Autocratic Legalism in the Formation of Legal Products During Jokowi's Administration: A Critical Analysis of Article 218 of Law Number 1 of 2023 Concerning the Penal Code

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ABSTRACT

There is a problem of legal products in Indonesia with the ratification of Law Number 1 of 2023 on the Criminal Law Code, which is the emergence of an article that prohibits attacking the honor or dignity of the President and Vice President. This article is allegedly an embodiment of an autocratic legalism. The issue raised is how autocratic legalism in the formation of legal products occurs in the era of the Jokowi administration and what are the legal implications. This research aims to describe autocratic legalism, analyze Article 218 of the latest Criminal Code, measure the legal impact, and recommend future improvements and changes. This research is a doctrinal or normative juridical research with qualitative analysis using statutory and case approaches. This research method is descriptive analysis. The results of this study illustrate that autocratic legalism is a dangerous understanding. The application of this understanding in Indonesia during the Jokowi administration is the existence of Article 218 of the latest Criminal Code Law which prohibits everyone in public from attacking the honor or dignity of the President or Vice President. This article is not based on legal principles. As a result, it creates repressive laws and the protection of human rights is neglected. So, it is necessary to try to stop this autocratic legalism by maintaining the independence of law enforcement officials, institutional reform of political parties, and creating collective popular control.

Keywords: Autocracy Legalism, the Criminal Law Code, Principle of Law.

INTRODUCTION

Following the conclusion of the Dutch East Indies era in 1943, the Japanese government took control until 1945. After the Japanese occupation ended, Bung Karno (Soekarno) proclaimed Indonesia's independence on August 17, 1945. With independence came the enactment of the first constitution of the Republic of Indonesia, known as the 1945 Constitution. Despite the change in governance, the criminal law system continued to rely on the codification of the *Wetboek van Strafrecht voor Nederlandsch-Indië* (WvSNI), a Dutch colonial penal code. This was implemented based on the principle of concordance, which dictated that the criminal laws of the Netherlands be applied in its colonies, with certain adjustments made to account for local circumstances[1].

Criminal law reform in Indonesia began in 1946 with the enactment of Law Number 1 of 1946 on Criminal Law Regulations. Article 5 of the law stipulates that "criminal law regulations that are wholly or partially unenforceable, contradictory to Indonesia's status as an independent state, or no longer relevant, shall be deemed temporarily invalid in full or in part." Article 8 further outlines changes in terminology and the removal of several provisions in the Criminal Code. However, these revisions remain incomplete and fragmented, underscoring the need for a comprehensive and systemic overhaul of Indonesia's criminal law framework [2].

In this context, Barda Nawawi Arief has emphasized that efforts to reform criminal law are, by nature, ongoing and continuous. Similarly, Jerome Hall argues that the improvement and development of criminal law should be a perpetual and sustained endeavor, with detailed records and documentation of these efforts preserved for future reference and analysis [3].

There are three key reasons for reforming the Criminal Code in Indonesia. (1) from a political perspective, as an independent nation, the Republic of Indonesia should have its own Criminal Code, reflecting its sovereignty. (2) from a sociological standpoint, the Netherland-origin criminal law is no longer compatible with Indonesian society, as certain acts that are punishable under Indonesian customs are not addressed in the Netherland Criminal Code. (3) in terms of language, the Netherland Criminal Code is written in Dutch, meaning that law enforcement officials must understand Dutch to apply its provisions correctly, which poses a significant barrier [4].

The process of reforming Indonesia's Criminal Code (RKUHP) began with the first National Law Seminar (Seminar Hukum Nasional) in 1963. Following this, the government formed the RKUHP Drafting Team in the 1970s or 1980s. Despite the drafting process taking 30 years, the team only completed the full RKUHP manuscript by the end of 1993. However, political challenges within the legislative realm delayed discussions, causing the RKUHP to remain stalled in the national legislative program from 1993 until early 2013. It was not until June 2015, during the first term of President Joko Widodo, that a Presidential Letter was issued, initiating the government's renewed efforts to revisit and discuss the RKUHP [5].

The letter stipulated that the government aimed to finalize the discussions on the RKUHP within two years, targeting completion by 2017. However, it was not until December 6, 2022, that the government, together with the House of Representatives (DPR), approved the Draft Criminal Code Bill (RKUHP) to become law. It was then officially enacted as Law Number 1 of 2023 concerning the Criminal Code (KUHP), signed by the President on January 2, 2023 [6].

Following the enactment of the law, there is a provision that does not align with the principles of a rule of law state, specifically Article 218 of Law Number 1 of 2023 concerning the Criminal Code (KUHP), which addresses offenses against the honor or dignity of the president and/or vice president. As stated in Article 1, paragraph (3) of the 1945 Constitution, “Indonesia is a state based on law.” This principle reflects the concept of Equality Before the Law, meaning that every individual, regardless of their background, should receive equal treatment under the law.

More specifically, the principle of a rule of law state, in a substantive sense, refers to the existence of laws and regulations designed to protect individual rights and freedoms, promote social rights, and safeguard group rights. The inclusion of specific provisions related to offenses against the honor or dignity of the president and/or vice president is perceived to undermine the substantive principle of the rule of law. [7]

Furthermore, the existence of this provision creates a paradigm in which the government holds a higher position than other citizens, despite the fact that the government itself is composed of citizens. Indirectly, this regulation infringes upon human rights, as outlined in Article 3, paragraph (2) of Law Number 39 of 1999 concerning Human Rights, which states:

“Everyone has the right to recognition, guarantees, protection, and fair legal treatment, as well as to legal certainty and equal treatment before the law.”

The phrase 'everyone' as stated in the above article signifies that fair legal treatment and equal treatment before the law apply to all individuals, without granting special treatment or exemptions for the President and Vice President. The existence of specific regulations for those who insult the President and Vice President effectively implies that they hold a status above other citizens, despite the fact that the President and Vice President are also citizens.

From a legal standpoint, based on the ruling of the Constitutional Court, Decision No. 013-022/PUU-IV/2006 declared that Articles 134, 136, and 137 of the former Criminal Code were unconstitutional; thus, the enforcement of these articles must be annulled in accordance with the 1945 Constitution of the Republic of Indonesia, rendering them without binding legal force. However, the newly enacted Criminal Code reintroduces these provisions, altering their framework to classify them as offenses requiring a complaint, which does not address the fundamental issues present in the previous legal provisions that are deemed anti-

democratic. This suggests that the government is attempting to find a loophole to circumvent the Constitutional Court's ruling [8].

Furthermore, several issues have emerged in the formation of legal products that do not prioritize the principles of the rule of law during President Joko Widodo's administration. According to data from the World Justice Project regarding the Rule of Law Index, Indonesia achieved a relatively good score of 0.53 points in 2022, reflecting an increase of 0.01 points compared to the previous year. One contributing factor to this improvement is the increasing number of legislative products being developed. However, a dichotomy exists in this context, as indicated by the 2022 World Press Freedom Index from Reporters Without Borders (RSF), which states that Indonesia is currently in a difficult situation regarding press freedom [10].

The existence of Article 218 of Law No. 1 of 2023 concerning the Criminal Code has introduced a tendency that can be explained through the concept of 'autocratic legalism.' This notion of autocratic legalism can be characterized by a systematic and sustained assault on institutions that are meant to oversee government actions within a democratic mandate. It involves loosening constitutional ties and constraints on the executive branch through legal reforms, allowing the government to operate within the bounds of the law while, in reality, violating the principles of the rule of law [11].

This study aims to analyze the legal implications arising from the enactment of Article 218 of Law No. 1 of 2023 concerning the Criminal Code in Indonesia. The urgency of this study is underscored by at least two key points: First, it illustrates that autocratic legalism in Indonesia has notably strengthened in recent years, particularly with the passage of the Criminal Code Law. Second, it examines the legal implications of Article 218 on democracy and the principles of the rule of law in Indonesia. Thus, this study seeks to contribute not only to the advancement of constitutional law knowledge but also to identify avenues for the general public to enhance their critical awareness and participation in monitoring state policies related to the formulation of legal products.

RESEARCH METHODS

The approach used in this research is a statutory approach (statue approach) and case approach. In this research, the laws and regulations used are related to the 1945 Constitution of the Republic of Indonesia, and laws and regulations related to the focus of this research, namely Article 218 of Law No. 1 of 2023 concerning the Criminal Code (KUHP), Law No. 39 of 1999 concerning Human Rights, and Law No. 13 of 2022 concerning Amendments to Law No. 12 of 2011 concerning the Formation of Legislation and Judicial Decisions. The type of research used in this legal research is normative juridical research. The source of legal materials to be used in this study is primary legal material consisting of applicable laws and regulations. Secondary legal materials that are from the results of research, books, and scientific journals or the internet that are relevant to the problem under study. Other non-legal materials such as legal dictionaries are also encyclopedias and so on. From the results of the synthesis analysis then conclusions are drawn as necessary, in accordance with the objectives of the study.

RESULTS OF DISCUSSION

Autocratic Legalism

In terms of terminology, autocratic legalism consists of two components: 'autocracy' and 'legalism.' Autocracy refers to a system of governance where power is concentrated in the hands of one individual or a group of individuals who assert themselves and monopolize power in the state, exercising authority without constraints. [12]. According to Landman T [13], a state is categorized as an autocracy if there is a lack of competition, closed recruitment for political positions, and arbitrary executive power. In such autocratic states, leaders tend to exploit their citizens by appropriating national resources for their personal benefit and/or the interests of specific groups. [14].

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In brief, legalism refers to strict adherence to laws or regulations. Legalism characterizes a legal system where a code of conduct based on rules or commands must be followed regardless of origin, morality, or political status, prioritizing the letter of the law over the spirit of the law itself [15]

In recent years, laws have been enacted as if they were based on constitutional principles and the rule of democracy; however, in reality, these constitutional and democratic principles have been subverted by those in power. Kim Lane Scheppele refers to this phenomenon as autocratic legalism, which can be identified when an individual elected through democratic processes launches attacks on institutions that have the potential to oversee their actions while in office. [11]

In line with this, autocratic legalism employs three strategies in its implementation [16]. First, through colonization, established state institutions eliminate opponents and potential challengers from positions of power, appointing their own political affiliates to replace them. Subsequently, these institutions are weakened to create a landscape that optimizes executive capabilities. Second, through duplication, when colonizing state institutions incurs significant costs, an autocrat may duplicate these institutions by creating new systems within them that can be directly controlled by the executive. Third, through evasion, gaps in accountability are deliberately created to allow the executive to exercise authority without restraint. This is achieved by adjusting regulations to establish a gray area where the jurisdiction and accountability mechanisms of an institution are ambiguously defined and controlled by the executive.

Based on the above perspective, it is evident that autocratic legalism exploits constitutional democracy to fulfill its interests. More specifically, Zainal Arifin Mochtar and Idul Rishan, citing Corrales [17], identify three key elements of autocratic legalism: 1) the co-optation of the ruling party in the parliament; 2) violations of the law and constitution; and 3) the undermining of judicial independence [18]. The first indicator is typically achieved by minimizing opposition in the parliament. The second indicator is generally established by enacting laws that favor certain political actors while simultaneously harming the public at large. Meanwhile, the final indicator disrupts the judicial power institutions through changes in the composition of judges, opaque selection processes, and the absence of term limits for judges.

Autocratic legalism can also be understood as the imposition of interests that disregard the will, desires, and needs of the citizens [18]. Following this perspective, the rapid legislative process, especially when conducted without adequate deliberation or in a manner that does not align with the wishes of the citizens, can be categorized as a form of legal autocracy. Another aspect that also lies outside the needs of the people is the design that allows individuals to occupy strategic positions for extended periods while attempts are made to close off opportunities for rotation. One example of this is the manipulation of executive term limits. Autocratisation by executive term limits manipulation is a process through in which incumbents weaken executive constraints, so that there is no contestation that affects the possibility of citizens to vote who reigns again, with the aim of not leaving his post [19].

Unlike authoritarianism, which outright rejects adherence to legal products, autocratic legalism utilizes the law as a means to justify actions that appear to be constitutional policies. According to Landau in his work titled 'Abusive Constitutionalism,' this indicates that policies seemingly framed under the guise of law and constitutionalism are not necessarily non-authoritarian. In fact, authoritarian regimes can leverage the constitution to their advantage for decades [20].

This ideology rejects liberal democracy, which Anna Sledzinska Simon terms as illiberal democracy. According to her, there are three strategies to understand the scenario of illiberal democracy [21]. First, it involves rejecting the fundamental principles of liberal constitutionalism by dismantling the system of checks and balances to advance political interests. Second, it employs legal instruments to achieve political goals that are fundamentally illegitimate. Third, legitimacy is derived from the parliament—regardless of constitutional review, the constitutional judiciary may declare that such legitimacy is inconsistent with the constitution.

From a broad and in-depth perspective, autocratic legalism, abusive constitutionalism, and illiberal democracy all seek to ensure that those elected through democratic means, while in power, implement a range of policies

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that may infringe upon the fundamental rights of citizens, as opposed to the principles upheld by liberal ideologies [21].

The Implementation of Autocratic Legalism in Indonesia during the Joko Widodo Government Era

As previously explained regarding the concept of autocratic legalism, this ideology utilizes legal instruments to advance specific agendas that effectively undermine the sovereignty of the people. The autocrat can easily argue and justify their actions under the guise of the law they have enacted, claiming that these laws were established through constitutional means. Subsequently, they employ these laws to circumvent established legal principles that have been agreed upon collectively.

Since 2019, Indonesia can be viewed as a case study of the fundamental patterns of autocratic legalism. In that year, Joko Widodo's administration, elected through the 2019 General Election based on the decision of the General Election Commission (KPU) No. 987/PL.01.8-KPT/06/KPU/V/2019 regarding the determination of the vote tally for presidential and vice-presidential candidates, received 55.50 percent of the votes [22]. This resulted in Joko Widodo, paired with Ma'ruf Amin, being established as President for two consecutive terms.

This vote tally marked Joko Widodo's second candidacy in the presidential election contest, having previously secured 53.15 percent of the votes during his first candidacy in 2014 [23]. This indicates a significant increase in the vote tally from the first term to the second. It reflects that Joko Widodo's leadership during his first term was relatively successful in fulfilling the responsibilities of both head of government and head of state.

However, during Joko Widodo's second term, there were significant upheavals concerning legal reform, illustrating the application of autocratic legalism in Indonesia. The enactment of Law Number 1 of 2023 on the Criminal Code (KUHP) is one manifestation of how the paradigm of a legal autocrat is reflected in Joko Widodo's administration.

There are problematic articles that have sparked controversy, particularly the offense of insulting the President and Vice President, as outlined in Article 218 of the Criminal Code (KUHP), which states, Paragraph (1)

"Anyone who publicly insults the honor or dignity of the President or Vice President shall be punished with a prison sentence of up to 3 (three) years or a fine of a maximum of category IV". Paragraph (2)

An act shall not be considered an insult to the honor or dignity as referred to in paragraph (1) if it is carried out in the interest of the public or in self-defense.

The inclusion of this clause in the article was proposed by the government [24], It is also considered that the drafting of the Criminal Code does not prioritize constitutional principles in its formation. The following are some legal reasons why the offense of insulting the president and vice president does not uphold the principles of the rule of law.

First, regarding the argument that "The president is a symbol of the state" or "The personification of society" used by the government to justify the article on the insult of the president and vice president in the establishment of the Criminal Code as law is incorrect. The matter of state symbols is already regulated in Articles 35, 36, 36A, and 36B of the 1945 Constitution, as well as in Law Number 24 of 2009 concerning the Flag, Language, and National Emblem, as well as the National Anthem, which state that the state symbols include the Garuda Pancasila, the red and white flag, the Indonesian language, the state emblem, and the national anthem.

Second, the process of forming the Criminal Code, which prioritizes the principle of decolonization, does not seem to be reflected in the articles concerning the insult of the President and Vice President. If we trace it back, the article on insulting the president originates from the Dutch Criminal Code, specifically Article 111 of the Nederlands Wetboek van Strafrecht, which was used to maintain the dignity of the King and Queen of the Netherlands as symbols of the state. This was then adapted into Articles 134, 136bis, and 137 of the old Criminal Code, which regulated deliberate insults against the king and queen with a maximum prison sentence

of 5 years or a fine of up to 300 guilders [25]. This provision was adopted by the old Criminal Code by changing the phrase “king and queen” to “President and Vice President”.

It is clear that there is a difference in tradition between the Netherlands and Indonesia, which is reflected in their systems of government. The Netherlands employs a monarchy system where the King and Queen are symbols of the state. In contrast, in Indonesia, the positions of President and Vice President are not hereditary as in a monarchy. The President and Vice President in Indonesia are directly elected by the people through elections, and there are time limitations on their terms. Additionally, these positions can be dismissed if the President or Vice President violates the Constitution of Indonesia. Most democratic countries that still uphold laws against insulting the President and Vice President or figures of authority are those with a monarchical system [26].

Third, there is the Constitutional Court Decision No. 013/-022/PUU-IV/2006, which has declared Articles 134, 136, and 137 of the Penal Code related to the crime of insulting the president to be in conflict with the constitution. Therefore, the legal implication is that these articles should no longer be relevant to be included in the enactment of the Penal Code [27].

Investigating the legal considerations in the decision, the Constitutional Court holds the view that insulting the President can become an obstacle to the possibility of a single interpretation by the President. Meanwhile, the Constitutional Court emphasizes in its considerations that the crime of insulting the President and Vice President should refer to the articles on insults aimed at their personal qualities, in accordance with Articles 310 to 321 of the old Penal Code. Jimly Ashiddiqie's opinion regarding the implementation of the Constitutional Court's decision is that it is an obligation, meaning that the Constitutional Court's decision has immediate legal force and is binding on the parties involved [28]. What distinguishes the articles on insulting the President and Vice President in the old Penal Code from those in the new Penal Code is the wording; where the old Penal Code categorized it as a common offense, the new Penal Code utilizes a complaint offense. This creates an impression that the government is seeking a loophole to disregard the Constitutional Court's ruling.

Fourth, it is inappropriate for the Penal Code to include articles that insult the president because the president is a position that should be distinguished from the individual holding that position. As a position, the president does not possess moral character to feel insulted. In this structure, every comment, emotion, praise, or even public ridicule towards the president serves as an assessment of how well the President and Vice President carry out their duties and functions. The question of whether the communication method that criticizes the functions of the President and Vice President is appropriate falls within the realm of ethics and involves social sanctions, making it inappropriate to impose criminal sanctions.

Even if the insult is directed at the dignity and honor of the individual holding the position of President and Vice President, it can be addressed through articles on personal insult or through civil litigation mechanisms. The policy of abolishing articles on insults against heads of state has been implemented in many countries, such as France in 2013 and Germany in 2017 [29].

Referring to the definition of the President (Latin: praesedere), it is a title held by the leader of an association, corporate organization, or even a state. According to Article 4, paragraph (1) of the 1945 Constitution, the President of the Republic of Indonesia holds governmental power. Therefore, based on this article, the President is a position and does not refer to the individual. According to Logemann, the position serves as a subject of state law; however, it is more accurate to refer to the officeholder, as this understanding correlates with status, thus not considering their age [30].

The individual as a natural person is different from the position, as the natural subject is born out of natural reasons, while the position arises due to legal reasons, namely the existence of applicable laws within the realm of the state. Referring to Hans Kelsen's perspective (1971) in a book titled Pure Theory of Law regarding legal subjects, Kelsen states that a subject is considered a legal subject when there is a grant of rights and obligations by a piece of legislation.

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Kelsen intends to convey the understanding that a piece of legislation can give rise to rights and obligations under the condition that it is created by an organ known as a legal organ. It is this legal organ that applies the law (legislation), and this legal organ is a fictive concept [31].

Fifth, the criminal offense of defamation against the President and Vice President in the Criminal Code (KUHP) does not reflect the objectives of criminal law reform, namely "protection of society" and "welfare of society." According to Prof. Arief Barda Nawawi (2009), one of the drafters of the Draft Criminal Code (RKUHP), the ultimate goal of criminal law reform should be to enhance protection and welfare aimed at society. Some of the points he raised include:

1. *Protection of society from antisocial acts that are harmful and dangerous to the community; thus, the aim of criminalization is to prevent and address crime;*

2. *Protection of society from the dangerous tendencies of an individual; therefore, the aim of criminalization is to rehabilitate the offender or to strive to change and influence their behavior so that they return to compliance with the law and become good and useful members of society;*

3. *Protection of society from the abuse of sanctions or reactions from law enforcement or the general public; therefore, the aim of criminalization is to prevent arbitrary treatment or actions outside the law;*

4. *Protection of society from disturbances to the balance or harmony of various interests and values resulting from criminal acts; therefore, the enforcement of criminal law must be able to resolve the conflicts caused by crimes, restore balance, and bring about a sense of peace within society* [32].

The protection and welfare of society in the reform of criminal law manifest the concepts of "social defense" and "social welfare." In some legal literature, these two terms are often referred to by only one of them, namely "social defense," since the notion of societal protection also encompasses societal welfare. This perspective serves as a legal policy guideline that underpins and simultaneously represents the legal political objectives in Indonesia, and it is also part of the effort to reform criminal law in the country. Criminal law serves as a means to protect society from crime while considering the interests of the community/state, victims, and offenders. This aligns with one of the objectives of the state as articulated in the Preamble of the 1945 Constitution, which states that the government of Indonesia is committed to protecting all Indonesian people and the entire Indonesian homeland.

The articles concerning the insult of the President and Vice President obscure the interpretation of the state's objectives, giving the impression that the state holds a dominant position of power. In contrast, Marjdono Reksodiputro argues that, given the evolution of fundamental social values in modern democratic societies, offenses of insult should not be employed to hinder criticism and protests against the central government's policies, particularly those of the President and Vice President. This is because state policies are not solely the interests of the President and Vice President; rather, they encompass the interests of the people, which is fundamentally different from the interests of a royal state [33].

The dictum of Lord Acton (1834-1902) states that "power tends to corrupt, and absolute power corrupts absolutely." (Power is prone to abuse, and strong power is likely to lead to significant abuse of that power) [34], The articles concerning the insult to the President and Vice President have a tendency to be abused by the President and Vice President in the future. The transformation of the insult provisions, which originally classified as a public offense, into a complaint-based offense could allow the President and Vice President to act arbitrarily in pursuing interests that they deem inconsistent with their political agenda.

From the various legal reasons mentioned, when linked to Adriaan Bedner's views on the categories consisting of several elements that must be fulfilled within the rule of law principle—namely procedural elements, substantive elements, and control elements—there exists a misalignment. The inconsistency between the articles regarding insults to the President and Vice President and the principles of the rule of law can be observed in the description of each element of the rule of law.

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The procedural element includes several components, namely the existence of legal rules, state actions subject to the law, formal legality, and democracy. Normatively, the criminal offense of insulting the President and Vice President is a written rule codified in legislation as stated in the enactment of Law No. 1 of 2023 concerning the Criminal Code. This indicates that the element of legal rules is fulfilled. It also stipulates how the President and Vice President should act in cases of alleged insult, regulating their actions as a complaint offense, meaning that the President and/or Vice President themselves must report to law enforcement authorities.

However, in the elements of formal legality and democracy, there are concerns regarding this article. The formal legality referred to by Adriaan Bedner (2010) emphasizes that legal products must be clear and certain in their content, accessible and predictable for their subjects, and generally applicable in their enforcement. The main characteristic of law as a collection of rules and procedures is that it must apply logical criteria, adhering to standards of universality and equality [35]. However, the President and Vice President cannot be equated with the legal position of ordinary citizens, and they are not considered natural legal subjects who can experience personal offense. Their roles are public offices, and any criticism or commentary directed toward them should be viewed as part of democratic accountability, rather than grounds for personal insult or offense.

In the context of democracy, the rule of law cannot function optimally without being democratic. This means that laws will only be fair if they are shaped by general consent, reflected through a participatory process. Without this participatory element, democracy becomes merely a formal concept, which in turn can produce highly unjust laws. Participation ensures that laws serve the public interest, while its absence risks concentrating power and disregarding the needs and rights of the people [36]. Through Constitutional Court Decision Number 91 of 2020, which adjudicated the judicial review of the Job Creation Law (UU Cipta Kerja), the court's legal considerations explained the concept of meaningful participation within the framework of democracy.

Partisipasi bermakna (*meaningful participation*) yang dimana partisipasi masyarakat harus memenuhi tiga prasyarat, yaitu: *pertama*, hak untuk didengarkan pendapatnya (right to be heard); *kedua*, hak untuk dipertimbangkan pendapatnya (*right to be considered*); dan *ketiga*, hak untuk dipertimbangkan pendapatnya (*right to be considered*). Partisipasi publik itu diperuntukan baik dalam proses pembuatan aturan hukum, maupun dalam proses berjalannya negara yang itu bisa masuk dalam ranah kebijakan publik.

The expression of the public, which serves as a channel for public participation in state policies made by the President or Vice President, should not be categorized as criminal defamation. If this is the case, the essence of public participation becomes nullified and halted. The substantive right of society to express their views on the actions of the President or Vice President, which should be considered or explained, is instead interpreted as criminal defamation. This directly undermines the democratic process, making it far from truly democrati.

The substantive elements, as outlined by Adriaan Bedner (2010), include the subordination of all laws and their interpretation to fundamental principles of justice, the protection of individual rights and freedoms, the promotion of human rights, and the safeguarding of group rights. In the Indonesian legal framework, these substantive elements are enshrined in the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). For example, the right to freedom of expression through speech, writing, and expression is guaranteed by Article 28D paragraph (1), Article 28E paragraphs (2) and (3), and Article 28F of the UUD NRI 1945.

Philosophically, John Rawls places such rights within his foundational concept of justice, which he refers to as the "original position." According to Rawls,

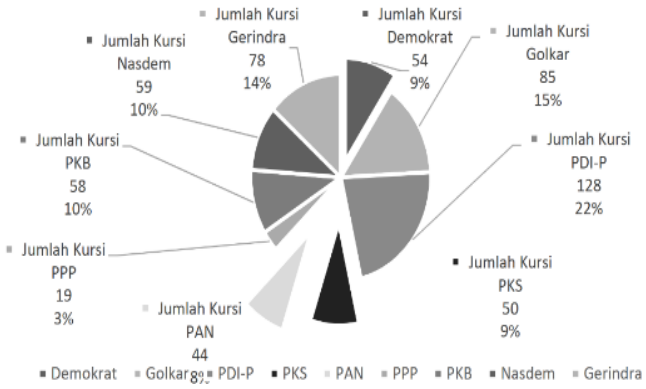
"Justice is the first virtue of social institutions, as truth is of system of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust" [37].

Thus, referring to the long history of drafting the Criminal Code (KUHP), which took considerable time before its enactment into law, there remain significant concerns regarding the injustice present in the article on insulting the President and Vice President. The injustice in this article arises because it could lead to the emergence of paternalistic policies. Such policies entail the government assuming responsibility for individual affairs of its citizens, often through coercive regulation of behavior, particularly through criminal law [38].

The control element includes the necessity of an independent judiciary and other institutions tasked with upholding the rule of law. An independent judiciary serves as the last line of defense in safeguarding democracy [39]. The Constitutional Court, as one of the guardians of the Constitution in Indonesia, has declared that the articles in the old Criminal Code (KUHP) concerning insults against the President and Vice President are deemed unconstitutional (see the ruling of the Constitutional Court No. 013-022/PUU-IV/2006). In general, the provisions regarding insults against the President and Vice President do not align with the values of Pancasila and the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945).

Thus, the control element, which is supposed to uphold the supremacy of law or serve as the last line of defense for enforcing the principles of a legal state, is instead overlooked in the formulation of the new Criminal Code (KUHP). Provisions that were deemed unconstitutional by the Constitutional Court have been revived and re-established as criminal offenses under the complaint-based system. This situation raises concerns about the commitment to constitutional principles and the protection of individual rights, as it allows for the potential misuse of power against legitimate expressions of dissent and criticism.

In the formulation of legal products, there are three indicators of autocratic legalism: (1) the co-optation of the ruling party in the parliament; (2) violations of laws and the constitution; and (3) the erosion of judicial independence [17]. These three indicators were found in the formulation of legal products during Joko Widodo's administration, specifically in the enactment of Law No. 1 of 2023 concerning the Criminal Code, which includes the articles on the insult of the president and vice president.



There is no clear demarcation between the executive and legislative branches [18]. Joko Widodo has a strong grip on the ruling parties that hold the majority in parliament, which, in principle, undermines the democratic process in every aspect of law, particularly in the legislative process. This lack of democracy arises from the relationship between the President and the Parliament (DPR), as illustrated below, *Sumber:* [40]

Almost all factions approved the ratification of the draft Penal Code (Rancangan KUHP) into law, with only the Prosperous Justice Party (Partai Keadilan Sejahtera) opposing it by staging a walkout during the 11th plenary session of the second legislative period of 2022-2023 on December 6, 2022 [41]. A significant 91% of the members of the House of Representatives (DPR) agreed to the ratification of the Penal Code Law. This accommodating relationship between the President and the DPR tends to lead them to reach compromises in the legislative process for this law.

In brief, political politicization undermines the protection of human rights, the rule of law, and civil society organizations, especially those playing a role as opposition [42]. Furthermore, authoritarian leadership has increased amid a democratic recession, leading to violations of laws and the constitution. Autocrats use the

law to legitimize all their actions and authority in carrying out legal regulations [43]. This certainly undermines the constitutional order in a law-based state by eliminating parliamentary oversight and the participation of civil society [44].

Strengthening of Repressive Law

A repressive regime is one that places all interests of power at risk, particularly those interests that are not protected by a legal system that is established for the sake of privilege and authority. Such regimes often prioritize the maintenance of power over the enforcement of justice, resulting in the suppression of dissent and the erosion of individual rights [45]. A repressive regime justifies all actions taken to punish criminals, utilizing every effort from enforcement and investigative examination to prosecution in court [46]. The consequences of such a regime, according to [47] is a totalitarian or authoritarian law that relies solely on the interests of power.

Historically, repressive laws have been used as tools by the German dictator Adolf Hitler, from his rise to the presidency to the execution of the genocide known as the Holocaust between 1941 and 1945. Hitler utilized legal instruments, including two separate laws enacted by Nazi Germany in September 1935, collectively known as the Nuremberg Laws and the Reich Citizenship Law and the Law for the Protection of German Blood and Honor. All of these laws embodied various racial theories that underpinned Nazi ideology. These laws provided a legal framework for the systematic persecution of Jews in Germany [48].

Based on the views of Soedjono [49], There are several specific characteristics of repressive law. First, maintaining order is the primary objective of the law. Second, the justification for limiting legal power is state authority. Third, regulations and guidelines are comprehensively structured to be stringent for individuals but flexible for those in power. Fourth, the arbitrary desires of the authorities serve as the basis for the creation of laws. Fifth, any situation that poses a threat to power provides the authorities with an opportunity to take action. Sixth, coercion is broadly inclusive with no clear limits. Seventh, self-control is the morality required by society. Eighth, power involves situations that are exempt from rules applicable to everyone. Ninth, disobedience is considered a crime, and public compliance must be unconditional. Tenth, public interest is permitted through accommodation, while criticism is viewed as a crime.

This article raises questions about repressive law in Indonesia for several reasons. First, it causes the President and Vice President to adopt a hardline stance towards the people. This article serves as an instrument for how power silences public criticism through criminal offenses. In fact, Article 1, Paragraph (2) of the 1945 Constitution of the Republic of Indonesia states, "Sovereignty is in the hands of the people and is exercised according to the Constitution." This provides a general picture of power being in the hands of the people, and the President or Vice President is elected directly by the people, thus making them accountable to the populace.

Second, power occupies a position above the law. As stated in Article 1, Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, "The State of Indonesia is a legal state." In the legal process, there exists the principle of Equality Before the Law, which is an indication of a legal state (rechtsstaat) aimed at ensuring equal treatment for every person before the law, regardless of their background. This principle establishes that citizens should receive equal treatment under the same legal provisions, meaning that no one, including those in power, is above the law, as they are also citizens. The phrase "No man is above the law" signifies that legal subjects are not entitled to any privileges under the law. If any legal subject is granted special privileges, it indicates that such a subject is placed above the law.

Third, legal interpretation based on power or flawed interpretation. Examining the grammatical or linguistic interpretation method reveals that the explanation in Article 218, Paragraph (1) of the Criminal Code, which states that "attacking the honor or dignity of a person is an act that diminishes or harms their reputation or self-esteem, including slander or defamation," is relative and subjective. For example, in a live national television talk show, a guest stated that the President and Vice President were both "fools." Only the President felt insulted and subsequently reported this to the police as a suspected act of defamation, while the Vice President did not feel offended. Logically interpreting this, even though it is clarified in Paragraph (2) which states that "acts done in the public interest" are meant to protect community interests expressed through the right to

freedom of expression and the right to democracy, such as protests, criticism, or differing opinions regarding the policies of the President and/or Vice President," this does not provide sufficient legal certainty, as the statements made pertain to a position held by the President.

Human Rights Protection Overlooke

The legitimacy of the recognition of Human Rights (HR) is rooted in a political and legal consensus that has been legalized in the United Nations Charter, based on the principles of agreements among all international nations. At that point, the existence and dignity of human beings, along with their rights, gain broader and stronger recognition in both national and international relations, no longer confined to local or translocal domains [50].

The dynamics of a state characterized by the rule of law have led to the emergence of a modern constitution that incorporates human rights into its articles. Of the approximately 120 constitutions in the world, over 80 percent of countries include written provisions regarding human rights, as outlined in the articles of the Universal Declaration of Human Rights (UDHR) of 1948. This has been accompanied by various forms of collective freedoms around the world, which have gradually been adopted by countries as a recognition of the international standardization system established to manage international relations. [51].

According to Frank La Rue, *the UN Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the cumulative requirement known as the "three-part test" is applied when imposing restrictions on freedom of opinion and expression*. This includes:

"(1) It must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency); and (2) It must pursue one of the purposes set out in article 19, paragraph 3, of the Covenant, namely (i) to protect the rights or reputations of others, or (ii) to protect national security or of public order, or of public health or morals (principle of legitimacy); and (2) It must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality)." [52]

(1) Harus disediakan oleh hukum, yang jelas dan dapat diakses oleh semua orang (prinsip-prinsip prediktabilitas dan transparansi); (2) Ia harus mengejar salah satu tujuan yang diatur dalam pasal 19, ayat 3, Kovenan, yaitu (i) untuk melindungi hak-hak atau reputasi orang lain, atau (ii) untuk melindungi keamanan nasional atau ketertiban umum, atau kesehatan masyarakat atau moral (prinsip legitimasi); dan (3) Harus sesuai kebutuhan dan sarana untuk seketat mungkin yang diperlukan untuk mencapai tujuan yang dimaksudkan (prinsip-prinsip kebutuhan dan proporsionalitas).

Referring to the above criteria, to evaluate the provisions of Article 218, paragraph (1) of the latest Criminal Code Law (KUHP), the results are presented in the following table:

Terms *"three-part test"*	**Article 218 paragraph (1) of KUHP**
The law must be clearly defined and accessible to all individueals (principles of predictability and transparency).	Fulfilment.
It must pursue one of the objectives outlined in Article 19, paragraph 3 of the Covenant, namely: (i) to protect the rights or reputations of others; or (ii) to protect national security, public order, public health, or morals (principle of legitimacy)	The formulation of the norm in Article 218, paragraph (1) of the Indonesian Penal Code (KUHP) targets acts that attack the honor or dignity of the President and/or Vice President. However, it does not contain provisions regarding the protection of the rights or reputations of others, as outlined in Article 19, paragraph (3) of the International Covenant on Civil and Political Rights (ICCPR) The formulation of the norm concerning attacks on the honor or dignity of the President and/or Vice President in Article 218,

	paragraph (1) of the latest Indonesian Penal Code (KUHP) lacks clarity regarding its implications. The evidence regarding the norm of attacking the honor or dignity of the President and/or Vice President is inherently subjective Therefore, the second requirement is not fulfilled.
It must be proven as necessary and by the least restrictive means required to achieve the intended purpose (principles of necessity and proportionality)	In the considerations section letter b of the latest Criminal Code Law, it states: "That the national criminal law must be aligned with legal politics, conditions, and the developments of community, nation, and state life, with the aim of respecting and upholding human rights, based on the Almighty God, just and civilized humanity, the unity of Indonesia, democracy led by the wisdom of deliberation/representation, and social justice for all Indonesian people. That the Pancasila norms stated in point b of the considerations of the Criminal Code Law are an inseparable part of the Preamble of the 1945 Constitution of the Republic of Indonesia, specifically in the fourth paragraph, which also outlines the purposes of the state, namely: To protect the entire Indonesian nation and all of its territory; To promote the general welfare; To educate the nation's life; and To participate in the establishment of world order based on freedom, eternal peace, and social justice Based on the explanations above, the provisions of Article 218 of the Criminal Code do not align with the current objectives, conditions, and circumstances. Therefore, the second requirement is not fulfilled.

The restrictions on freedom in the latest Criminal Code (UU KUHP) are already encapsulated in an instrument found in Chapter XVII regarding the crime of defamation, as articulated in Article 433 of the latest Criminal Code, which states:

"Every person who verbally attacks the honor or reputation of another by accusing them of something, with the intent for it to be publicly known, shall be punished for defamation, with a maximum imprisonment of 9 (nine) months or a maximum fine of category II. If the act referred to in paragraph (1) is committed in writing or through images that are published, displayed, or posted in public places, the offender shall be punished for written defamation, with a maximum imprisonment of 1 (one) year and 6 (six) months or a maximum fine of category III. Acts referred to in paragraphs (1) and (2) shall not be punishable if conducted in the public interest or as a necessity for self-defense".

When related to John Rawls' perspective, to ensure the protection of human rights, the constitutional agreement that forms the basic structure of society must be capable of guaranteeing a principle of fairness. Rawls views justice as fairness, developing the concept of justice into two principles: the principle of equal liberty and the difference principle [37].

When aligning John Rawls' principles of justice with human rights as outlined in the 1945 Constitution of the Republic of Indonesia, the principle of freedom—specifically political freedom, freedom of opinion, and the right to express oneself—is encapsulated in Article 28E of the 1945 Constitution. If certain limitations are

necessary to ensure that human rights protections remain intact, Rawls offers his second principle, which emphasizes difference and equality of opportunity.

The principles are elaborated as follows: First, every individual has an equal right to the broadest basic freedoms that can be reconciled with the same freedoms for all. Second, social and economic inequalities are to be arranged so that: (a) they benefit the least advantaged members of society to the greatest extent possible, and (b) positions and offices are open to all under conditions of fair equality of opportunity.

Prinsip yang pertama yang kemudian disebut "prinsip kebebasan yang sama" (*equal liberty principle*), seperti kemerdekaan berpolitik (*political of liberty*); kebebasan berpendapat dan mengemukakan ekspresi (*freedom of speech and expreesion*); kebebasan personal (*liberty of conscience and though*); kebebasan untuk memiliki kekayaan (*freedom to hold property*); dan kebebasan dari tindakan sewenang-wenang. Sedangkan prinsip yang kedua yaitu Prinsip Ketidaksamaan (*inequality principle*) dibagi menjadi dua, yaitu bagian (a) disebut sebagai "prinsip perbedaan" (*difference principle*) dan pada bagian (b) disebut dengan "prinsip persamaan kesempatan" (*equal opportunity principle*).

The correlation between Rawls' principles of justice and the norms outlined in Article 218 of the latest Penal Code suggests the potential for specific regulations designed to advance the interests of a dictator. In Rawls' view, the principles of justice must be considered in relation to the law (legitimacy) since these principles will determine several characteristics of legal products in practice. First, the actions mandated and prohibited by legal rules should be those that are reasonably expected to be undertaken or avoided by individuals.

Second, the ideas that must be articulated should convey the notion that they enact laws and issue commands with good faith. These two qualities, which incorporate the principle of justice, imply that laws and commands are accepted as such only if there is a general belief that these laws and commands can be obeyed and implemented.

It raises the question of why a specific article was created for every individual or citizen who commits acts of insult against the President and/or Vice President. Meanwhile, the Criminal Code already has guidelines for defamation or slander that apply to everyone, including the President and/or Vice President.

CONCLUSION

Autocratic legalism, in brief, refers to the planned and sustained assault on institutions that are supposed to oversee its actions within the framework of their democratic mandate, loosening the ties and constitutional limitations on the executive through legal reforms. The enactment of Law No. 1 of 2023 on the Criminal Code under Jokowi's administration is one manifestation of the emergence of autocratic legalism in Indonesia.

The legal implications of the enactment of Article 218 of the latest Criminal Code on democracy and the rule of law are the strengthening of repressive laws and the neglect of human rights protection. The strengthening of repressive laws is due to: (1) making the President and Vice President adopt a hardline stance against the people; (2) the power being placed above the law; and (3) legal interpretation based on power, leading to flawed interpretations. The neglect of human rights protection occurs because this article is not based on the norms established in international law regarding human rights, specifically Article 19 and Article 20 of the Universal Declaration of Human Rights (UDHR), and Article 19 (1) and (2) of the International Covenant on Civil and Political Rights (ICCPR).

RECOMMENDATIONS

1. Maintaining the Independence of Law Enforcement Agencies. A democracy without the rule of law will devolve into a lawless order without purpose. Therefore, a proper legal process is essential in a state.

2. Institutional Reform of Political Parties. After more than 20 years since the fall of the New Order era, it seems that the new political parties have yet to change the political behavior inherited from the New Order.

3. Collective Control by the People. There needs to be a shared awareness of this new danger (autocratic legalism). We must learn to recognize this threat, where we need to be better at documenting issues and learning from these problem.

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