

OFFENSE OF CONTEMPT AGAINST GOVERNMENT IN LAW NUMBER 1 OF 2023 CONCERNING CRIMINAL LAW CODE FROM CONSTITUTIONALISM PERSPECTIVE

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Abstract: The reform of criminal law in Indonesia has gone through a long process, so that it came to the enactment and promulgation of Act number 1 of 2023 concerning the Criminal Law Code which revokes the colonial heritage Criminal Law Code. However, as a new legal product, of course there are legal issues in it, which is related to the offense of contempt against government which includes executive, legislative and judicial powers. Specifically for contempt against the President and Vice President, a judicial review has been submitted to the Constitutional Court and ruled unconstitutional, but it has been re-enacted in the Criminal Law Code. So, based on this premise, this research analyzes how the offense of contempt against government is in Act number 1 of 2023 concerning the Criminal Law Code and whether the offense of contempt against government is contrary to the principles of constitutionalism. This study uses legal research methods. So, the results of this research are *first*, that the offense of contempt against government is contained in Articles 218-220 concerning attacks on honor or dignity and humiliation of the government and or state institutions which are regulated in Articles 240 and 241. *Second*, these offenses are contrary to the principle of constitutionalism which states that power must be limited so that the recognition, respect, and protection of human rights can be properly manifested. So that the state should not regulate the offense, moreover the offense related to contempt the President and Vice President has been adjudication unconstitutional by the Constitutional Court.

Keywords: Offense; Contempt Against Government; Criminal Law Code; Constitutionalism.

INTRODUCTION

Legal renewal in the context of positive law in Indonesia is a necessity that must continue to be carried out along with the times, especially in the context of consolidating living laws in society into the material content or substance of a law, so as to create conducive welfare in the socio-society (Fajrin & Triwijaya, 2019), because actually the law must always be capable of answering all legal issues that will come in the future, especially the renewal of criminal law in Indonesia, because the material criminal law which over time evolves and the legal needs of society become unresponsive and unable to accommodate various problems and dimensions the development of new forms of offenses and also experiencing so much blurring of norms that it creates legal uncertainty (Pradityo, 2018). Law is always left behind from social, economic, and cultural issues, law always feels late and slow to answer all existing problems, there are often differences between *das sein* and *das sollen*, so what happens is the difference between norms (law) and facts. According to Jurgen Habermas, law is a category of social mediation between facts and norms,

meaning that besides law there are facts that are not law. The fact that is not law is that it may be more numerous and extensive than the legal order, as in the postmodern view, law is only a small part of the overall order that exists (Rhiti, 2021). So that departing from those premises, giving rise to so many legal issues occurring in the scope of society, from vacuum norms, vague norms, and conflict norms, law should always go hand in hand with ancient civilization.

As a former Dutch colony which has a civil law legal system, thus making Indonesia a civil law legal system (Aulia & Al-Fatih, 2018; Janah, 2019; Widyaningrum, 2020). Various sources of formal law that apply in Indonesia, which is Legislation; Habit; Jurisprudence; Treaty; and Doctrine (Maulidya et al., 2023; Ngutra, 2016). Dutch legal heritage that is still valid today and has become positive law in Indonesia is *Wetboek van Strafrecht* (Criminal Law Code); *Burgerlijk Wetboek* (Civil Code); and *Wetboek van Koophandel* (Book of Commercial Laws). The civil law legal system is based on a branch of legal philosophy, namely legal positivism which is based on the principles of legality, legism and legal certainty. Historically, the idea of legality which claims to be able to provide legal certainty in law enforcement, especially in the realm of criminal law, if explored philosophically and historically, it is an idea that was born thanks to the idea of legism, at least that's what L.J. van Apeldoorn said, based on the ideas of J.J. Rousseau regarding the process of law formation, that the process is solely the special authority of legislators. Rousseau according to van Apeldoorn basically said that law is a statement of the original will of the people and it is the only source for the formation of law (Manullang, 2017).

As explained in the previous paragraph, Indonesia as a former Dutch colony still uses several legal products inherited from the colonial era, such as the Criminal Law Code, the Civil Code, the Commercial Code, but there are still legal products. other colonial legacies that are also still valid in Indonesia, namely the Civil Procedure Code which is regulated in the HIR (*Herzien Inlandsch Reglement*) and RBG (*Rechtreglement voor de Buitengewesten*), while the Criminal Procedure Code which is regulated in the Law Number 8 of 1981 concerning Criminal Procedure Code. The legal basis on which the colonial legal products came into effect is contained in the constitution in Article 1 of the Transitional Rules which reads:

“All existing laws and regulations are still valid as long as new ones have not been enacted according to this Constitution.”

This legal basis which is the basis for the legacy of colonial legal products in Indonesia is still valid today, but what will become the object of research in this scientific paper is the Criminal Law Code which on December 6 of 2022 was approved by the legislative and the Government to become a Law, which is Law number 1 of 2023 concerning Criminal Law Code, which means that the colonial heritage version of the Criminal Law Code is no longer valid. Of course, this is a very positive step from the Government of Indonesia which has formed a positive law version of the Indonesian Criminal Law Code which is not a colonial heritage, because as we also know, the colonial heritage version of the Criminal Law Code creates many interpretations, causing legal uncertainty at the level of its manifestations, even though this should not occur in the context of statutory regulations as the main source of formal law, the law must provide certainty. The total number of years Indonesia used colonial legal products, the Criminal Law Code, was 104 years and as time went on, the material criminal law version of the colonial heritage Criminal Law Code was no longer relevant to the conditions and needs of material criminal law in Indonesia. Regarding the effectiveness of the implementation of Law number 1 of 2023 concerning the

Criminal Law Code, this does not immediately become legal when it is promulgated and ratified by the Legislative and the Government, but will become effective within the next 3 years, in 2025.

The formation of Law number 1 of 2023 concerning the Criminal Law Code as a pure Indonesian positive law product that uses codification method, of course, is not immediately flawless or without criticism, there are still many legal issues that occur in it, especially relating to the article on attacking the honor or dignity of the President and Vice President as regulated in Articles 218 – 220; contempt against government and or state institutions regulated in Articles 240 and 241, in which these articles have broad meanings and are not fixed, giving rise to multiple interpretations regarding how the limits of attacks on honor or dignity and insults to the government or state institutions, which were in fact it is possible that when academics, students, and the general public are criticizing the performance of the President and Vice President as state and government institutions or state institutions which are also state institutions because they are regulated in the constitution, they will tend to be criminalized under that article, even though criticism is a form of the right to freedom of opinion whose fulfillment is guaranteed in the constitution, namely in Article 28E paragraph (3) which reads:

“Everyone has the right to freedom of association, assembly and expression of opinions.”

According to the principle of constitutionalism, the state with its various state institutions that have been regulated in the constitution, regulates how the implementation of the rule of law (*rechtstaat*) between the state and its citizens, so that government is carried out on behalf of and by the people, because sovereignty is in the hands of the people (Alfauzi & Effendi, 2020). Constitutionalism puts forward a system of limited state to the state as the executor of the constitution which has full power, so it is necessary to set limits on power in order to achieve the fulfillment of the rights of the citizens themselves, namely human rights as one of the substances of constitutionalism (Marzuki, 2010). The relevance of the understanding of constitutionalism to the legal issues of this research object is how a state institution that has been guaranteed the regulation of its rights and obligations through the constitution intersects with one of the human rights which is also guaranteed in the constitution, namely the right to be free to express opinions, criticism is a form the freedom of opinion. The constitution functions as the basic law which is the basis for every law issued and applies in the territory of the country (Suhardjana, 2010). The constitution as a form of social contract between the community and the government becomes a reaction from society to have a government that is governed by basic law, so that what is contained in the constitution is the relationship between those who rule and those who are governed.

When viewed from the perspective of the history of the Indonesian constitution, the limitation of powers either in the form of separation or distribution, can be seen in the third amendment to the 1945 Constitution of the Republic of Indonesia, which directed the direction of a functional horizontal arrangement of powers, so that the position of state institutions became equal. Each state institution as the organizer or executor of laws and regulations carries out functional supervision of other state institutions, so that the principle of checks and balances can be implemented and manifested properly (Suparman, 2023). Many modern countries apply the principle of constitutionalism because it is based on the foundation of the principle of constitutionalism which is fundamental to the constitution as a manifesto of the highest law that must be obeyed by the state represented by the government (Bactiar, 2016).

Limitation of powers, whether in the form of separation or distribution of powers, is a feature of constitutionalism and at the same time the main task of the constitution, so that the possibility of arbitrariness of power can be controlled and minimized with the aim of ensuring the protection, fulfillment, and respect for human rights itself as one of the goals of constitutionalism. Because as Lord Acton has also said that "power tends to corrupt, absolute power corrupts absolutely", so that it becomes so important to understand constitutionalism, because when power is not limited in such a way, what will happen is damage or arbitrariness and the victims are the community or citizens because their human rights are not guaranteed as it is the obligation of the state. Human rights are so important because they are an indicator to assess the level or class of civilization in a particular country, democracy, and the development of a country. In the context of the Indonesian legal state, the concept of human rights is actualized in the constitution, namely the 1945 Constitution of the Republic of Indonesia (Isra & Faiz, 2021).

The state represented by the government which has the highest power or authority is limited in power by the constitution so that arbitrariness does not occur. This concept is contrary to the offense of attacking the honor or dignity of the President and Vice President which is regulated in Articles 218-220 and contempt against government and or state institutions which are regulated in Articles 240 and 241, which should have become a necessity in the context of state life. The state as the holder of the highest authority to be criticized if it does not carry out its obligations as mandated in the constitution, while the offense implies that the government, be it the executive, legislative or judiciary tends to be anti-criticism, so that people are afraid to express opinions related to the performance of these state institutions. So that the legal issues that occur in this offense are not only vague norms, but also conflict norms, the ambiguity of norms is the unclear boundaries of attacks on the honor or dignity of the President and Vice President as well as contempt against government and or state agencies. So that the regulation of the offense is offended by the principle of constitutionalism which also has a connection with the rule of law (*rechtstaat*) and human rights.

So, with the description of the introduction, the purpose of this research is to find out how the offense of contempt against government is regulated in Law number 1 of 2023 concerning the Criminal Law Code and to find out whether the offense of contempt against government is contrary to the principal constitutionalism. So afterwards it is hoped that this research can become an additional thought related to the offense of insulting the government in Law Number 1 of 2023 concerning the Criminal Law Code from a constitutionalism perspective.

RESEARCH METHOD

The method in this research uses the method legal research (legal research), which is analyzing a legal issue by looking at literature studies or seeing how normative or positive law applies. The approach method used is the statute approach, which is the approach used to study and analyze related laws and regulations, and the conceptual approach, which is moving from the views and doctrines that developed in the science of law (Salim & Nurbani, 2017).

RESULTS AND DISCUSSION

1. Offense of Contempt against Government in Law Number 1 of 2023 concerning Criminal Law Code.

Material criminal law has a principle that is very attached to it, namely the principle of legality or the principle of *nullum delictum nulla poena sine praevia lege poenalli*, or which means that there is not a single act that can be subject to criminal sanctions and/or actions, except for the strength of the criminal law in the law that existed before the act was committed (DAN & PEMIDANAAN, 2005). The principle of legality as formulated in material criminal law and the constitution is one of the fundamental principles (Chuasanga & Argo Victoria, 2019) that must be maintained to achieve the goal of legal certainty (Anjari, 2018). The meaning of the principle of legality must be interpreted wisely within the framework of law enforcement and justice. When viewed from the situation and conditions in which it was born, the principle is to protect individual interests as the main characteristic of the objectives of criminal law according to the classical school, so that there is no arbitrariness by the government as the holder of power or the highest authority (Rahayu, 2014).

Law number 1 of 2023 concerning Criminal Law Code as a positive legal product of material criminal law in Indonesia is purely a very positive step from the government. The Criminal Law Code, which was approved by the legislative and the government on December 6 of 2022, became a law, which means that the colonial legacy version of the Criminal Law Code is no longer valid. Of course, this is a very positive step for the Government of Indonesia which has formed a positive law version of the Indonesian Criminal Law Code which is not a colonial heritage, because as we also know, the colonial heritage version of the Criminal Law Code creates many interpretations, causing legal uncertainty at the level of its manifestations, even though this this should not occur in the context of statutory regulations as the main source of formal law, law must provide certainty. The total number of years Indonesia used colonial legal products, the Criminal Law Code, was 104 years and as time went on, the material criminal law version of the colonial heritage Criminal Law Code was no longer relevant to the conditions and needs of material criminal law in Indonesia. Regarding the effectiveness of the implementation of Law number 1 of 2023 concerning the Criminal Law Code, this does not immediately become legal when it is promulgated and ratified by the Legislative and the Government, but will become effective within the next 3 years, in 2025.

As explained a bit in the background section, even though this is a positive step from the government, there are several articles that are problematic, giving rise to legal issues such as vague norms and conflict norms, as in Article attack on the honor or dignity of the President and Vice President which is regulated in Articles 218-220 and contempt against government and or state institutions which are regulated in Articles 240 and 241. Article 218 paragraph (1) and (2) explains that:

- (1) Any person who in public attacks the honor or dignity of the President and/or Vice President shall be punished with imprisonment for a maximum of 3 (three) years or a maximum fine of category IV.
- (2) Does not constitute an attack on honor or dignity as referred to in paragraph (1), if the act is carried out in the public interest or self-defense.

According to the elucidation of Article 218 paragraphs (1) and (2) that what is meant by attacking one's honor or dignity is an act that humiliates or damages one's good name or self-

esteem, including contempt or slandering. Then what is meant by being carried out in the public interest is protecting the interests of society which are expressed through the right to expression and the right to democracy, for example through demonstrations, criticism, or opinions that are different from the policies of the President and/or Vice President. In a democratic country, criticism is important as part of freedom of expression which is as constructive as possible, even if it contains disapproval of the actions, policies or actions of the President and/or Vice President. Basically, criticism in this article is a form of supervision, correction, and suggestions on matters related to the public interest. Further in Article 219 explains that:

“Everyone who broadcasts, shows, or attaches writing or pictures so that they are visible to the public, plays recordings so that they are heard by the public, or disseminates by means of information technology containing attacks on the honor or dignity of the President and/or Vice President with the intention of making the contents known or more publicly known, shall be punished with imprisonment for a maximum of 4 (four) years or a maximum fine of category IV.”

In Article 220 it only explains related to criminal provisions and the classification that the article is a complaint offense. Articles 240 and 241 regulate contempt against government or state institutions, of which Article 240 contains 4 paragraphs which read:

- (1) Everyone who in public verbally or in writing insults the government or state institutions shall be punished with imprisonment for a maximum of 1 (one) year and 6 (six) months or a maximum fine of category II.
- (2) If the crime referred to in paragraph (1) results in riots within the community, the penalty is imprisonment for a maximum of 3 (three) years or a fine for a maximum of category IV.
- (3) The criminal act referred to in paragraph (1) can only be prosecuted based on the complaint of the insulted party.
- (4) The complaint referred to in paragraph (3) is made in writing by the head of the government or state institution.

Based on the elucidation of Article 240, what is meant by insulting is an act that humiliates or damages the honor or image of the government or state institutions, including contempt or slandering. Contempt is different from criticism which is the right to expression and the right to democracy, for example through demonstrations or conveying opinions that are different from government policies or state institutions. In a democratic country, criticism is important as part of freedom of expression (Anugrah Pradana et al., 2022; Sabela, A. R., & Pritaningtias, 2017), which is as constructive as possible, even if it contains disapproval of the actions, policies or actions of the government or state institutions. Basically, criticism in this provision is a form of supervision, correction, and suggestions on matters relating to the public interest. In relation to the government and state institutions, what is meant by government is the President; Vice President and Minister who assist the task as mandated in the constitution. Meanwhile, what is meant by state institutions are the People's Consultative Assembly (Indonesian: MPR), the People's Representative Council (Indonesian: DPR), the Regional Representative Council (Indonesian: DPD), the Supreme Court (Indonesian: MA) and the Constitutional Court (Indonesian: MK). So that what is meant by state institutions here is not only legislative, but also judicial power. Further in Article 241 which also contains 4 paragraphs it is explained that:

- (1) Everyone who broadcasts, shows, or attaches writing or pictures so that they are visible to the public, plays recordings so that they are heard by the public, or disseminates by means of information technology containing insults to the government or state institutions, with the intention of making the contents of insults known to the public, shall be punished with imprisonment for a maximum of 3 (three) years or a maximum fine of category IV.
- (2) If the crime referred to in paragraph (1) results in harassment in society, the penalty shall be imprisonment for a maximum of 4 (four) years or a maximum fine of category IV.

- (3) The criminal act referred to in paragraph (1) can only be prosecuted based on the complaint of the insulted party.
- (4) The complaint referred to in paragraph (3) is made in writing by the head of the government or state institution.

The offense or article on contempt the President and Vice President was deleted and declared to have no binding legal force through a judicial review at the Constitutional Court through Adjudication number 013-022/PUU-IV/2006 concerning Request for Review of the Criminal Law Code (hereinafter referred to as the Criminal Law Code) against the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) which states that Articles 134, 136 bis and 137 of the Indonesian Criminal Law Code are contrary to the 1945 Constitution of the Republic of Indonesia and do not have binding legal force. With Law Number 1 of 2023 concerning the Criminal Law Code, articles related to contempt the President and Vice President are regulated again, meaning that there is also a conflict with the Constitutional Court's Adjudication. This new offense in the Criminal Law Code is related to contempt against government and/or state institutions, because previously this article was not regulated, it only regulated contempt the President and Vice President even though it was deleted through a Constitutional Court Adjudication.

2. Offense of Contempt against Government in Law Number 1 of 2023 Concerning Criminal Law Code according to Constitutionalism Perspective.

As a country based on law, checks and balances between institutions or powers are a must because this is a principle that must exist in a country that stands in the name of law. Of course, there are not only checks and balances between institutions or powers, but there must also exist between the government and those who are governed, between the state and its people. The constitutionality of these two legal subjects has also been guaranteed in the Indonesian constitution, the 1945 Constitution of the Republic of Indonesia which explains how the obligations of the government as the representative of the state and human rights for society are regulated and related to the fulfillment, protection and respect given responsibility and the location of the obligation to implement it to the government. One of them is the human right to expression, which is regulated in Article 28E paragraph 3:

“Everyone has the right to freedom of association, assembly and expression.”

The right to express opinions is included in basic or fundamental human rights and is very embedded in the concept of human rights itself that these rights are human nature and do not originate from the state (Jessup, 2022). The right to express opinions is also included in giving criticism to the government in the context of carrying out its obligations as stipulated in the constitution and laws if there are unconstitutional actions, so that the role of the community as the holder of the highest sovereignty is to provide criticism so that the life of the state becomes more meaningful or meaningful participation, because community participation is so crucial in all decision-making processes (Abustan, 2022), recognition, enforcement and promotion of Human Rights itself, community participation can submit suggestions regarding the formulation of a statutory regulation (*regeling*) or policy (*beschikking*) to the drafting state institution norms on Human Rights (Renggong & Ruslan, 2021), this is contained as regulated in Article 102 of Law Number 39 of 1999 concerning Human Rights which reads:

“Every person, group, political organization, community organization, non-governmental organization, or other social organization, has the right to submit suggestions regarding the formulation and policies related to human rights to National Human Rights Commissions and or other institutions.”

So that the relationship between the government and those who are governed (society) is not just merely normative, but in manifestation it has a clear and deep-rooted thread. The principle of constitutionalism states the same thing, that in a country, in order to avoid arbitrariness, the separation/division of powers is an absolute must so that the fulfilment, protection and respect for human rights can be manifested properly and in accordance with the applicable principles. The state is here as a stakeholder of obligations within the scope of legal relations between communities, the state as the governed, the governed community, the state as the executor of obligations, the community as the recipient and collector of rights. Simple accountability for the situation in the context of legal relations based on this social contract, according to law, the public has the right to collect and sue, and according to state law is subject to such billing.

However, this principle is not in line with the stipulation of Law number 1 of 2023 concerning the Criminal Law Code which repealed the colonial version of the Criminal Law Code. The difference is related to the Article on Contempt of Government, in this context it means insulting the President and Vice president; DPR; DPD; MPR; MA and MK. As we know, the article related to contempt the president and vice president in the Criminal Law Code has previously been submitted for a judicial review to the Constitutional Court and was ruled unconstitutional, so that the article is no longer valid, this is in Adjudication number 013-022/PUU-IV /2006 concerning the Request for Review of the Criminal Law Code (hereinafter referred to as the Criminal Law Code) against the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) which states that Articles 134, 136 bis and 137 of the Criminal Law Code are contrary to The 1945 Constitution of the Republic of Indonesia and does not have binding legal force. Introducing an article that has been declared unconstitutional in the new law is the same as not respecting the final and binding Constitutional Court Adjudication and violating the principle of constitutionalism which explains the importance of limiting/division powers so that the fulfilment, protection, and human rights can be well manifested.

The revived offense of contempt the President and Vice President is also contrary to human rights, both normatively and in principle. It has already been explained that the right to express an opinion is the same as giving criticism, especially in the context of this research, criticizing the President and Vice President, this matter should not be regulated again in Law number 1 of 2023 concerning the Criminal Law Code, because it contradicts Article 28E paragraph 3 which clearly regulates the right to express opinions. As we also know, the quality of law enforcement in Indonesia is currently not in line with the legal needs of society (Sholehudin, 2020), there are still many law enforcers who use the law for the benefit of certain people and with the norm of delict returned, the tendency to be used for certain interests is higher than the interests of human rights, so that this tends to harm people's rights, so that the resulting law is conservative or orthodox (Marpaung, 2011), so that what happens is politics is more determinant of law than law should be determinant of politics (Sulaiman, 2017).

As we also know, according to Soerjono Soekanto, there are 5 (five) factors in law enforcement, namely the substance/material factors of the law itself; law enforcement factors, namely the parties that form or apply the law; factors of facilities or facilities that support law

enforcement; societal factors, namely the environment in which the law applies or is applied; cultural factors, namely as a result of work, creativity and taste based on human initiative in social life. Among these 5 (five) factors, what most determines the effectiveness of law enforcement is the factor of law enforcement, because law enforcers determine how law enforcement and peace maintenance are carried out. Sociologically too, every law enforcer has a status and role. Law enforcers are role models within the scope of society, who should have certain abilities that are in line with the aspirations of the community (Amrunsyah, 2017). This is also related to how law is seen as a social institution, because the law does not work by itself, but is closely related to the public services provided by law enforcers to the community as a human right for them. The law does not work according to its own measurements and considerations, but by thinking and considering what is good to do for society. So it is clear that the factor of law enforcement is so important, that if we look at the norm of insulting the Government (President and Vice President; DPR; DPD; MPR; MA; and MK) the tendency will only be in favor of certain interests, in this case the law operates on behalf of the oligarchs or mere power (*machstaat*), not in the name of constitutional democracy, this is also contrary to the constitution which states that Indonesia is a country based on law (*rechtstaat*), not on mere power (*machstaat*) (Mahfud, 2003).

The offense of contempt against the DPR, DPD, MPR, MA and MK are a new offense in the context of the criminal law code in Indonesian positive law, because the previous Criminal Law Code did not regulate offenses against government institutions other than the executive, in the Law No. 1 of 2023 this is a new offense. However, as is the principle of constitutionalism, the separation/division of powers is so important in a rule of law that prioritizes the fulfillment, protection and respect for human rights. Separation/division of powers is also closely related to the principle of *trias politica* which explains that power is divided into 3 (three), namely Executive, Legislative and Judiciary powers as explained by Montesquieu, the core of this theory is so that there is no concentration of power and the formation of absolute arbitrary power, so that power in a country must be limited (Irawan, 2016; Widodo, 2012; Yani, 2018). In the context of separation, this means that each power has its own functions, authorities and obligations and may not intervene or help each other. Meanwhile, in the context of division, powers can work together to carry out the mandate of the constitution and the orders of the law. In line with the aim of achieving a constitution that is socially justice, seeing the purpose of the constitution which is intended to build social justice for all members and for all the people of Indonesia.

In the context of this principle, it is clear that the importance of power is not only focused on one tip, but must be shared in the interests of protecting the human rights of the community. The state must provide legal protection to the public in a broad, comprehensive, firm and complete manner, not half measures by regulating the norms or offenses for insulting the government in Law Number 1 of 2023 concerning the Criminal Law Code, because the community is in a weak position in the legal aspect (Salim & Nurbani, 2017). Legal protection itself is based on human rights. The concept of legal protection for the people originates from the concepts of recognition and protection of human rights and the concepts of *rechtstaat* and rule of law (Malik et al., 2021). The concept of recognition and protection of human rights provides its content and the concept of *rechtstaat*, and rule of law creates the means. Thus, the recognition and protection of human rights will thrive in the *rechtstaat* or rule of law, on the contrary it will be dry in dictatorial or totalitarian

countries, so that instead of legal protection that must be provided by the state is in a preventive form first rather than just repressive (Hadjon, 1987).

This is contrary to the principle of constitutionalism which explains that power must be given restrictions, and, in this context, power can also be criticized by all elements of society as a legal subject that has legal standing or a role occupant in this offense of insulting the government. The existence of this offense gives a tendency that the government cannot be criticized and will be subject to criminal penalties if it wants to issue constructive opinions in the context of a constitutional state, so that the current government tends to have no limitations in carrying out its duties, functions, and authorities, so that society is the target of laws and regulations. Invitation as applicable positive law cannot do anything but only accept public services from the government, whether it is in accordance with the constitution or not. So, this is contrary to the principle of constitutionalism. The state as the bearer of obligations and responsibilities or state responsibility, in terms of protecting, advancing, upholding and fulfilling human rights as one of the elements in the principle of constitutionalism must see how the participation of the community to contribute to upholding human rights as one of its elements as a form of constitutional juridical action (Simanjuntak, 2017), so that the state should look more closely at how material criminal law in this context is the offense of contempt against government whether it is in accordance with the principles of constitutionalism or only in favor of certain elite interests so that the legal products made are purely elitist (Marpaung, 2011).

Although the elucidation of the article on contempt against government explains that contempt is different from criticism which is the right to expression and the right to democracy, when viewed from the perspective of law enforcement factors in Indonesia it is still far from what it should be as the role occupant of law enforcers who carry out laws and regulations properly, the tendency that is seen is a violation of the principle of constitutionalism which explains the importance of limiting power and guaranteeing human rights, in this context is the right to issue opinions and expressions, the state should have to look again whether the norms or offenses are appropriate according to the relevant time and place, because if it is forced only in the interests of the authorities who put forward certain interests or oligarchs (Winters, 2011), what will happen later is only violations of human rights as explained in the principle of constitutionalism. The state must return to the objectives of the law itself, namely Justice, Certainty and Utilitarianism of Law as explained by Gustav Radbruch, but of all that, the most important thing to be the top consideration is that the law aims to provide legal protection and public order (Mertokusumo, 2019). The state must also see and identify the norm or offense of contempt against government whether it is indeed an act that harms or injures (*a malum*) so that sanctions are given, because as we know, government or state institutions are legal subjects (*rechtspersoon*) regulated in the constitution as executors and guarantors of human rights, not legal subjects (*natuurlijkpersoon*) who have feelings and can be harmed or abused.

CONCLUSION

The offense of contempt the government as regulated in Law number 1 of 2023 concerning the Criminal Code is regulated in the Article of Attack on the Honor or Dignity of the President and Vice President which is regulated in Articles 218-220 and Contempt against Government and/or State Institutions in this case namely DPR; DPD; MPR; MA and MK, are regulated in Articles 240 and 241. Specifically for the offense of contempt for Attack on Honor or the Dignity of the President and Vice President, it is an offense which was re-enacted after being adjudicated

unconstitutional by the Constitutional Court, so that there was a discrepancy with the Constitutional Court Adjudication which was final and binding, also contrary to the Principles of Constitutionalism which states the importance of limiting powers so that protection, fulfillment and respect for human rights can be manifested properly.

The principle of constitutionalism based on the trias politica and human rights guarantees freedom of opinion and conveying criticism to the government along with its state apparatus, namely law enforcers if in implementing the constitution and laws and regulations there is a discrepancy with the principles applicable in the science of law, however this is not reflected in the promulgation of offenses against the government which violate human rights, especially in this context is the freedom to express opinions, one of which is to criticize the government. As we also know, the quality and effectiveness of law enforcers in Indonesia is still far from expectations, so there are often discrepancies with existing laws (*das sollen*) and manifestations of these laws (*das sein*), thus provoking the offense of insulting the government. The government is not carrying out its obligations to guarantee the fulfillment, protection, and respect for human rights as one of the elements in the principles of constitutionalism, the state should not bring up this offense again because it is against the constitution.

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