granting the aforementioned petition of the Petitioners, four Constitutional Judges have dissenting opinions, namely: **Constitutional Judges I Dewa Gede Palguna, Soedarsono, H.A.S. Natabaya, and H. Achmad Roestandi.**

Opinion of the Constitutional Judges I Dewa Gede Palguna and Soedarsono

Whereas the legal provisions petitioned by the two Petitioners to be constitutionally substantiated are Article 134, Article 136.bis, and Article 137 of the Indonesian Criminal Code, which respectively read as follows:

- Article 134 of the Indonesian Criminal Code:

Intentional defamation against the President or Vice President, shall be subject to a maximum imprisonment of six years, or a maximum fine of four thousand five hundred Rupiah;

- Article 136.bis of the Indonesian Criminal Code:

The intentional defamation as intended in Article 134 shall also include the deed as intended in Article 315, when this is committed in the absence of the defamed person, either in public through acts of outrage, or not in public but in the presence of more than four persons, or otherwise in the presence of a third person, who, even though being there at his own will, feels offended, by acts of outrage, also verbally or in writing;

- Article 137 of the Indonesian Criminal Code:

(1) Any person who distributes, openly exhibits or puts up a writing or depiction which contains a defamation against the President or Vice President, with the intent to make the defaming contents widely known or increase the publicity thereof, shall be subject to a maximum imprisonment of one year and four months, or a maximum fine of four thousand five hundred Rupiah;

(2) In the event that the guilty person commits the crime in his profession and that, during the commission of the crime two years have not yet elapsed, since that an earlier conviction for a similar

crime has become irrevocable, he can then be deprived from practicing that profession.

Whereas because the legal provisions petitioned by the two Petitioners to be constitutionally substantiated are provisions setting forth the defamation against the President and Vice President, as set forth in Chapter II of the Indonesian Criminal Code regarding *Crimes Against the Dignity of the President and Vice President*, the question is: Are the legal norms specifically set forth the provisions on defamation against the President (and/or Vice President) are contradictory to the 1945 Constitution?

With respect to such questions, the following shall be considered first:

- In any legal tradition, there is a universal provision that defamation is a criminal act, although the substance may be different according to the space and time, so that something that is considered as defamation in/at a certain place and time is not necessarily considered as defamation in/at another place and different time. Therefore, defamation – against any person and in the criminal law of any country- is an act that may be imposed with sanction;

- It is true that, as explained by the expert Prof. Dr. Mardjono Reksodiputro quoting the opinion of Cleiren, according to the history, the provisions of Article 134 of the Indonesian Criminal Code are intended to protect the dignity of Kings, therefore they are not formulated as complaint-based

offense but as ordinary offense. The reason is that "...a King's dignity does not justify the King to act as the party filing the complaint (*aanklager*)" and that "...a King is closely related (*verweren*) to the interests of his state (*staatsbelang*), so that the king's dignity requires a special protection". According to the expert Prof. Mardjono Reksodiputro, it is the reason for the special Article on defamation against a King ((*vide Minutes of Hearing of Case No. 013/PUU-IV/2006, date October 10, 2006*). It is also clarified by the Expert Prof. Dr. Andi Hamzah. Due to such historical reason, the expert Prof. Dr. J.E. Sahetapy, SH, MA, among others, is not of the same opinion stating that the provisions requested to be substantiated as set forth in the a quo Petitions should remain be applied at present (*vide Minutes of Hearing of Case No. 013/PUU-IV/2006 and Case No. 022/PUU-IV/2006, dated November 14, 2006*).

Therefore, by considering the reason that, according to the history, the Indonesian Criminal Code applicable at present is derived from *Wetboek van Strafrecht* inherited by the colonial government of the Netherlands in which the provisions regarding defamation against the President (and Vice President) are contradictory, based on the history of the preparation, to the intention to protect a King's dignity, the next question is: are such provisions relevant to be implemented to the President (and Vice President) at present? In this matter, we are of the opinion that they are still relevant based on the following reasons:

- From the legal perspective of state administrative law, if in a Constitutional Monarchic state the dignity of the state is inherent in the King/Queen, the dignity of a Republic State with a Presidential system, like Indonesia, is inherent in the President because, other than as the chief executive, the President also serves as the head of state. Therefore, in his/her capacity as the head of state, the President is granted privileges that is commonly called “prerogative right” in state administrative law –which, according to the history, is a “remaining right” granted to the Crown, either a King or Queen, as may be known from the state administrative history regarding the transformation from Absolute Monarchy to Constitutional Monarchy. Therefore, if the legal construction regarding the defamation against the President (and Vice President) is rejected because, according to the history, it is intended to protect a King/Queen’s dignity, the adoption of the prerogative rights in the presidential institution is not acceptable because it, according to the history, is also derived from the rights of a King/Queen as the head of state;

- From other perspective, in this matter the perspective of international law, the state’s dignity inherent in the President is reflected in several provisions in various branches of international law, among other things: (1) in the field of international agreement law, in which there is a provision that a President is exempted from the requirement to present credentials in a negotiation to enter into

an international agreement because the state is constructed as inherent in the President; (2) still in the field of international agreement law, in the event of an extradition agreement. In the field of extradition, there is principle of non-extradition of political criminals. However, if a crime is committed against a President and/or his/her family members, such principle is excepted based on a clause called *Attentate Clause*, although it is usually limited to crimes related to the assassination or attempt to assassinate a president and/or his/her family members. It means that such crimes will not be considered as political crimes based on the international law. Therefore, the perpetrators may be extradited; (3) in the field of diplomatic law, if a President undergoes an official visit to a foreign country, he/she shall be granted diplomatic immunities and privileges. However, it is a common practice that when a President visits a foreign country incognito, such immunities and privileges are deemed to exist implicitly. It is based on the idea that the personality of his/her state is inherent in the President; (4) in the field of international law regarding recognition, in the practice, official visit of a president to a country being in the process of searching for international recognition is deemed as implied recognition to such country. It is also based on the idea that the personality of a state is inherent in the president of such state;

- The spirit of the entire provisions of the 1945 Constitution as an integrated system is to realize Indonesia as a democratic rule of law and a democratic state based on law. Rule-of-law and democratic state respects, protects, and guarantees the fulfillment of the freedom of expression – including the freedom to convey criticism to the President. However, rule-of-state and democratic state shall not protect perpetrators of defamation, whomever such defamation is intended to. Perpetrators of defamation cannot take shelter behind the freedom of expression. The Constitution respects, protects, and guarantees any one having the intention to convey his/her opinions, but not for the perpetrators of defamation.

- It is true that there is a potential or possible violation of constitutional rights, particularly those provided in Article 28 and Article 28E Paragraphs (2) and (3) of the 1945 Constitution, when a person conveying criticism to the President is considered having committed defamation against the President by investigator or public prosecutor. Such condition is not an issue of the constitutionality of a norm, but an issue of a norm application. When a constitutional norm is practiced by law enforcement apparatus, there is a potential violation of anyone’s constitutional rights, among other things due to misinterpretation. However, misinterpretation and misapplication of norms are completely different from the inconstitutionality of the norms. In order to deal with the aforementioned problem, constitutional courts in other countries, in addition to the authority

to conduct judicial review or constitutional review, are also given the authority to try constitutional questions and constitutional complaint cases.

Constitutional question takes place when a judge (other than constitutional judge) doubts the constitutionality of a legal provision to be applied in a concrete case. For that reason, before deciding the case concerned the related judge shall first file a request (question) to the constitutional court in respect of the aforementioned legal norm constitutionality;

Whereas constitutional complaint takes place when a citizen complains to the constitutional court that an action or Commission of a state official or public official has violated his/her constitutional rights while all general remedies are no longer available (exhausted).

This Court does not have such authorities, constitutional question and constitutional complaint – at least not until this time.

o Whereas based on all the explanations above, the issue relevant for further study does not actually rest on whether the provisions regulating defamation against the President (and Vice President) are constitutional or not, but more on legal political issue or the aimed law (*ius constituendum* or *de lege ferenda*), in this matter legal political issue in the field of criminal law, namely:

- Whether or not the provisions on defamation against the President (and Vice President) in the new draft Indonesian Criminal Code are

still relevant to be regulated in particular or separate chapter; whether it is insufficient, for example, with a separate article in the section regulating defamation;

- Whether it is still relevant to qualify slandering of the President as a non-complaint-based offence, whether it is insufficient, for example, if special provisions are made for the complaint procedures (for example by way of deciding that the complaining party does not have to be the President or the Vice President himself/herself), without disregarding the requirement of complaint from the defamation offence against the President;

- Whether it is still relevant to impose such a criminal sanction on anyone slandering the President or Vice President (six years in prison) as applicable today.

o Whereas, based on all the above-mentioned considerations, it is obvious that there is no sufficient reason to declare the provisions petitioned for judicial review in the *a quo* petition as provisions contradictory to the 1945 Constitution, therefore this petition should be rejected.

Opinions of Constitutional Judges H.A.S. Natabaya and H. Achmad Roestandi

Petitioner I (Dr. Eggy Sudjana, S.H.,M.Si) in his petition states that Articles 134 and 136 *bis* of the Indonesian Criminal Code (KUHP) concerning Defamation

against the President of the Republic of Indonesia or Vice President of the Republic of Indonesia are contradictory to Article 28F of the 1945 Constitution. Whereas Petitioner II, Pendapotan Lubis, in his petition states that in addition to Article 134 and 136 bis, Article 137 of the KUHP is also contradictory to Article 27 paragraph (1), Article 28 paragraph (3) and Article 28J of the 1945 Constitution;

In order to response the two petitions of the aforementioned Petitioners, it is necessary to first discuss the following three subject matters:

A. The position of the President according to the 1945 Constitution;

B. The status of the President as a legal subject according to the Positive State Administration Law *(het Stellig Staatsrecht);*

C. The existence of Article 134, Article 136 bis and Article 137 of the Criminal Code in relation to Article I of the Transitional Provisions of the 1945 Constitution;

A. **The Position of the President according to the 1945 Constitution** can be seen from its four functions, namely President as the Head of State, President as the Chief Executive, President as the Commander in Chief of the Army, Navy and Air Force, and President as the Chief Diplomat. As the Commander in Chief the President is the Chief Commander during peaceful period and war period. This shows us that there is civil supremacy over the military according to the constitution. Whereas as the Chief Diplomat, the President is the sole organ of Indonesia in the context

of international relation and at the same time the sole state representative with other countries. This is as said by Oppenheim: 1. The Head of State, as chief organ and representative in the totality of its international relations, acts for his State in its international intercourse, with the consequence that all his legally relevant international acts are considered to be acts of his State (International Law A Treatise Vol I-Peace (1966) page 757)*;*

Therefore, all honours and privileges given by other countries are due to his capacity as the Head of State obtained from the fact that the dignity of a Head of State is acknowledged by international society and international law;

All of the above-mentioned functions of the President are regulated in the 1945 Constitution. The functions of the president as the Head of State and the Chief Executive are provided Article 4, Article 14 and Article 15 of the 1945 Constitution. Whereas the functions of the President as the Chief Commander and Chief Diplomat are provided in Article 10, Article 11 and Article 13 of the 1945 Constitution;

Given those four functions of the President, it is obvious that the President is the symbol of sovereignty, continuity and grandeur of a Head of State and at the same time the Chief Executive. As the logical consequences of the aforementioned functions, the election and impeachment of a President as the central figure in a state are specifically

regulated in the 1945 Constitution, as provided in Articles 6 and 6A for election and Article 7A and Article 7B of the 1945 Constitution for impeachment, the methods of which are different from those for other state officials;

Based on the above-mentioned description, it can be concluded that a President is the result of distillation of the Indonesian people, therefore the President is the personal embodiment and representative of people's dignity and majesty*);*

B. President as a subject of the state administration law is a legal person referred to using the function *(ambt)*. Therefore, the state administration law is the entirety of special law, which is only applicable for the conduct of particular persons that can be deferred from other persons only because such persons are functionaries *(ambtsdrager);*

Since the aforementioned state administration law is a special law that is binding upon a President in his capacity, the legal action of a President shall not be accounted for as an individual *(prive),* but in his capacity as a functionary *(ambtsdrager)*. It is logical according to the law if there are articles in the Criminal Code regulating the protection of individuality of a functionary, as regulated in Article 134, Article 136 bis, Article 137 of the Criminal Code, for President and Vice President and Article 207 of the Criminal Code for General Authorities;

The protection of individuality of a functionary (in this case a President), is also regulated in almost any Criminal Code of a number of states. For example, among other things, in Germany in Deutsches Strafgesetzbuch, the offence of defamation against the President is qualified as an offence detrimental to a democratic rule of law *(democratishe rechtsstaat)*. This is regulated in Section 90 of the Title Three concerning Endangering the Democratic Rule of Law *(Gefährdung des demokratischen Rechtsstaates);*

Section 90 Disparagement of the Federal President.

(1) Whoever publicly disparages the Federal President in a meeting or through the dissemination of writings (Section 11 subsection (3)) shall be punished with imprisonment from three months to five years.

(2) In less serious cases the court in its discretion may mitigate the punishment (Section 49 subsection (2)) if the requirements of Section 188 have not been fulfilled.

(3) The punishment shall be imprisonment from six months to five years if the act constitutes defamation (Section 187) or if the perpetrator by the act intentionally gives his support to efforts against the continued existence of the Federal Republic of Germany of against its constitutional principles.

(4) The act shall be prosecuted only with the authorization of the Federal President.

Pursuant to the provisions of Section 90 of the aforementioned *Deutsches Strafgesetzbuch*, the existence of the aforementioned Section 90 appears to be protecting the principles of democratic rule of law in Germany;

C. **Whereas the Transitional Provisions of Article I of the 1945 Constitution** reads, “All existing laws and regulations shall remain applicable insofar as the new ones have not been established according to this constitution.” Based on these Transitional Provisions, all existing laws and regulations shall be acknowledged until the new ones are established according to the constitution in the sense that review on a law can only be conducted by way of a legislative review. It is understandable that when a constitution is replaced by a new constitution or undergoes an amendment, it is necessary to regulate its consequences on the old legal system applicable at the time the new constitution comes into effect or articles of the old amended constitution. The provisions regulating the such consequences shall be referred to as Transitional Provisions because they regulate transition from the old legal system based on old constitution to the new legal system based on the new constitution;

There will always be two questions arising in case of any amendment to the constitution:

1. What are the capacities of the state organs existing on the date the amendment comes into effect?

2. How is the binding force of other laws and regulations applicable on the date the amendment comes into effect?

In respect of the capacities of the old organs, it may be determined that such organs shall have the capacities to continue performing their functions until being replaced by the organs established under the new constitutional provisions, whereas in respect of the binding force of other laws and regulations applicable on the date the amendment comes into effect, it is necessary to differentiate:

1. New constitutional provisions having the characteristics of immediately applicable full legal norms;

2. New constitutional provisions containing only principles that need to be further regulated by laws made in line with the new constitution;

In general, it is acknowledged that other laws and regulations applicable on the date the new constitution comes into effect, shall remain applicable until they are revoked, supplemented or amended by other laws and regulations under the new constitution, unless they are contradictory to the new constitution in the nature of immediately applicable full legal norms;

In such context of transitional legal norms, we should maintain the existence of Article 134, Article 136 bis and Article 137 of the Criminal Code. With due observance of the message of Article I of the Transitional Provisions of the 1945 Constitution stating expressly (*expressis verbis)* that all existing laws and regulations shall remain applicable insofar as they have not been amended under this constitution, DPR together with the Government shall conduct legislative review on the laws and regulations applicable prior to the amendment to the 1945 Constitution. In amending the Criminal Code, legislators certainly need to consider whether the offence of defamation against the President that is an independent offence *(zelfstandigedelict)* will become a complaint-based offence *(klacht delict)* and whether the sanction intended for the offence of defamation against the President will be mitigated. Hence, review on the current Criminal Code can be conducted for amendment and adjustment with due observance with the spirit of time. All of the foregoing shall depend on the legal policy of the legislators in this matter the DPR and the Government;

In addition to the above-mentioned issue, it is also necessary to discuss the issue of equality before the law as also used as a reason by the Petitioners, particularly Petitioner II;

Equality before the law as provided in Article 27 paragraph (1) of the 1945 Constitution does not mean that each law must be applicable to

anyone who due to his/her nature, achievement or condition is different from the other. And if it is required, insofar as there is valid (reasonable) and non-arbitrary reason, different treatment for particular persons is not contradictory to the Constitution;

For comparison with regard to the application of guarantee of equal protection, the Supreme Court of India which adheres to the equality principles developed by the US Supreme Court states, among other things:

"The principle of equality does not mean that every law must have universal application for all who are not by nature, attainment or circumstances in the same position, as the varying needs of different classes of persons often require separate treatment. It does not take away from the State the power of classifying persons for legitimate purposes. See Durga Das Basu "*Human Rights in Constitutional Law";*

It is also necessary to give due observance of the Court Decision in case Number 070/PUU-II/2004, stating among other things "equality shall means giving similar treatment to similar things and different treatment to different things";

CLOSING

Based on the above-mentioned description it can be concluded that Article 134, Article 136 bis and Article 137 of the Criminal Code petitioned by the

Petitioners are not contradictory to the 1945 Constitution because those articles need to be established to protect the dignity of a President and Vice President. What happens in the case experienced by Petitioner I and Petitioner II is that the law enforcement issue of the *a quo* articles by Investigators/Public Prosecutors is not a constitutionality issue because the Investigator/Public Prosecutor must be able to distinguish defamation from criticism against the President or Vice President;

Whereas the articles concerned need to be amended in respect of their nature of offence and their sanction as well as placement of regulation, is the legal policy of the legislators (DPR and Government);

If the articles related to crime against the dignity of the President and Vice President are declared as nonbinding by law, there shall be an absence of law *(rechtsvacuum)* that eventually shall result in legal uncertainty *(rechtsonzekerheid)*. When this occurs, it is impossible for the Police and Public Prosecutor's Office to conduct investigation and prosecution in respect of the crime against the dignity of the President and Vice President. Therefore, Article 310-321 of the Criminal Code cannot be immediately applied on the crime intended to the President and Vice President as said by Expert Prof. Mardjono Reksodiputro because the Investigator/Public Prosecutor is impeded by the legality principle provided in Article 1 paragraph (1) of the Criminal Code (the principle of *Nullum delictum nulla poena sine praevia lege poenali*);

The opinion of Prof. DR. J.E. Sahetapy that Article V of Law Number 1 Year 1946 concerning Criminal Provisions which reads: “the criminal provisions that are entirely or partially inapplicable or contradictory to the capacity of the Republic of Indonesia as an independent state, or that are no longer useful, must be entirely or partially deemed as invalid” must be used as *”toetssteen”* (test case) against the Criminal Code in relation to the petition for judicial review on Article 134, Article 136 bis and Article 137 of the Criminal Code is not correct because according to Article 24C of the 1945, the Constitutional Court is only authorized to test law against the Constitution, not to test law against law;

Moreover, the aforementioned Article V of Law Number1 Year 1946 is intended to Judges (General Court) in the application of the Criminal Code against crimes deemed *contradictory to the capacity of the Republic of Indonesia as an independent state*. This article also contains message for the legislators (DPR and Government) to give due observance of the articles that are no longer suitable (colonial articles) with the capacity of the Republic of Indonesia as an independent state in revising the Criminal Code (see Articles I and II of the Transitional Provisions of the 1945 Constitution);

Finally, please allow the Two Dissenters to contemplate for a while that “sometimes it is better to lose, then do things right, than win, but eventually says things wrong”. (Prime Minister of the United Kingdom Tony Blair).

SUBSTITUTE REGISTRAR

SGD.

Cholidin Nasir.