

## ARTICLE

# THE PHENOMENA OF AUTOCRATIC LEGALISM IN THE POST-COVID-19 PANDEMIC AND HOW THE CONSTITUTIONAL COURT HAS A ROLE AS GUARDIAN OF THE CONSTITUTION

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### Abstract

*Autocratic legalism as a problem of the arbitrariness of power which is based on the construction of legitimate law becomes a serious problem compared to authoritarianism because of acts of the arbitrariness of power. Autocratic legalism is carried out by manipulating the law, the arbitrariness of power then does not seem to conflict with the law. This is certainly a threat to democracy. For this reason, this study aims to examine the problem of how autocratic legalism practices in Indonesia occurred after the Covid-19 pandemic. This paper also tries to explain how the Constitutional Court as the guardian of the constitution helps to perpetuate the practice of autocratic legalism through its decisions. This study uses the socio-legal method and using secondary data. The results of the study show that there are indicators of autocratic legalism by the DPR in making the third amendment to the Constitutional Court Act. Furthermore, the deviation from the Constitutional Court's decision on the Job Creation Law which was conditionally ruled unconstitutional by the Government by issuing Perppu 2/2022. Lastly, the Constitutional Court in its several decisions also seems to perpetuate the practice of autocratic legalism.*

*Keywords: Autocratic Legalism, Democracy, Post Pandemic Covid-19, Constitutional Court*



## A. Introduction

Larry Diamond uses the term<sup>1</sup> *Autocratic Legalism* to describe the decline of democracy globally as a form of third wave of autocratization. This decline is shown by the erosion of various elements of democracy,<sup>2</sup> when this setback occurs in the realm of the constitution then this is what is referred to as *Autocratic Legalism*. Kim Lane Scheppele explains the phenomenon of autocratic legalism by departing from the development of classical autocratic, if classical autocratic is carried out overtly and not infrequently accompanied with violence by authority holders in unconsolidated democracies, then autocratic legalism is carried out by giving birth to legitimate and constitutional legal instruments to weaken democratic institutions at the central level as stated by Lane<sup>3</sup> “*some constitutional democracies are deliberately hijacked by legally clever autocrat groups, using constitutionalism and democracy then destroying both*”.<sup>4</sup>

*Autocratic Legalism* using constitutional legal instruments is a form of democratic erosion by threatening pluralism, free speech, loss of functioning of democratic institutions, and judicial independence. The use of courts to perpetuate the erosive practice of democracy will give birth to *abusive judicial review* and the use of court mechanisms as a tool of sociopolitical control over voices contrary to the government’s goal of giving birth to *administrative and judicial control*.<sup>6</sup> For *legalistic autocrats* there are two ways to colonize a

1 Larry Diamond is a senior fellow at the Hoover Institution and Mosbacher Senior Fellow in Global Democracy at the Freeman Spogli Institute for International Studies (FSI) at Stanford University. He is a principal investigator in the field of the Global Digital Policy Incubator, which is part of the policy department at Stanford. He led the center of Democracy and the construction of the rule of law for more than six years. Larry Diamond also founded the Journal of Democracy during the International Forum for the Study of Democracy of the National Endowment for Democracy.

2 Regitze Helene Rohlffing and Marlene Wind, “Death by a Thousand Cuts: Measuring Autocratic Legalism in the European Union’s Rule of Law Conundrum,” *Democratization*, December 15, 2022, 1–18, <https://doi.org/10.1080/13510347.2022.2149739>.

3 Kim Lane Scheppele is Professor of sociology of law at the Princeton University Center for Human Values at Princeton University. One of his activities is also on the teaching staff in Pennsylvania, focusing on the fields of legal sociology and ethnography, comparative sociology, political sociology and human rights. What Lane is concerned about is research into the rise and fall of constitutional government. He has studied how democracies are under intense pressure on the rise of new autocrats. The research that the author will conduct is in line with Lane’s capacity and the author will also elaborate with the situation of democracy and its development in Indonesia. Center for Human Values at Princeton University. One of his activities is also on the teaching staff in Pennsylvania, focusing on the fields of legal sociology and ethnography, comparative sociology, political sociology and human rights. What Lane is concerned about is research into the rise and fall of constitutional government. He has studied how democracies are under intense pressure on the rise of new autocrats. The research that the author will conduct is in line with Lane’s capacity and the author will also elaborate with the situation of democracy and its development in Indonesia.

4 Kim Lane Scheppele, “Autocratic Legalism,” *The University of Chicago Law Review* 85, no. 2 (2018): 545–84.

5 Başak Çali, “Autocratic Strategies and the European Court of Human Rights,” *European Convention on Human Rights Law Review* 2, no. 1 (March 10, 2021): 11–19, <https://doi.org/10.1163/26663236-bja10015>.

6 Ibid.



state institution, *firstly*, they reorganize a state institution that is already firmly established, remove opponents and potential opponents from positions of power then appoint political allies to replace them, *secondly*, eliminate the existence of existing state institutions or institutions by replacing them with new ones that have the same function.<sup>7</sup> This kind of practice is carried out by Hugo Chavez<sup>8</sup> by way of proposing a consultative referendum for the election of the National Constituent Assembly, in its course this Assembly<sup>9</sup> served as Chavez's vehicle to weaken the already solid institution, its first target being the courts. This can be seen from the fact that after the ratification of the constitution was carried out, the National Constituent Assembly dissolved the Supreme Court and appointed almost all of its successors, subsequently this body consistently decided to legitimize the regime's actions as constitutional.<sup>10</sup>

Indonesia has its own characteristics related to the symptoms of autocratic legalism, starting with a democratization process that grows well after the end of the new order government which is then followed by constitutional amendments that further entrench democracy, respect for human rights, changes and the presence of a number of state institutions, judicial reform, strengthening the presidential system, the establishment of a Constitutional Court that has a role to balance power, and various improvements in the constitutional system that reflect the positive development of democracy in Indonesia. During president Jokowi's reign, a number of social and political analysts have conveyed how democracy in Indonesia has suffered breakdowns and setbacks and strengthened political cartelization that reflect the consolidated political power of the understanding of autocratic legalism.<sup>11</sup>

The presence of the Constitutional Court started a wider spectrum in the democratization process in Indonesia with its authority; the Constitutional Court became an institution that was seen as capable of providing protection for human rights and preventing autocracy carried out by

7 Ibid.

8 Hugo Chavez was President of Venezuela from 1999 to 2013 his role in clearly promoting a new approach to the Latin American integration project, Chavez played an important role in the process of integrating ideas and institutions that were initially very radical and the passage of time was acceptable, see Tom Chodor and Anthea McCarthy-Jones, "Post-Liberal Regionalism in Latin America and the Influence of Hugo Chávez," *Journal of Iberian and Latin American Research* 19, no. 2 (December 2013): 211–23, <https://doi.org/10.1080/13260219.2013.853353>.

9 Chodor and McCarthy-Jones.

10 Op Cit, Will Freeman

11 Herlambang P Wiratraman, "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics," *Federal Law Review* 50, no. 3 (September 2022): 314–30, <https://doi.org/10.1177/0067205X221107404>



other branches of power. This view is not wrong but also not absolutely correct, the Constitutional Court can also be an actor who legitimizes autocratic actions through birth verdicts. For this reason, this article aims to examine autocratic legalism in Indonesia in a post -pandemic context as a response and continuation of policies born in the midst of the Covid-19 pandemic which gave birth to political thinking of an “emergency state” where the policies set are centralized and ignore democratic principles, as well as how the Constitutional Court, which is dubbed as the guardian of the constitution, puts its position in responding to autocratic actions.<sup>12</sup>

## **B. Contestability Rule of Law is The Veil of Autocratic Legalism in State of Exception**

The past two decades in Latin America and Central Europe has shown how democratically elected Governments use laws to decommission institutions of accountability and concentrate power on the executive and transform democratic structures into consolidated ones. The practice of autocratic legalism that occurred in Hungary as described by some studies, shows the increase of authoritarianism within the Hungarian government towards public freedom, which can be seen from the unfair electoral practices that are preceded by amending the constitution so that the conduct of elections runs constitutionally to legitimize the power struggle of the next period. According to Sargentini’s report, the EU Parliament in September 2018 revealed the Hungarian government had committed systematic violations of the rule of law, human rights, civil rights, and social rights.<sup>13</sup>

In contrast to Hungary, the emergence of the practice of autocratic legalism in India became an inseparable part of the law and the crisis of democracy at the time, where the government made changes to the Act to change the rules of campaign funds, the Indian government also made informal amendments to

12 Herlambang P Wiratraman, “Testing the Direction of Tafisr ‘Formal Test’ of the Constitutional Court’s Decision on the Job Creation Law,” in Policy Paper: Mk Ruling Related To The Job Creation Law (Yogyakarta: Faculty of Law, Gadjah Mada University, 2022), <https://law.ugm.ac.id/policy-paper-putusan-mk-terkait-uu-cipta-kerja/>.

13 Will Freeman, “Colonization, Duplication, Evasion: The Institutional Strategies of Autocratic Legalism,” SSRN Electronic Journal, 2018, <https://doi.org/10.2139/ssrn.3210488>.

Rafael Labanino and Michael Dobbins, “‘The Goal Is Not Necessarily to Sit at the Table’—Resisting Autocratic Legalism in Hungarian Academia,” *Higher Education Quarterly* 76, no.3 (July 2022): 521–36, <https://doi.org/10.1111/hequ.12290>.

Green MEP Judith Sargentini said there are clear risks of serious violations by the Hungarian government against EU values. The substance of the report is a concern about the rule of law in Hungary, its electoral system, corruption, freedom of expression, assembly and assembly, and the rights of minority asylum seekers and most importantly regarding the independence of the courts in Hungary which is considered to be not doing well.

the constitution to weaken guided democracy in India, in essence, the legal prospects would be mobilized for the oppressive end cause. India itself has legal autocrats who are adept at utilizing or using legal instruments to strengthen their own power and aim to change the system they lead. As it is known that in India, law plays a role as a form of licensing as well as a driving function of the economy.<sup>14</sup>

In Indonesia, consolidated politics is a result of the control of political parties in elections with the support of oligarchic power which ultimately forms political cartels so that the design in elections is very easy to consolidate to get support from citizens. This understanding is supported by Fukuyama's view, when politics is cartelized and power is an oligarchy democracy will only be a mere formal procedure of dry essence. Although elections were held and freedom of choice was guaranteed, it was only the formation of a political elite that hijacked the sovereignty of the people.<sup>15</sup>

The Covid-19 pandemic period has made autocratic legalism gain a comfortable way to move. Although Covid-19 is basically a problem in the health sector, but it greatly determines the pattern and structure of the socio-economic sector. At the same time, the strategy of autocrats in building a legal framework to overcome the pandemic presses government officials to adjust despite opposing democracy and constitutionalism. As stated by Cosmin Cercel in his research, the legal infrastructure during the Covid-19 pandemic, in addition to being used to support liberal economic dominance, is also used by several autocrat groups to maintain and gain power, with the rise of authoritarian leaders in the United States, Central Europe and Eastern Europe.<sup>16</sup> Principles of constitutionalism such as separation of powers, popular sovereignty, protection of human rights, and equality before the law are being reversed. After the pandemic this trend has culminated with the birth of policies that seek to overcome the threat of the pandemic by temporarily suspending the constitutional protection of basic rights, emergency legislative mechanisms. Consequently, executives across Europe hold dominant power by producing extraordinary policies or blank checks to organize state constituencies.<sup>17</sup>

14 Deepa Das Acevedo, "Autocratic Legalism in India: A Roundtable," *Jindal Global Law Review* 13, no. 1 (June 2022): 117–40, <https://doi.org/10.1007/s41020-022-00171-y>.

15 Wiratraman, "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics."

16 Cosmin Cercel, Associate Professor in Law at the University of Nottingham School of Law, PhD (Sorbonne), LLM (Sorbonne), LLB (Bucharest/Sorbonne).

17 Cosmin Cercel, "Law, Politics, and the Military: Towards a Theory of Authoritarian Adjudication," *German Law Journal* 22, no. 7 (October 2021): 1192–1208, <https://doi.org/10.1017/glj.2021.66>.



The symptoms of autocratic legalism cannot be separated from the problem of subjectivity to the *rule of law*, this aspect is also easy to use as a veil that disguises the act of *autocratic legalism* and gains legitimacy unilaterally. As an abstract concept, *the rule of law* became a field of debate for jurists and political experts that was never finished. The rule of law is<sup>18</sup> *essentially a contested concept* depending on the agreement on the competing normative issues or the existence of disagreements on the issue and why the rule of law is always juxtaposed with democracy is because there are lawsuits that must be present to overcome every problem that exists, so it is inevitable that *the rule of law* will be played by the party that owns the arena of power as validation of autocratic actions.<sup>19</sup> In this context, the party that holds power with the *rule of law* has more advantages with the resources at their disposal to determine the public sphere which will turn the situation as the beginning of an attack on democracy and constitutionalism. That context can be understood in Bourdieu's construction of the relationship between agents and structures within the social sphere. The social sphere is a dynamic arena in which power requires a series of actions that are based on and influenced by the resources owned by the agent.<sup>20</sup>

Subjectivity and contestability will always be attached to the *rule of law*, even if a prudent measure of legal experts to clarify or apply the specificity of political actions in dealing with the Covid-19 pandemic. Besides that, leaders are increasingly daring to dampen pressure and even bear the shame of various public criticisms to frame their own version of the law with the aim of centralizing and consolidating their power, even more so in a *state of exception* that allows the government to use emergency powers that can obscure the limits of legal action under more normal circumstances because emergency powers makes it easier to expand political control such as restrictions on human rights.<sup>21</sup>

What is illustrated in the autocratic practice of legalism and pandemic conditions is a confirmed benchmark in the indicators of democrat-

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- 18 Adrian W. Bedner, "An Elementary Approach to the Rule of Law," in *Socio-Legal Studies*, 1st ed. (Denpasar, Bali: Pustaka Larasan in collaboration with the University of Indonesia, Leiden University, University of Groningen, 2012).
- 19 Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?," *Law and Philosophy* 21, no. 2 (March 1, 2002): 137–64, <https://doi.org/10.1023/A:1014513930336>.
- 20 Kukuh Yudha Karnanta, "Paradigms of the Arena Theory of Literary Cultural Production: A Study of the Thought of Pierre Bourdieu," *Journal Poetika* 1, no. 1 (2013).
- 21 David Mednicoff, "The Rule of Law, Covid-19, and the Struggle against Autocratic Power – towards a Multi-Faceted Approach," Article, *Blog Symposium on Power Policy and Pandemic*, April 8, 2022, <https://lexatlas-c19.org/the-rule-of-law-covid-19-and-the-struggle-against-autocratic-power-towards-a-multi-faceted-approachntitle/>.

ic death presented by Levitsky and Ziblatt.<sup>22</sup> The existence of rejection and the emergence of weak commitments to democratic procedures, domination, and loss of recognition of the legitimacy of opposition politics provide tolerance and even advocate the use of force by the authorities against civilians. The decline or even death of democracy is largely due to democratically elected executives and legislatures in elections that are supposed to create *checks and balances* in government turning into a group of autocrats who take advantage of the law to perpetuate the practice of domination, although the separation of powers has been outlined in the constitution there is no guarantee a democratically formed government will give birth to a democratic government. This can be seen in practice where some power holders seek the wrong path by manipulating the law and the constitution to legitimize autocratic actions within a constitutional framework.<sup>23</sup>

Placing democracy as justified against the power of the constitution is a way of thinking about the constitution as a root in the government of the country, meaning that changes to the constitution require a stricter mechanism than the laws and regulations under it because it is very likely that an amendment of a constitution will give birth to a major reform of the laws that were already stable during the pre-amendment. Yet, a constitution that requires strict change procedures are also a problem in a democracy based on the principle of popular sovereignty, so it is necessary to enforce a rule to limit the extent to which institutions that hold the authority to change the constitution *vis a vis* with the needs of the community. This can be used as a benchmark for the need to change the constitution to narrow or even eliminate the practice of *autocratic legalism*.<sup>24</sup>

As a consideration, research from *the Bingham Centre for the Rule of Law* that constructs a “*thin and thick*” related to the conception of rule of law can be a benchmark for how to see the quality of *the rule of law* discourse in both normal and emergency conditions.<sup>25</sup>

- 22 Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (United Kingdom: Vikings, 2018).
- 23 Bojan Bugarić, “Central Europe’s Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism,” *International Journal of Constitutional Law* 17, no. 2 (June 28, 2019): 597–616, <https://doi.org/10.1093/icon/moz032>. 28 Ludvig Beckman, “Democratic Legitimacy Does Not Require Constitutional Referendum. On ‘the Constitution’ in Theories of Constituent Power,” *European Constitutional Law Review* 14, no. 3 (September 2018): 567–83, <https://doi.org/10.1017/S1574019618000287>.
- 24 Ludvig Beckman, “Democratic Legitimacy Does Not Require Constitutional Referendum. On ‘the Constitution’ in Theories of Constituent Power,” *European Constitutional Law Review* 14, no. 3 (September 2018): 567–83, <https://doi.org/10.1017/S1574019618000287>.
- 25 Julinda Beqiraj, Rowan Stennett, and Weinberg Nyaisa, “The Rule of Law and Covid-19 Related Technologies,” Working Paper (United Kingdom: Bingham Centre for the Rule of Law, May 2021), [https://binghamcentre.biicl.org/documents/112\\_the\\_rule\\_of\\_law\\_and\\_covid\\_19\\_related\\_technologies](https://binghamcentre.biicl.org/documents/112_the_rule_of_law_and_covid_19_related_technologies).



**Thin** ————— **Thick**

Rule by Law	Legality	Right Competition	Democratic Conception
Government action is justified by the law	Government action is justified by the law	Government action is justified by the law	Government action is justified by the law.
	Generality, formal equality, publicity, prospectivity, consistency, clarity, stability, congruence.	Generality, formal equality, publicity, prospectivity, consistency, clarity, stability, congruence.	Generality, formal equality, publicity, prospectivity, consistency, clarity, stability, congruence.
	Independence of the judiciary, principles of natural justice, judicial review, access to the courts.	Independence of the judiciary, principles of natural justice, judicial review, access to the courts.	Independence of the judiciary, principles of natural justice, judicial review, access to the courts.
	Justification, procedural principles, and reasonability.	Justification, procedural principles, and reasonability.	Justification, procedural principles, and reasonability
		Civil and political rights. Sometimes also economic, social and cultural rights.	Civil and political rights. Sometimes also economic, social and cultural rights.
			Thin conception of democracy.

Apart from the theoretical framework, the conception of the *rule* of law still requires core elements that allow the formation of the principles of stability, predictability, clarity of law, limitation of discretion and abuse of power, equality before the law, and access to justice requires a more complex division of jurisdiction on the institutional structure of the state and may override the characteristics of each state.<sup>26</sup> The restriction of power can basically increase the effectiveness of the power itself, but often the holders of power feel the need for broader powers in order to be able to govern the state more effectively with little intervention as an excuse to protect citizens; this dualism causes a long debate between the management of the state and the purpose of the legal state in limiting power.<sup>27</sup>

**C. Autocratic Legalism Policies in Indonesia at the Post-Pandemic**

The crises that have occurred in various sectors including the massive global health and development crisis, coupled with the presence of Covid -19, have further aggravated the country in carrying out its democratic fusion, some are even looking to be able to return to a more certain pre-Covid-19 order. For example, in a democratic country that adheres to the practice of liberalism, the times when the Covid-19 Pandemic occurred,

<sup>26</sup> Beqiraj, Stennett, and Nyaisha.  
<sup>27</sup> Bedner, "An Elementary Approach to the Rule of Law."



was done with the reluctance of the state to carry out its social democratic functions. While in Indonesia, the strengthening of neo-liberalism can be seen from the G20 Presidency held in Indonesia in 2022, where the G20 is supported by strong and established alliances involving political businesses and large companies, this will certainly have the potential to damage the democratic structure that has been fought for in recent years.<sup>28</sup>

Indonesia's preparations after the Pandemic are more focused on the recovery and development of its economic aspects, this is marked by hosting the G20 Presidency, encouraging investment into the country, with an incoming investment target of IDR 1,200 trillion in 2022, and encouraging the digital economy. The strengthening of this economic sector is an alarm for the perpetuation of the practice of Autocratic Legalism.<sup>29</sup>

Some controversial issues that are considered a form of policy that indicates autocratic legalism can be seen in the following examples:

**1. Policy towards the *Komisi Pemberantasan Korupsi (KPK)***

The KPK is one of the state institutions that has an important role in efforts to create a clean government and of course in order to uphold constitutionalism. With its functions and authority, it is not surprising that for a few individuals the KPK is considered a threat. The issue of weakening the KPK through the revision of the KPK Law in 2019 is a reflection that there are different views in looking at policies towards the KPK, one of which is an effort to protect itself from the threat of the KPK with several arrangements in the revision of the KPK Law in 2019 but seems to still support the existence of the KPK as an institution that oversees it. As stated by Corrales,<sup>30</sup> autocratic legalism is usually characterized by the weakening of all state institutions that are able to supervise government power, so the issue of revision of the KPK Law, which is considered to weaken the KPK, is an example of an indication of the practice of autocratic legalism. The main points that are considered as weakening the KPK in the Revised

28 Amit Prakash, "Introduction to a special issue of India Review: Reflections on Politics and Policy for a post-Covid- 19 Era: Analysing Continuities and Fractures through the First Wave of 2020," India Review 20, no. 2 (March 15, 2021): 97–103, <https://doi.org/10.1080/14736489.2021.1904367>.

29 Al-Fa dhat.

30 The Fall of the Pillars of the Rule of Law, <https://www.jentera.ac.id/publikasi/runtuhnya-pilar-pilar-negara-hukum> accessed on 02 February 2023



Law as offered by the DPR are the limitation of the KPK's term of duty to only 12 years since the law was promulgated, restrictions on the KPK which can only handle corruption cases with losses of 50 billion and above, the abolition of the authority to prosecute, restrictions on activities such as wiretapping by the KPK which must be authorized by the head of the district court and investigations by the KPK must be on the proposal of the prosecutor's office and the police, and the KPK cannot issue a warrant to stop the investigation. These points are considered to weaken the KPK, but if they pass into articles in the latest KPK Law, then these articles are a form of control that is autocratic by lawmakers against the KPK but is wrapped up as if it is constitutional.

## **2. Ratification of the Draft Job Creation Bill**

It is undeniable that the presence of the Job Creation Bill even since it has not been passed has been considered full of legal substance that is pro-oligarchic interests. Since before it was passed, the Job Creation Law has received many rejection from civilians, especially workers who will be greatly harmed by the passage of the Job Creation Bill. The Job Creation Bill with its substance tends to benefit entrepreneurs, so it is considered that there are group interests behind the formation of the Job Creation Bill. In addition, with the passage of the Job Creation Bill, the authority to issue principle permits, spatial planning, and so on was transferred to the central government which led to centralization. But like turning a deaf ear, the framers of the law eventually passed the Job Creation Bill.

We can see how the efforts to ratify the Job Creation Bill, which was also known to be carried out with minimal transparency and even closed, seemed to be in a hurry with a substance that seemed like a scheme made by the government reflected indications of autocratic legalism. Through the Job Creation Bill, the oligarchic elite launched a scenario of developing the state and seemingly legal according to the law by taking refuge behind the Job Creation Bill.

### **3. Issuance of Government Regulation in Lieu of Law No. 2 of 2022 (Perppu Cipta Kerja)**

In 2023, the Government of the Job Creation Regulation aimed to replace the Job Creation Law No. 11 of 2020 which was decided as a conditional unconstitutional law by the Constitutional Court. Constitutional Court Decision No. 91/PUU-XIII/2020 states that the Job Creation Law is contrary to the 1945 Constitution and has no conditionally binding legal force. In addition, the Job Creation Law will also become permanently unconstitutional if no improvements are made within 2 years of the decision being read. However, under the pretext of a coercive crunch status, the unconstitutional Job Creation Law turned into constitutional through the Job Creation Library. Taking advantage of the legal arrangements that allow the president to issue Perppu, the Perppu Cipta Kerja, which even by the Constitutional Court Decision has been declared unconstitutional, is circumvented as if it is legal to be made constitutional again through the legality of the Perppu Cipta Kerja. From this, we can see exactly how the Government will find ways to pass its interests without the need to break the law. Quoting Bivitri Susanti in her article "*Authoritarianism Wrapped in Law*" the government with such actions has committed an act of autocratic legalism, namely the use of the law to legitimize undemocratic actions.

### **4. The Issue of Postponement of Elections and Extension of Presidential Term**

It is one of the discourses that continues to pass in our ears also on the issue of postponing elections and extending the term of office for the president. Although it is obviously a big opposition to this discourse, we also cannot close our eyes and ears to the fact that there is also great support for the realization of this discourse. We can see this, one of which is through several statements that indicate support conveyed by several Chairmen of well-known Political Parties in Indonesia. One of the reasons most echoed by supporters of the discourse is order to keep the election from dam-



aging the post-pandemic recovery period and anticipate the threat of recession. In fact, whether it is the postponement of elections or the extension of the presidential term, it will clearly oppose the soundness of the constitutional mandate that has provided for elections and the length of the presidential term. Apart from that, if it is not for self-interest then clearly everyone should know that the postponement of elections and the extension of the presidential term will actually undermine democracy, and the reasons presented are basically disputable. Although it has not been outlined in policy, this discourse very clearly reflects how the authority seeks to take control and seeks to gain legitimacy for its actions by taking refuge behind ostensibly constitutional grounds.<sup>31</sup>

#### **5. Ratification of the Criminal Code Bill (RUU KUHP)**

Although we all agree on the spirit of decolonialization depicted in the desire for the renewal of the Indonesian Criminal Code, it is unfortunate that when it has been formulated, apart from the process of its formation which is considered to be very minimal transparency, the RKUHP in some of its substance actually seems to colonize its own people. The controversial substance includes articles that are closely related to the government's interest in the protection of its good name, such as articles of contempt of the president, contempt of the legitimate government, contempt for state institutions/general powers, sexual crimes, defamation, and others. With these articles, the Government is protected and can at any time punish forms of public criticism of how the government is run by it and for its actions as a government. This certainly illustrates an authoritarian government, and with the validity of the Criminal Code Bill which contains these protection articles, actions that can degrade people's human rights will appear to be legitimate because they are carried out under the law as a form of *autocratic legalism*.

#### **6. Revision of the Constitutional Court Law**

31 In Kompas.id <https://www.kompas.id/baca/polhuk/2023/01/24/ahli-hukum-tata-negara-waspadai-terwujudnya-perpanjangan-masa-jabatan-presiden> article, several statements by the Chairman of the Politician Party were written regarding his support for the postponement of the 2024 elections, including:



One other example of efforts to practice autocratic legalism in Indonesian policy is the revision of the Constitutional Court Law. In substance, the revision of the Constitutional Court Law shows how the government of the judiciary is intervened by the government through the political process of establishing a law regulating the judicial institution of the Constitutional Court. The point of concern in the revised draft of the Constitutional Court Law is the first regarding the addition of the minimum age requirement to become a constitutional judge from 47 to 60 years. Secondly, the change in the terms of the term of office of constitutional judges from the period model to the maximum age limit of 70 years. The minimum age and tenure limits of constitutional judges are essentially nothing more than a political compromise.<sup>32</sup> Instead of revising the Constitutional Court Law in the interest of protecting the constitutional rights of citizens, lawmakers and governments formed an insubstantial arrangement and inserted their interests by intervening in arrangements regarding the judiciary that could actually place the Constitutional Court in a maelstrom of conflicts of interest.

#### **7. Policy Regarding the Tenure of the Head of the Nusantara Capital Authority**

Another example of one of the unfortunate policies that have passed into an article in the law is the policy regarding the Tenure of the Head of the Nusantara Capital Authority (IKN Authority) in Law Number 3 of 2022 concerning the National Capital (IKN Law). The IKN Law does not recognize elections as a system for choosing the head of the IKN special regional government, in contrast to other special regional government head election systems, the IKN Law states that the IKN Regional Government is held by the Head and Deputy Head of the IKN Authority whose appointment is carried out by the President after consultation with the DPR. Not only that, but Article 10 paragraph (1) of the IKN Law

32 Idul Rishan, Lecturer at the Faculty of Law, Universitas Islam Indonesia (FH UII), Department of Constitutional Law, Revision of the Constitutional Law, for whom? , <https://law.uui.ac.id/blog/2020/06/23/revisi-uu-mk-untuk-siapa/>, accessed on February 2, 2023.



stipulates that:

*“The Head of the Nusantara Capital Authority and the Deputy Head of the Nusantara Capital Authority as referred to in Article 9 hold office for 5 (five) years from the date of the inauguration and thereafter can be appointed and reappointed within the same term of office”*

Such an arrangement makes it possible for the Head of the IKN authority and his deputy to be re-elected without any restrictions on the term of office. The absence of a clear arrangement regarding the period of the Head of the IKN Authority opened a gap in the entry of autocratic legalism.<sup>33</sup>

At the level of policymaking that concerns statehood and the wheels of government during the pandemic, it is difficult to distinguish and provide clear ethical indications that distinguish between good decisions and bad decisions.<sup>34</sup> The thing that can dissect decisions made for good or bad is in the hands of philosophers and ethicists,<sup>35</sup> in which the pandemic was the right time to work to see and evaluate the recommendations formulated by scientists and the political decisions taken. All kinds of policies taken during the pandemic and even in relation to various countries are not only charged with epistemic responsibility by the directly affected paramedics but also policy-making politicians who may at the time of policy taking be under enormous pressure.<sup>36</sup> When the responsibility of decision-making during a pandemic is set during a pandemic, the responsibility for the policy must be viewed until the end of the pandemic, because often political decisions in a state of Margaret deviate from the principles of democracy and constitutionalism.<sup>37</sup>

The pandemic and post-pandemic period and its relationship with democracy must be understood that democracy is not

33 Miftah Faried Hadinata, “The Role of the Constitutional Court in Preventing Symptoms of Autocratic Legalism in Indonesia,” *Journal of the Constitution* 19, no. 4 (November 30, 2022): 749, <https://doi.org/10.31078/jk1941>.

34 Andrea Klimková, “Epistemic and Ethical Responsibility during the Pandemic,” *Ethics & Bioethics* 11, no. 3–4 (December 1, 2021): 117–25, <https://doi.org/10.2478/ebce-2021-0017>.

35 Ibid.

36 Ibid.

37 Ibid.

just a mere set of formal rules and procedures, but far from it the most important thing is the involvement of citizens implemented in political life and the running of the wheels of government.<sup>38</sup> Manipulation of the principle of popular sovereignty in the legislative process consequently gives birth to bad policies for abandoning the principles of constitutionalism, through hidden means, and taking refuge behind the *rule of law*.<sup>39</sup> In simple terms, it can be understood as an act of autocracy by using the law so that its actions seem to have legitimacy and look constitutional that threaten the constitutional rights of citizens. The real threat to democracy is to no longer involve the people as the highest holders of power and to strengthen the doctrine of totalitarianism.<sup>40</sup> The way to counteract efforts to weaken people's power is to protect the system that has been built so that the role of the people becomes increasingly centralized. Of course, in taking policy after the Pandemic at the state level, it is necessary to think about a holistic balance between fully and never fully rational political interests and a scientific approach.<sup>41</sup>

The pandemic is an event that must be recognized as a multifaceted event, from the severely affected medical dimensions, social and cultural dimensions, ethics, governance, and law. The consequences of this event also brings new order that requires more adjustments to its presence, but clearly at the level of the concept of autocratic legalism both during the pandemic and also post-pandemic cannot be justified in its implementation. This is a serious threat to the continuity of democracy, if viewed from a political and ethical perspective, the priority is the continuation of democracy and against the arbitrariness of the government that strengthens its authority and power in order to maintain the pow-

38 Leszek Koczanowicz, "Pandemic Challenges and Models of Democracy," *Ethics & Bioethics* 11, no. 3–4 (December 1, 2021): 196–205, <https://doi.org/10.2478/ebce-2021-0014>.

39 Miftah Faried Hadinatha, *Op.Cit.* 741

40 Totalitarianism is a concept used to explain the political system adopted by a country, which regulates almost every aspect of the public and private spheres, in other words, society is totally regulated and gets full control from the existing government or regime. check Evva Annisaa' Muslimah, "Totalitarianism In Mo Yan's Big Breasts And Wide Hips" 02 (2014).

41 Koczanowicz, *Op.Cit.*, "Pandemic Challenges and Models of Democracy."



er it has.<sup>42</sup> So, the pandemic brings valuable lessons that radical reforms are needed to survive this kind of crisis and the need for increased public participation, a mechanism that is as transparent as possible to ensure the continuity of democracy in Indonesia and opposes the practice of eloquent autocrat in reformulating the law for long-term political interests and maintaining the power it currently has by eroding popular participation and reducing democracy.

#### **D. How Constitutional Court Respond to Autocratic Legalism Policies**

Judicial review is an important element in the protection of democracy based on several reasons, *first*, the courts can overturn laws that violate constitutional principles, so it will put restrictions on policymakers to follow legal standards constitutionally. *Second*, judicial review can clarify and revise executive and legislative failures in formulating policies as a result of hasty decision making. *Finally*, the judicial review provides an avenue for minorities to gain access to their rights and can encourage nonviolent comparative politics.<sup>43</sup> Ahron Barack's contention is that a judge who sees his role in protecting the constitution and democracy will discuss in a different way than a judge who distances himself from such considerations. Judges who see that the balance between overlapping social values is an important element in their judicial role to render judgments, in contrast to judges who believe that social balance must be carried out through legislative authority. Perceptions of judicial roles will influence the thinking of judges in using their authority to fulfill actions, although it will affect the relationship of separation of powers with the legislative and executive bodies.<sup>44</sup>

Some policies that are born vulnerable to the pandemic and post Covid-19 pandemic cannot be intervened by the Constitutional Court, this is a limitation of power where the Constitutional Court can intervene through policies that are considered to cause harm constitutionally and through the submission of judicial review is only limited to Law. However, in its development, the

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42 Ibid

43 Stephen Cody, "Dark Law: Legalistic Autocrats, Judicial Deference, and the Global Transformation of National Security," *University of Pennsylvania Journal of Law & Public Affairs* 6, no. 4 (2021 2020): 643–86.

44 Aharon Barak, *The Judge in a Democracy*, New Jersey: Princeton University Press, 2008, hlm. 121.



Constitutional Court began to have the authority to test Perppu which originated from the Constitutional Court Decision No. 138 / PUU-VII / 2009 concerning Testing of Government Regulations in Lieu of Law Number 4 of 2009 concerning Amendments to Law Number 30 of 2002 concerning the Corruption Eradication Commission. Perppu itself is outlined by the 1945 Constitution in Article 22 stipulated to overcome the ‘compelling crunch’ then the legitimacy of the validity of a Perppu depends on the approval of the DPR. In a political climate and a healthy democracy, the birth of Perppu can be understood as a goodwill of the government to overcome the emergency, and high public trust in representative institutions will be the basis of the assessment framework for the ratification of the Perppu. But in a political climate that reflects the autocratic legalism, the birth of Perppu will give produce many questions due to the pressure the emergence of the Covid-19 pandemic as several studies have shown shifting and distorting the protection of the basic rights of citizens as a way of perpetuating power.<sup>45</sup> Referring to the findings of Petra Bard and Lauren Pech positing how to build what she calls ‘pseudo-democracy’ in a consolidated manner is *first*, ratifying the constitution so that it is in line with autocracy; *second*, organizing the legislature to align with the design of the autocracy; *third*, make use of the constitution or the Constitutional Court to further consolidate and maintain the new order of constitutionalism.<sup>46</sup> Therefore, it is not an exaggeration that the Constitutional Court can also be a means of implementing autocratic legalism.

Here are some policies that reflect the autocratic legalism that can be intervened by the Supreme Constitutional Court through rulings. First, the formal test of the Job Creation Law is very thick with the nuances of autocratic legalism that are dry participation and the requirement for executive control over the law. As a result in formal testing by Constitutional Court, which declared Conditionally Unconstitutional because the establishment of the Job Creation Law does not pass meaningful participation.<sup>47</sup> The ruling on the Job Creation Law opens up a new history in the Constitutional Court, because the Job Creation Law is the beginning of the Constitutional Court’s conduction

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45 Ni'matul Huda, “Pengujian Perppu Oleh Mahkamah Konstitusi,” *Jurnal Konstitusi* 7, no. 5 (May 20, 2016): 073, <https://doi.org/10.31078/jk754>.

46 Petra Bard and Laurent Pech, “How to Build and Consolidate a Partly Free Pseudo Democracy by Constitutional Means in Three Steps: The ‘Hungarian Model,’” *SSRN Electronic Journal*, 2019, <https://doi.org/10.2139/ssrn.3608784>.

47 *Vide*. The Constitutional Court Decision Number No. 91/PUU-XVIII/2020.



of formal testing. The ruling on the Job Creation Law shows clearly that the main principles of Indonesian democracy are alive and well, *checks and balances* between independent judiciary and the executive are clearly shown in decision No. 91/PUU -XVIII/2020.<sup>48</sup> The Constitutional Court's decision on the Job Creation Law became an important moment, considering the many questions of Independence of the Constitutional Court after the revision of the Constitutional Court Law to extend the term of office of constitutional judges which showed government intervention in the judicial branch of power.<sup>49</sup>

There is no good law without the independency of the judiciary, of which the Constitutional Court is a pillar of democracy that must be respected in the absence of any political intervention from other branches of power, because the Constitutional Court will eventually adjudicate the policies made by the government. The courts can not only legitimize the unilateral actions of lawmakers, as a lesson is what happened to Poland and Hungary i.e. manipulation of the judiciary with political power will only lead to the legitimacy of the government's dominance within the state. The third amendment to the Constitutional Court Law has some similarities with autocratic legalism in Hungary and Poland. In the case of Hungary, the government intervened in the judiciary through the political process, amending the law on the mechanism for appointing judges. For example, the Orban government has increased the number of constitutional judges from eight to fifteen and the ruling party could directly appoint new judges.<sup>50</sup> Meanwhile, in Poland, the election-winning party is heading for five new judges to legitimize power and reject candidate judges put forward by parties supporting the previous governing regime.<sup>51</sup>

*Second*, the testing of the IKN Law which is not in accordance with the principles of the Establishment of Laws and Regulations based on Law 12/2011 resulted in the IKN Law being submitted for formal and material tests to the Constitutional Court with Case Number 25/PUU - XX/2022. Al-

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48 Petra Mahy, "Indonesia's Omnibus Law on Job Creation: Reducing Labour Protections in a Time of COVID-19," SSRN Electronic Journal, 2021, <https://doi.org/10.2139/ssrn.3772526>.

49 Zainal Arifin Mochtar and Idul Rishan, "Autocratic Legalism: The Making of Indonesian Omnibus Law," *Yustisia Jurnal Hukum* 11, no. 1 (April 28, 2022): 29, <https://doi.org/10.20961/yustisia.v11i1.59296>.

50 David Kosař and Katarína Šípulová, "The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law," *Hague Journal on the Rule of Law* 10, 1 (April 2018): 83–110, <https://doi.org/10.1007/s40803-017-0065-y>.

51 Mirosław Wyrzykowski, "Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland," *Hague Journal on the Rule of Law* 11, no. 2–3 (November 2019): 417–22, <https://doi.org/10.1007/s40803-019-00124-z>.

though the establishment of the IKN Law violates the constitution and democracy, the Constitutional Court responded by rejecting the testing of the IKN Law, in contrast to its ruling on the Job Creation Law which considers the aspect of non-fulfillment of the principle of openness, namely not providing space for participation to the public, the Constitutional Court considers that the IKN Law is in accordance with the principles and procedures for the formation of laws and regulations and the constitution.<sup>52</sup> The legal consideration in the refusal of the formal and material test of the IKN Law is that the discovery of the fact by the judges by way that the Petitioner was considered unable to distinguish specifically and clearly outlines the potential harm in the issue of constitutionality in the IKN Law. Furthermore, the *Majlis* also considered that the Applicant did not clearly outline the issue of the process of forming Law 3/2022 which was considered contrary to the 1945 Constitution and the Applicant did not elaborate at all on the norms of the article proposed to be reviewed.<sup>53</sup>

In testing the IKN Law, the Constitutional Court only focuses on *petitum* in which they were not looking at the buildings of the legal framework in the IKN Law such as the loss of local elections, regional heads who have ministerial-level positions, the loss of regional-level people's representative institutions, the ambiguity of special autonomy.<sup>54</sup> In contrast to the Job Creation Law where judges are on a spectrum more than the *petitum*, namely by looking at the entire process of the birth of the Job Creation Law. The existence of the institution of the court, especially the Constitutional Court, cannot be separated from the social, cultural, economic, and political realities that will construct a certain political system so according to Hirschl that condition is what shapes the understanding of judges so that judges cannot act in an empty state and without an understanding of the reality behind the judge's decision. The court must take part in manifesting the political objectives and noble values of the state, as long as the court does not have the authority to coerce

52 Nor Fadillah, "Application of the Principle of Openness in the Formation of the Law on Job Creation and the Law on the National Capital," *Journal of Lex Renaissance* 7, no. 2 (April 1, 2022): 243–64, <https://doi.org/10.20885/JLR.vol7.iss2.art3>.

53 *Vide*. The Constitutional Court Decision Number 39/PUU-XX/2022

54 The existence of the Authority institution as a ministerial equivalent institution that manages regions with special authority does not reflect Chapter VI of the 1945 Constitution, which states that the head of regional government is only the democratically elected Governor, Regent / Mayor, so the Authority institution is a form of abusive constitution carried out by the central government, furthermore, what is contrary to the 1945 Constitution in the IKN Law is the disappearance of the legislative body in IKN as a representation of the local people to carry out legislative, supervisory and budgetary functions. The IKN Constitution actually distorts the implementation of asymmetrical Decentralisation by determining the characteristics of local governments that are special in nature but run by the central government .



other branches of power then as long as it will not give birth to a juristocracy that will destabilize the separation of powers and democratic principles, the assessment of the Constitutional Court in intervening in the mistakes made by the executive and legislature as a form of political expansion of the legislative court is a form of assessment against the authority of the Constitutional Court.<sup>55</sup>

## E. Conclusions

The law no longer has ‘virtue’ in the face of dodgy autocrats using the rule of law argument, the law only becomes a game to build power through the manipulation of democracy and constitutionalism so that this disease is difficult to diagnose, which in the end the journey of government in the state is only the creation of a handful of parties who continue to secure power for their next generation regime in pseudo elections. The symptoms of autocratic legalism in Indonesia after the end of the New Order government cannot be separated from consolidated democracy and politics, at this point, political parties as shareholders of democracy can make efforts that are far from the value of constitutional morality to legitimize autocratic actions. The presence of a pandemic provides new challenges, not only for the health sector but also for the socio-economic sector, which requires the law to be present to overcome problems, but emergencies are an opportunity for autocrats to launch strategies with authoritarianism nuances on the grounds of protecting citizens. In addition, the pandemic period gave birth to several policies in a state of minimal participation, this is an illustration of how autocrats use the pandemic as an excuse to exclude participation and is a primitive reason why Covid-19 is present in the era of advanced technological development, how public space participation is not only heard from the mouth by the ear directly, the public space has shifted virtually and this has become a turning point for citizens to control the course of government.

The Constitutional Court responded to two laws that were thick with autocratic nuances with different decisions, the Job Creation Law had to deal with a conditional unconstitutional decision, the court’s argument was that the Job Creation Law was dry with meaningful participation which was a sign of healthy democracy with the boundaries between the executive and

55 Ran Hirschl, “Constitutional Court vs Religious Fundamentalism Three Middle Eastern Tales”, *Texas Law Review*, Vol. 82, Iss. 7. 2004, hlm. 1856. <https://www.proquest.com/docview/203680245/fulltextPDF/11FC0D0DAEC44E80PQ>, 25 November 2021.

judicial branches of power still being maintained, more importantly, the Constitutional Court's decision on the Job Creation Law was a blow to autocratic legalism. A different verdict was born from the review of the IKN Law, where the judges focused more on the *petitum* rather than the ambiguous and abusive constitutional framework of the IKN Law. Although the constitutional judges did not necessarily intend to legitimize autocracy, there is an important factor that as guardians of the constitution requires the constitutional court to take a stand to disqualify articles made by the executive that is contrary to what is outlined by the constitution, as long as the court does not control and have dominance over other branches of power; the assessment of the political expansion of the judiciary is a *prima facie* for the existence and function of the Constitutional Court, meaning that the decision of the Constitutional Court will be a reflection of how the government works by the community at large which will form a strong discourse in the public sphere which in itself forces back the symptoms of autocracy.

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