

Criminal Law Reform in Indonesia : The Perspective on Freedom of Expression and Opinion

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Abstract

This article aims to discuss several criminal acts in the Indonesian Criminal Code that directly correlate with the right to freedom of expression and opinion. The analysis of these crimes employs the perspective of international human rights norms to assess the extent to which the mission of criminal law reform has been implemented in the reformulation process. This research uses a normative legal approach with statutory and conceptual approaches. The results of this study reveal that several criminal acts raise concerns regarding democratization and decolonization missions. These acts include the crime of attacking the dignity of the President and Vice President, the crime of participating in demonstrations, the crime of defaming the government and public control, the crime of defamation, and the crime of spreading disinformation. Although the crime of blasphemy has undergone significant transformation, it still possesses punitive potential if not restricted to material offenses. Moreover, the criminal act of disinformation requires further harmonization with the ITE Law. The incompatibility with the above missions confirms that some of these offences are disproportionate and potentially threaten freedom of expression and opinion.

Abstrak

Artikel ini bertujuan untuk membahas beberapa tindak pidana di dalam Kitab Undang-Undang Hukum Pidana Nasional yang berkorelasi langsung dengan hak kebebasan bereksprei dan berpendapat. Analisis terhadap beberapa tindak pidana tersebut menggunakan perspektif norma-norma HAM Internasional untuk menguji seberapa jauh misi reformasi hukum pidana berupa dekolonialisasi, demokratisasi, konsolidasi, dan adaptasi (harmonisasi) telah dilakukan dalam proses formulasinya. Penelitian ini merupakan penelitian hukum normatif dengan pendekatan perundang-undangan dan pendekatan konseptual. Hasil penelitian ini mengungkapkan bahwa beberapa tindak pidana menimbulkan kekhawatiran terkait misi demokratisasi dan dekolonisasi. Perbuatan tersebut antara lain tindak pidana penyerangan harkat dan martabat Presiden dan Wakil Presiden, tindak pidana ikut serta dalam demonstrasi, tindak pidana pencemaran nama baik kepada pemerintah dan penguasa umum, tindak pidana pencemaran nama baik, dan tindak pidana penyebaran disinformasi. Meskipun tindak pidana penodaan agama telah mengalami transformasi yang signifikan, namun masih memiliki potensi hukuman jika tidak terbatas pada pelanggaran materiil. Apalagi, tindak pidana disinformasi perlu menenknakan misi adaptasi (harmonisasi) lebih lanjut dengan UU ITE. Ketidakselarasan dengan misi-misi di atas menegaskan bahwa beberapa tindak pidana tersebut tidak proporsional dan berpotensi mengancam kebebasan bereksprei dan berpendapat.



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A. INTRODUCTION

1. Background

The criminal law reform is an effort inspired by the Indonesian people because, until now, the Criminal Code is the legacy of the Dutch government (Wetboek van Straftrecht). The image of national criminal law can be described by two conditions: age and character. Age portrays the enactment of the Criminal Code, which has lasted more than 100 years and has survived although the development of society has changed. And character portrays the colonial characteristic of criminal law. These two conditions strengthen a paradigm for law enforcement officials, namely the punitive paradigm.¹

Prayitno emphasized that the efforts to reform criminal law are facing enormous challenges in aspects of legal reform and consilience. In the aspect of legal reform, criminal law reform is an effort to reformulate legal concepts and norms that are in line with Pancasila values (Five Principles of the Indonesian State). This effort then created the National Criminal Code. Meanwhile, in the aspect of consilience, efforts to reform criminal law must be the main agenda in legal studies aiming to ensure that the criminal law discourse continues to develop empirically and is not bound by merely normative efforts.²

In the explanation of the National Criminal Code, there are four main missions of reforming the national criminal law, namely decolonization, democratization, consolidation, and adaptation (harmonization). Decolonization means replacing the norms that, in the early days of its formulation, were used by the Dutch Government for the benefit of colonialism. Democratization means that criminal law arrangements must adopt the principles of human rights. Consolidation means uniting various criminal law norms that have been spread into various laws and regulations. Unification is meant by the recodification of criminal law. Adaptation (harmonization) means adaptation to the development of criminal law studies and legal studies in an interdisciplinary manner to accommodate various developments in norms and social developments.³

To establish the originality of this research, the researcher needs to convey the findings of relevant previous studies related to the research topic. First, the study by Zico

¹ Otto Yudianto, "Karakter Hukum Pancasila Dalam Pembaharuan Hukum Pidana Indonesia," *DiH: Jurnal Ilmu Hukum* 12, no. 23 (2016): 37, <https://doi.org/https://doi.org/10.30996/dih.v12i23.890>.

² Kuat Puji Prayitno, "Pancasila Sebagai 'Screening Board' Dalam Membangun Hukum Di Tengah Arus Globalisasi Dunia Yang Multidimensional," *Jurnal Dinamika Hukum* 11, no. Edisi Khusus Februari (2011): 158.

³ Ade Mahmud, "Transformasi Nilai-Nilai Pancasila Dalam Pembaharuan Hukum Pidana Nasional," *Jurnal Hukum Mimbar Justitia* 4, no. 1 (2018): 7-9, <https://doi.org/https://doi.org/10.35194/jhmj.v4i1.352>.

Junius Fernando et al. explores the article on contempt of the President and Vice President in Indonesia.⁴ This research revealed that, despite the Constitutional Court's ruling stating the article on contempt of the President and Vice President as unconstitutional, the attempts to recriminalize this particular article in the National Penal Law do not constitute disobedience to the Constitution.⁵ The conducted reformation of criminal law led to the transformation of the article from the delict category to a complaint delict, reflecting the spirit of democratization and promoting freedom of expression and speech. In a separate study on freedom of expression in Indonesia, Fernando et al. stated that the disruption of freedom of expression and speech potentially leads to pathology democracy. Consequently, limitations on freedom of expression and speech should be imposed when such expressions and speech could cause harm to others' reputations and rights.⁶

Second, Vidya Prahassacitta and Hasibuan's research on the protection of disparities in freedom of expression in the application of the defamation article.⁷ This study found that different judges' interpretations of the norm's components led to variations in penalties in several ITE Law defamation case judgments. This is because the formulation of defamation norms in the ITE Law does not contain a clear formulation. This condition threatens freedom of expression and opinion because there are no clear measures and standards regarding the limits to which electronic information contains defamatory or defamatory content. In another study on the crime of spreading disinformation, Prahassacitta, and Harkrisnowo also emphasized that criminal law intervention needs to be limited in cases that attack freedom of expression and opinion; that is, such restrictions should only be imposed if the spread of disinformation has massive consequences or significant losses.⁸

⁴ Zico Junius Fernando, Pujiyono Pujiyono, and Nur Rochaeti, "Telaah Pasal Penghinaan Terhadap Presiden Dan Wakil Presiden Di Indonesia," *Jurnal Rechtsvinding Media Pembinaan Hukum Nasional* 11, no. 1 (2022): 135–151, <https://doi.org/http://dx.doi.org/10.33331/rechtsvinding.v11i1.826>.

⁵ Aulia, Z. Z. M., Bagus, M., & Firmansyah, A. (2023). Sanksi Pidana dalam Pengalihan Fungsi Ruang Terbuka Hijau. *Ma'mal: Jurnal Laboratorium Syariah Dan Hukum*, 4(1), 40–58. <https://doi.org/10.15642/mal.v4i1.197>

⁶ Zico Junius Fernando et al., "The Freedom of Expression In Indonesia," *Cogent Social Science* 8, no. 1 (2022): 1–11, <https://doi.org/10.1080/23311886.2022.2103944>.

⁷ Vidya Prahassacitta and Batara Mulia Hasibuan, "Dsiparitas Perlindungan Kebebasan Berekspresi Dalam Penerapan Pasal Penghinaan Undang-Undang Informasi Dan Transaksi Elektronik," *Jurnal Yudisial* 12, no. 1 (2019): 61–79, <https://doi.org/http://dx.doi.org/10.29123/jy.v12i1.299>.

⁸ Vidya Prahassacitta and Harkristuti Harkrisnowo, "Criminal Disinformation in Relation to the Freedom of Expression in Indonesia: A Critical Study," *Comparative Law Review* 27, no. December (2021): 135–165, <https://doi.org/10.12775/CLR.2021005>.

Thirdly, Elva Imeldatur Rohmah's research on the issue of defamation of the president in democratic countries has brought to light several legal comparisons between nations that specifically legislate the criminal act of defamation of the president and those that do not. The countries that have such legislation appear to aim at reinforcing the political stability of the nation. Conversely, countries that do not have specific regulations on this matter tend to prioritize the principles of freedom of expression and opinion as integral components of the democratic process, which must be upheld and respected by the state.⁹

2. Problem Statement

Based on the four missions above, the question that needs to be presented is whether the formulation of offense in the National Criminal Code is in line with the four missions above? To answer this question, the researcher intends to test several studies that are directly related to human rights norms, namely the right to freedom of expression and opinion. This perspective is essential for testing the relationship between several norms within the bill in relation to the missions of decolonization, democratization, consolidation, and adaptation (harmonization).

3. Method

This type of research is qualitative research with descriptive methods. This research is normative legal research that focuses on analyzing the norms in the National Criminal Code and ICCPR so that the relevant approaches used are legislative approaches and conceptual approaches. The primary legal materials are the National Criminal Code and the ICCPR. Secondary legal material is taken from searching various legal literature, both in relevant journals and books.

B. DISCUSSION

1. The Right To Freedom Of Expression And Opinion

The efforts to reform criminal law must be by human rights norms, as explained in the introduction above. In contrast to the image of criminal law in the past, whose formulations were very punitive, cruel, and retributive. The image of criminal law today must respect human rights norms, and that is what makes criminal law more progressive, restorative, and rehabilitative. In this paper, the researcher limits it to one of the human rights norms, namely the right to freedom of expression and opinion. According to some

⁹ Elva Imeldatur Rohmah, "Pasal Penghinaan Presiden Dalam Bingkai Negara Demokrasi," *Al-Jinayah: Jurnal Hukum Pidana Islam* 9, no. 1 (2023): 28–56, <https://doi.org/https://doi.org/10.15642/aj.2023.9.1>.

discourses, Indonesia is a state with Pancasila democracy, so it is obligated to protect human rights.¹⁰

Zainal Abidin explained that Indonesia is bound by international law as well as morally by the nation and that every policy must be based on human rights norms.¹¹ Kalin and Kunzli emphasized the state's obligations in three aspects, namely the protection, respect, and fulfillment of human rights.¹² In this context, the state is obliged to protect, respect, and fulfill the right to freedom of opinion and expression.

This paper will first focus on the reform of criminal law and its relation to the right to freedom of expression and opinion. In human rights discourse, the right to freedom of expression occupies a central position as the main buffer for a democratic state. Freedom of expression and opinion is a fundamental right for everyone and of course plays a role in the democratization process in all aspects (not only legal and political, including social and cultural). It can be said that freedom of opinion and expression is not only attached to individual rights but also collective rights as a form of community participation in the democratic process.¹³

John Stuart Mill expressed his view that freedom of expression and opinion is as vital as freedom of thought, if not inseparable from it. However, the state may have the authority to criminalize immoral acts; in the context of thinking, expressing, and uttering opinions, this freedom becomes an "*encomium*" that transcends mere moral judgments. Mill contends that social construction has always placed expression and opinion as subjects worthy of evaluation based on the moral foundation of society. However, the crux of the issue regarding expression and opinion lies in the quest for truth or the potential for error. Moreover, the filtration of truth is inherently present within the social construct of society, exemplified through dialogues and deliberations.

Individual rights, expression, and opinion are considered private property with inherent value that is deeply personal. If the state suppresses or restricts this freedom, reducing it to a mere expression or subjective perspective of truth, it essentially deprives

¹⁰ Bobi Aswandi and Kholis Roisah, "Negara Hukum Dan Demokrasi Pancasila Dalam Kaitannya Dengan Hak Asasi Manusia (HAM)," *Jurnal Pembangunan Hukum Indonesia* 1, no. 1 (2019): 129, <https://doi.org/10.14710/jphi.v1i1.128-145>.

¹¹ Zainal Abidin, "Perlindungan Hak Asasi Manusia Di Indonesia," *Pelatihan HAM Bagi Panitia RANHAM Prov. Sumatera Barat* (Jakarta, 2013): 6.

¹² Walter Kalin and Jorg Kunzli, *The Law of International Human Rights Protection*, Second Edi (New York City: Oxford University Press, 2019): 95-104.

¹³ Fernando et al., "The Freedom of Expression In Indonesia": 4.

an individual of their sole intrinsic value.¹⁴ Mill emphasizes that freedom of expression and opinion hold significant value for every individual. Similarly, Joseph Hamburger asserts that freedom of expression and opinion lies at the core of human existence, representing the embodiment of freedom of thought. When certain states or groups enforce a specific threshold of truth upon opinions, they essentially deprive the dialectical process of truth of its most precious element. Mill acknowledged that truth often faces suppression from the majority, who seek to conceal perspectives diverging from their own.¹⁵ Consequently, Mill expresses particular concern regarding the non-existence of an absolute essence of truth itself.

Given that freedom of expression and opinion is inherent as part of human rights, it is necessary to refer to international human rights norms. The normative justification of the right to freedom of expression and opinion is contained in Article 19 of the UN Declaration of Human Rights. However, Article 29 paragraph (2) of the UN Declaration of Human Rights provides a restriction that the right to freedom of expression and opinion can be restricted by the state through legislation (derogable rights). These restrictions make the right to freedom of expression and opinion a right that can be restricted by the state for the sake of a fair collective purpose, namely to maintain decency, public order, and the general welfare.

Indonesia adopts the above norms of freedom of expression and opinion into the constitution, considering that these norms are very fundamental in the promotion of Pancasila democracy. Even the 1945 Constitution before the amendment already regulated this right to freedom (vide Article 18), indicating that Indonesia from the beginning had positioned the right to freedom of expression and opinion as a fundamental right before the UN Council regulated it in the UN Declaration of Human Rights (in comparison, Indonesia regulated it in 1945, three years earlier considering that the UN Declaration of Human Rights was initiated in 1948).

Meanwhile, the 1945 Constitution (post-amendment) maintained and developed norms for the right to freedom of expression and opinion. Explicitly, the norm is contained in Article 28E, paragraph (3) of the 1945 Constitution. In addition, Article 28F of the 1945 Constitution also gives the right to convey information through various available

¹⁴ John Stuart Mill, *On Liberty*, ed. David Bromwich and George Kateb, Rethinking (New Haven and London: Yale University Press, 2003): 86-88.

¹⁵ Joseph Hamburger, *John Stuart Mill On Liberty and Control* (Princeton: Princeton University Press, 1999): 95.

channels. However, the right to freedom of expression and opinion can also be restricted by the state (derogable rights) as stated in Article 28J paragraph (2) of the 1945 Constitution. Such restrictions do not mean reducing the democratization process, but rather for the sake of broader and fundamental interests.

Based on Article 19 paragraph (3) of the International Covenant on Civil and Political Rights (ICCPR), restrictions on the right to freedom of expression and opinion can be implemented in 2 dimensions, namely the individual dimension and the collective dimension. On the individual dimension, restrictions are placed solely to preserve the reputation or honor of a person who is violated for this freedom. The collective dimension encompasses four main things, namely: maintaining national security; maintaining public order; maintaining public health; and maintaining public morals. It is in this context that the justification and rationalization of state policy can restrict the right to freedom of expression and opinion.

Why are restrictions also necessary? Qulub contends that when expressing opinions and viewpoints, the limits should rely on the moral beliefs upheld by the local community. Accordingly, consideration should also be given to public order.¹⁶ Feinberg highlights a critical point that rationalization of restrictions on freedom of expression and opinion can be justified when the expressed expression or opinion results in tangible harm, such as damage to one's reputation (in the case of defamation) or when the opinion incites widespread trouble.

However, Feinberg also acknowledges that certain expressions and opinions may not be subject to criminalization depending on the context and setting. For instance, opinions expressed by witnesses in a courtroom, criticisms shared through various media channels, the freedom of the press, expressions and opinions exchanged during public debates or academic discussions, vigorous criticisms voiced during demonstrations in public spaces, and even political figures engaging in critical discourse to garner votes in their contests.¹⁷

Restrictions in the context of criminal law must be formulated clearly and strictly so as not to cause multi-interpretation. The formulation is an actualization of the principle

¹⁶ Siti Tatmainul Qulub, "Batasan Kebebasan Berpendapat Dalam Menyampaikan Argumentasi Ilmiah Di Media Sosial Perspektif Hukum Islam," *Al-Jinayah: Jurnal Hukum Pidana Islam* 4, no. 2 (2018): 253, <https://doi.org/https://doi.org/10.15642/aj.2018.4.2.247-267>.

¹⁷ Joel Feinberg, *Freedom and Fulfillment: Philosophical Essays* (Princeton: Princeton University Press, 1992): 129.

of legality known as the four main principles of legality, namely *lex scripta*, *lex certa*, *lex praevia*, and *lex stricta*. These four principles, if used properly, will produce a good formulation of offenses and do not violate restrictions on freedom of expression and opinion.¹⁸ In a more specific context of defamation, it is necessary to refer to General Comment No. 34 of the International Covenant on Civil and Political Rights (ICCPR), which recommends that defamation should no longer be considered a criminal offense but rather be redirected to civil resolution mechanisms. This process is much fairer, providing the accused party with the opportunity to demonstrate that their statement constitutes the truth and whether it was intended to harm someone's reputation. Conversely, the plaintiff can also prove that the statement, even if true (malicious truth), has indeed led to damage of their reputation and caused harm to them.

2. Criminal Code and Freedom Of Opinion And Expression

In the context of criminal law, the state has the authority to determine which arrangements of an act are prohibited and therefore punishable. In the formulation of criminal law norms, the government often deals with human rights norms, considering that criminal law is a form of state restrictions on behavior (both citizens and state institutions themselves). Therefore, the formulation of a criminal act sometimes even always faces a dilemma when the formulation is closely related to the social, political, economic, and cultural life of the community. Faults in the formulation will have a direct impact and disrupt all aspects of people's lives. This problem is also seen in the formulation of the Criminal Code Draft, which has received resistance from the community since 2015, until now the formulation is still problematic.

In the context of the criminal law reform, several articles in the criminal code face major problems when dealing with restrictions on the right to freedom of expression and opinion. Therefore, it is necessary to look at the quality of its formulation in several tables along with its explanation below.¹⁹

¹⁸ Iskandar Wibawa, "Reconstruction Of The Legality Principle In Penal Law Enforcement For The Realization Of Justice," *Untag Law Review* 2, no. 1 (2018): 13, <https://doi.org/http://dx.doi.org/10.36356/ulrev.v2i1.718>.

¹⁹ Aliansi Nasional Reformasi KUHP, "Respon Aliansi Nasional Reformasi KUHP Terhadap Isu Krusial RUU KUHP Paparan Pemerintah" (Jakarta, 2022): 1-38, <http://reformasikuhp.org>.

Table 1. Assault on the Honor and Dignity of the President and Vice President

The Criminal Code Article	Restriction	Reform Mission
Article 218	The form of restriction is to maintain the reputation or honor of a person (President and Vice President). In paragraph (2), public order is an excuse to affirm the meaning of "honor and dignity" but it needs clear indicators and boundaries so as not to create a hegemony of interpretation by the government. One thing that should be underlined is that Article 19 paragraph (3) of the ICCPR refers only to the reputation of the person as an individual, not the reputation of the institution or position.	It is not in line with the mission of decolonization because historically, it has been used by the Dutch Government in its colonialist goals. It is not in line with the mission of democratization because it is incompatible with the restrictions on the right to freedom of expression and opinion. Other missions are fulfilled.

Source: National Criminal Code

The Constitutional Court, through Decision No. 013-022/PUU-IV/2006, has declared this offense unconstitutional because it is not in line with the concept of a democratic state. But the government revived this article on the pretext that the dignity of the President and Vice President is fundamental in the presidential system. But in practice, this article has the potential to ensnare many critics. Of course, the government until now has not had clear measures and indicators regarding the difference between criticism and "assaulting honor". Therefore, the consequences will be very dangerous for the democratic climate.

Fernando et al. asserted that the recriminalization of defamation against the president and vice president did not constitute a violation of the Constitutional Court's decision mentioned earlier. This is because the process of reformulating the norm changed the classification of the offense from an ordinary offense to a complaint offense. Moreover, the revival of the article was justified based on the principle of 'ratio legis,' which recognizes the president and vice president as symbolic figures representing the

state.²⁰ In alignment with Fernando et al.'s viewpoint, Adhya Satya also referred to the positions of president and vice president as symbolic representations of the state, signifying the sovereignty of the country.²¹

To determine whether the president and vice president can be classified as symbols of the state, a normative inquiry is essential. Neither the constitution (Article 36A) nor Law Number 24 of 2009 concerning the Flag, Language, and National Emblem, as well as the National Anthem, explicitly designates the president and vice president as state symbols. As such, the notion labeling the president and vice president as symbols of the state remains a doctrinal interpretation. Consequently, it is pertinent to refer to Article 19, paragraph (3) of the International Covenant on Civil and Political Rights (ICCPR), which recommends addressing insults directed at individuals, not their positions.

Table 2. Contempt of Court

THE CRIMINAL CODE ARTICLES	RESTRICTION	REFORM MISSION
ARTICLE 280 LETTER B	The form of restriction is to maintain a person's reputation or good name (integrity of judges, court officers' integrity, law enforcement officials' integrity)	This article fulfills four main missions. However, it has the potential to jeopardize the mission of democratization if the panel of judges violates the principle of <i>audi et alteram partem</i> .

Source: National Criminal Code

The formulation of the article has changed, expanding its scope from solely targeting the integrity of judges to encompassing law enforcement officials and court officers. This broader formulation deserves appreciation as it promotes equality among legal actors within the courtroom. In the researcher's view, this article should be regarded as a spirit of opening up space for the freedom of law enforcement officials, particularly prosecutors and legal advisors, during the adversarial system of legal ideas in the courtroom. While judges possess the authority to lead and control the proceedings, they must uphold their integrity in providing a proportional role (*audi et alteram partem*).

²⁰ Fernando, Pujiyono, and Rochaeti, "Telaah Pasal Penghinaan Terhadap Presiden Dan Wakil Presiden Di Indonesia": 149-150.

²¹ Adhya Satya Lambang Bangsawan, "Kajian Kritis Terhadap Putusan Mahkamah Konstitusi Nomor 013-022/PUU-IV/2006 Tentang Pembatalan Pasal Penghinaan Terhadap Presiden," *Refleksi Hukum: Jurnal Ilmu Hukum* 4, no. 1 (2019): 99, <https://doi.org/https://doi.org/10.24246/jrh.2019.v4.i1.p97-114>.

Failure to uphold this spirit could potentially lead to the use of this article to restrict the maneuverability of law enforcement officials (prosecutors and legal advisors). This will only create an authoritarian trial process, and the sacredness of justice is hindered by the sacrality of the judge's symbol. Court decisions are not anti-criticism legal products but must be open to every criticism so that legal studies can develop, especially in reviewing judges' decisions.

Table 3. Blasphemy Offense

THE CRIMINAL CODE ARTICLES	RESTRICTION	REFORM MISSION
ARTICLE 300 AND 301	The form of restriction is to maintain public order and public morals related to religious believers in Indonesia.	This article has undergone significant transformation in the effort to fulfill the right to freedom of religion or belief. However, this has the potential to infringe upon the right to freedom of expression as part of the mission of democratization when, in one of the sermons, another religion is declared false, misguided, or as infidels. Meanwhile, Article 301, paragraph (1), has the potential to be excessively punitive and vague if not delimited by a formulation of the material delict that includes a significant danger. It is not in line with the mission of harmonization, especially on the incitement of hatred. Other missions are fulfilled.

Source: National Criminal Code

The inclusion of the blasphemy law in the criminal code is fundamentally in contrast to the spirit of criminal law reform. The practice of applying this article has always given rise to diverse dimensions, and sometimes it is difficult to find widely accepted interpretations of "blasphemy" in religion. What is dangerous is the hate spin that is always played by adherents of certain religions to control public opinion for the benefit of certain religious identity groups.

Cherian George, in his research on the hate spin, explained that the phenomenon of using the "blasphemy" article in various countries has a common pattern at each specific moment. The feeling of offense is always created and manipulated by elite figures to build a commonality of people's will on that sense of offense. By playing at the intersection of society, these elite figures can mobilize the identity of religious groups for anti-democratic goals.²² This was reinforced further in the run-up to political contestation in various regions. One of the strongest impacts of the hate spin is in the case of Ahok, when he was still the Governor of DKI Jakarta.

Ismail Ruslan explained that hate spin is used and, of course, it works effectively because of the patron-client relationship and its relationship with primordialism derived from religious psychology. The role of religious figures is very important because of their ability to play religious opinions. On the other hand, most religious identity groups place the position of religious figures as sacred and holy, so that any expression that comes out of a religious figure is a truth that must be accepted by the group. The patron-client relationship is incomplete without the primordialism derived from religious psychology. The belief that a particular identity group's religion is superior to that of other infidels becomes the catalyst for the emergence of tension and intolerance.²³

From George and Ruslan's research above, the hate spin has always been the initial trigger in using the blasphemy article for the benefit of certain religious identity groups. It could be argued that the blasphemy article creates a paradox at the emergence of patterns of strengthening identity politics and is, of course, very dangerous. In his research, Zainal Abidin considered that those who became suspects due to the blasphemy article could not be said to have committed blasphemy. According to Zainal Abidin, in some cases that occurred, reports of blasphemy are always closely related to differences in interpretation of religious practices and understandings, not to acts of incitement of hatred towards a particular religion.²⁴

The practice of using blasphemy articles has always been complicated, and it is difficult to find a definite and clear measure of its elements. In Article 300 of the National

²² Cherian George, *Pelintiran Kebencian: Rekayasa Ketersinggungan Agama Dan Ancamannya Bagi Demokrasi*, ed. Ihsan Ali-Fauzi and Irsyad Rafsadie (Jakarta: Pusat Studi Agama dan Demokrasi (PUSAD) Yayasan Paramadina, 2017): 63.

²³ Ismail Ruslan, "Pelintiran Kebencian (Hate Spin): Rekayasa Ketersinggungan Dan Ujaran Kebencian Dengan Menggunakan Identitas Agama Dan Etnik Di Kalimantan Barat," *Al-Hikmah Jurnal Dakwah* 14, no. 2 (2020): 192-193, <https://doi.org/https://doi.org/10.24260/jhjd.v14i2.1811>.

²⁴ Zainal Abidin Bagir, "Kerukunan Dan Penodaan Agama: Alternatif Penanganan Masalah" (Yogyakarta, 2017): 8-14.

Criminal Code, the government has realized this and formulated blasphemy into the formulation of hostility and incitement to hatred that can generate violence (hate speech). This formulation, of course, deserves appreciation considering that this article has eliminated the element of "blasphemy," which was previously included in the draft of the Criminal Code, the researcher still perceives that this article shares similar substance with the hate speech offense. Therefore, it is preferable to consolidate this article into the hate speech offense, restricting it to material delict with serious consequences (limited to serious harm).

Furthermore, considering the complexity of interpreting a religion or belief in Indonesia, this article has the potential to carry significant punitive consequences. For instance, in the element of "expressing hatred or enmity," further clarification is necessary to address whether a religious figure, during their sermon, referring to another religion or belief as misguided and infidels, constitutes an expression of hatred or enmity. Without a concrete explanation, this article could potentially ensnare many religious figures. While the researcher may not agree with the content of a sermon containing references to infidels, it is also recognized that such expression is part of the forum internum as a form of freedom of thought and belief in a religion as true faith. This has been evident in a case of blasphemy through Decision Number 69/Pid.B/2012/PN.Spg, which implicated one of the followers of the Shia teachings.²⁵

In addition to Article 300, Article 301 paragraph (1) governs the dissemination of information related to Article 300 through information technology means. This article clearly has the potential to become a vague provision since it lacks limitations on the construction of material delict. Prahassacitta, who researched the spread of false news, emphasizes that in criminal acts related to the dissemination of information through information technology, there should be restrictions on whether the information can cause disturbances to public order, such as inciting violence or riots (limited to serious harm).²⁶ The researcher agrees with this view, thus, the criminalization of Article 301 paragraph (1) requires limitations on the extent of significant harm.

²⁵ Faiq Tobroni, "Pembedaan Kebebasan Beragama Dan Penodaan Agama (Studi Putusan Nomor 69/Pid.B/2012/PN.Spg)," *Al-Jinayah: Jurnal Hukum Pidana Islam* 5, no. 2 (2019): 493, <https://doi.org/https://doi.org/10.15642/aj.2019.5.2.489-510>.

²⁶ Prahassacitta and Harkrisnowo, "Criminal Disinformation in Relation to the Freedom of Expression in Indonesia: A Critical Study": 161-162.

Table 4. Organizing Marches, Rallies, and Demonstrations Offense

THE CRIMINAL CODE ARTICLES	RESTRICTION	REFORM MISSION
ARTICLE 256	Restrictions with the aim of national security and public order.	Is notification equated with authorization? Does the aim of notification also constitute a form of control over the rights to freedom of expression and opinion? This matter requires serious attention to examine whether this article aligns with the mission of democratization or not. The rest of the mission has no problems.

Source: National Criminal Code

This article requires clarification that notification is not intended as a form of authorization. This article is not clear in formulating the "public interest" so the interpretation is only owned by the government and tends to be manipulative. The potential thing that occurs is that any marches, rallies, and demonstrations that are not in line with government programs will be difficult to obtain permits for, so people and minority groups will be vulnerable to the snare of this article. Nevertheless, the researcher appreciates the enactment of laws that limit this article to material delict involving significant harm (serious harm).

Table 5. Contempt of Government or State Institutions Offense

THE CRIMINAL CODE ARTICLES	RESTRICTION	REFORM MISSION
ARTICLE 240 PARAGRAPH (1), (2) AND ARTICLE 241 PARAGRAPH (1), (2)	Restriction for national security, public order, and reputation. One thing that should be underlined is that Article 19 paragraph (3) of the ICCPR refers only to the reputation of the person as an individual, not the reputation of the institution or position.	It is not in line with the mission of democratization because it is incompatible with the restrictions on the right to freedom of expression and opinion. It is not in line with the mission of decolonization because, in principle, this offense also originated to the colonial interests of the Dutch government in the past. There is no problem with the other missions.

Source: National Criminal Code

My argument in this chapter is the same as the researcher's argument on insulting the president and vice president. The existence of these articles is no longer relevant in a democratic climate. The potential that can occur in practice is the government's tendency to use this article to suppress the opposition, critical civil society circles, academics, and students who criticize various academic activities and through demonstrations, as well as minority groups.

Article 240 paragraph (1) is a formal offense, which means that with the existence of an act of "insult," individuals who commit slander (slander) or libel (libel) can already be subject to criminal sanctions. In Wibowo's perspective, formulating the criminal offense of insulting the government or state institutions with a formal offense formulation signifies the sacredness of power that is susceptible to abuse.²⁷ This criminal offense has the potential to restrict the space for democracy when government officials or state institutions are filled with individuals who are anti-criticism. For instance, if there is criticism perceived as baseless or lacking valid data, non-democratic government officials or state institutions may tend to view such criticism as insulting.

Furthermore, Article 240 paragraph (2) constitutes an aggravation of paragraph (1) formulated as a material delict, involving the occurrence of public unrest". In practice, there is often a politics of fighting or blackmail by certain individuals that triggers the emergence of riots. Therefore, law enforcement officials must have clear measures and guidelines for the use of these articles. Article 241 is also potentially biased considering that the dimension of this article is in the use of electronic transaction information. The government needs to restrict this article to the consequences of riots, excluding the context of opinion wars on social media. Therefore, this dimension needs serious restrictions.

Tabel 6. Contempt Offense

THE CRIMINAL CODE ARTICLES	RESTRICTION	REFORM MISSION
PASAL 433 PARAGRAPH (1) AND (2)	Restrictions on the purpose of good reputation, public	It is not in line with the mission of democratization because it is incompatible with the restrictions on the right to freedom of expression and opinion. It is also not in line

²⁷ Ari Wibowo, "Kebijakan Kriminalisasi Delik Pencemaran Nama Baik Di Indonesia," *Pandecta: Jurnal Penelitian Ilmu Hukum* 7, no. 1 (2012): 9, <https://doi.org/https://doi.org/10.15294/pandecta.v7i1.2358>.

	order, and public morals.	with the mission of harmonization, especially in the Information and Electronic Transaction Law, which still maintains this offense.
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Source: National Criminal Code

The arrangement of contempt measures for all categories (the categorization of which is elaborated in this paper) needs to refer to the ICCPR's General Comment No. 34 on freedom of expression and opinion. In the recommendations of the UN Human Rights Council, every country that ratifies the ICCPR (including Indonesia, which has ratified it) needs to take a progressive step, namely the decriminalization of desecration. This is a breakthrough in strengthening the democratization process in Indonesia. Decriminalization does not mean that contempt is not provided for in the provisions of the law. The government may choose civil lawsuits as an alternative to resolving contempt cases, for example, by indemnifying victims.

Another step that needs to be taken is to continue to regulate it in the National Criminal Code but restrict it to serious harm. For example, it resulted in widespread riots and was organized into complaint offenses. The use of imprisonment in all categories of contempt is excessive and should not be necessary. The government should optimize alternatives to imprisonment which are formulated directly in the formulation of the offense. Another approach that needs to be strengthened is the restorative justice approach as an alternative and the best way to create a more civilized culture of dialogue and settlement.

Table 7. Broadcast or Dissemination of False News

THE CRIMINAL CODE	RESTRICTION	REFORM MISSION
ARTICLES		
ARTICLE 263 AND ARTICLE 264	Restrictions on the purpose of public order.	It is not in line with the mission of democratization because it is incompatible with the restrictions on the right to freedom of expression and opinion. It is also not in line with the mission of harmonization, especially in the Information and Electronic Transaction Law, which still maintains this offense.

Source: National Criminal Code

Prahassacitta emphasizes that the formulation of this criminal offense does not emphasize the element of intention (*dolus offense*) in the sense that it must be restricted

to someone's malicious intent or knowledge of the falsehood of the news to incite unrest by broadcasting or disseminating such news. Furthermore, in the context of its material elements, Prahassacitta highlights three criteria for justifying the criminalization of disinformation. Firstly, the approach taken (including the appropriate criminal sanction) needs to be rationalized with the objectives to be accomplished in the interests of citizens' right to access information, both individually and publicly. Secondly, the regulations ought to consider the least amount of infringement on the right to freedom of expression and opinion, such as through limiting them to offences that could cause harm or intentionally propagating false news to create disorder. Thirdly, the measures must maintain a proportionate relationship between the approach taken and the outcome achieved, or between the effect and the objective sought.²⁸

Articles 263 and 264 have the potential to become excessively punitive if not clearly and strictly limited with the formulation of intentional and material delict. Considering the rapid disruptions in information technology, it becomes challenging for the public to distinguish between true and false information. The fluid nature of social media usage undoubtedly leads to diverse information warfare. In this regard, Makarim emphasizes the need for appropriate policies concerning the prevention of the spread of false news by electronic system providers as a form of ex-ante liability for information control and the implementation of electronic information mitigation mechanisms when such information has caused public unrest, as a form of ex-post liability.²⁹

C. Conclusion

The government faces serious challenges in its efforts to realise democratic and reformative criminal law reform. From the discussion above, several criminal offences have serious problems with the mission of criminal law reform. Researchers firmly consider the criminal law approach to some of these criminal offences to be disproportionate so that decriminalisation or depenalisation of these articles is the main choice but it remains open if the government reforms in the form of better formulation. The government needs to listen to the aspirations of civil society and accommodate public participation in providing alternative formulations of offences in accordance with the principles of *lex certa*, *lex stricta*, *lex praevia*, and *lex scripta*. Several issues in the Criminal

²⁸ Prahassacitta and Harkrisnowo, "Criminal Disinformation in Relation to the Freedom of Expression in Indonesia: A Critical Study": 162-163.

²⁹ Edmon Makarim, *Tanggung Jawab Hukum Penyelenggara Sistem Elektronik*, (Jakarta: Rajawali Pers, 2010): 165-166.

Code that directly intersect with freedom of expression and opinion need to be re-discussed with clearer and firmer formulations (which can also be included in the explanation of the Criminal Code). In this context, the UN Human Rights Council General Comment No. 34 needs to receive serious attention and become a guide in reformulating the articles above. Other alternatives that can be strengthened are the fulfilment of restorative justice, strengthening alternatives to imprisonment, or regulating these articles as part of civil law. In the future, law enforcement officials need to conduct training or workshops on criminal prosecution guidelines as stipulated in Book I of the Criminal Code.

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