

Knitting Democracy, Separating Restraints: Legal Reform and a Critical Analysis of Article 256 of the New Criminal Code and its Impact on Freedom of Speech

Zico Junius Fernando ^a, **Kiki Kristanto** ^b, **Ariesta Wibisono Anditya** ^c

^a Faculty of Law, Universitas Bengkulu, Indonesia

^b Faculty of Law, Universitas Palangka Raya, Indonesia

^c Faculty of Law, Universiti Malaya, Malaysia

✉ corresponding email: zjfernando@unib.ac.id

Abstract

In Indonesia's democratic landscape, the presence of Article 256 of the Criminal Code has become a crucial point in discussions on freedom of expression and human rights. This article, with its criminal provisions for demonstration organizers who do not give prior notice to the authorities, poses a significant dilemma. The threat of imprisonment for up to six months and/or a maximum fine of Rp10 million raises deep questions about the space given to citizens to express their opinions in public spaces. This research uses normative legal research methods using statutory, conceptual, comparative, and futuristic approaches. The

nature of this research is descriptive-prescriptive. The data that has been collected is analyzed using the content analysis method. This research conducts an in-depth exploration of the implications of Article 256 of the current Criminal Code, which threatens criminal sanctions for organizers of unannounced demonstrations. This research investigates how this regulation has the potential to curb individual freedom of expression in public spaces, as well as its impact on the quality of democracy and the maintenance of human rights in Indonesia. The findings of this research confirm that Article 256 of the Criminal Code is a step backward in democratic practice and jeopardizes freedom of expression. The research underscores the urgency of revising this regulation to ensure that the right to express opinions in public, as mandated by Law No. 9 of 1998, is protected as a key element in democracy and human rights. This reflects the importance of maintaining public space as an arena for free discussion and criticism, which is at the core of a healthy democratic system.

Keywords

Article 256 of the Criminal Code, Freedom of Expression, Democracy, Human Rights, Regulation of Demonstrations, Indonesia.

Introduction

The passing of the Draft Criminal Code (R-KUHP) by the House of Representatives of the Republic of Indonesia (DPR RI) on December 6, 2022, marked an important moment in Indonesia's legislative history, but it was also shrouded in controversy and resistance, particularly from civil society groups.¹ Although passed with the aim of modernizing and simplifying Indonesia's criminal law system as part of democratization and decodification efforts, the final draft of the R-KUHP retains a number of articles that are seen as having serious

¹ Parningotan Malau, "Tinjauan Kitab Undang-Undang Hukum Pidana (KUHP) Baru 2023," *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam* 5, no. 1 (June 13, 2023): 837–44, <https://doi.org/10.37680/ALMANHAJ.V5I1.2815>.

implications for the sustainability of democracy in the country.² These controversial articles, including articles on attacking the honour or dignity of the President, insulting the government or state institutions, and Article 256, which regulates criminal acts against public order, are feared to open space for restrictions on freedom of opinion and expression.³ Critics consider that these articles have the potential to be used as a tool to silence criticism and opposition to the government, threatening the basic principles of democracy that value different views and open dialog. The existence of these articles in the new Criminal Code has sparked concerns that the new law, rather than advancing democracy, could actually become an obstacle to active and healthy political participation in Indonesia and weaken the foundations of civil liberties to which every citizen is entitled.⁴

The passage of Indonesia's new Criminal Code has significant consequences for democratic practices and freedom of speech in the country. Amidst hopes for a more adaptive and progressive legal reform, the new Criminal Code contains a number of articles that spark widespread concern.⁵ The main issue relates to articles that explicitly have the potential to restrict democratic activity and threaten freedom of speech.⁶ These articles, including but not limited to regulations around unannounced demonstrations, dissemination of information deemed to disrupt public security, and criticism of the government,

² Simon Butt, "Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?," *Griffith Law Review* 32, no. 2 (2023): 190–214, <https://doi.org/10.1080/10383441.2023.2243772>.

³ Deny Noer Wahid and Ilham Dwi Rafiqi, "Manifestation of Eastern Cultural Values by Re-Arranging Norm on Insulting the President and Vice President," *Hang Tuah Law Journal* 6 (September 2, 2022): 61–76, <https://doi.org/10.30649/HTLJ.V6I1.76>.

⁴ Yulio Iqbal and Cahyo Arsetyo, "Indonesia's New Criminal Code and Its Implication of International Treaties of Human Rights Commitment in Indonesia," *JURNAL PENELITIAN SERAMBI HUKUM* 16, no. 02 (July 23, 2023): 179–86, <https://doi.org/10.59582/SH.V16I02.832>.

⁵ Rina Rohayu Harun, Mualimin Mochammad Sahid, and Bahri Yamin, "Problems of Criminal Applications Law in The Life of Indonesian Communities and Cultures," *Jurnal IUS Kajian Hukum Dan Keadilan* 11, no. 1 (April 6, 2023): 140–55, <https://doi.org/10.29303/IUS.V11I1.1144>.

⁶ Marwadianto Marwadianto and Hillmi Ardani Nasution, "Hak Atas Kebebasan Berpendapat Dan Berekspresi," *Jurnal HAM* 11, no. 1 (2020): 1–4, <https://ejournal.balitbangham.go.id/index.php/ham/article/view/976/pdf>.

have the potential to be interpreted broadly and subjectively.⁷ This not only poses a risk of abuse of power by law enforcement officials but also creates an atmosphere of fear and self-censorship among the public. This condition indirectly curbs the space for public discussion, constructive criticism, and the active participation of citizens in the democratic process, raising serious questions about the state's commitment to the maintenance and development of democratic values and the protection of human rights.⁸

The vagueness in the articles' wording and interpretation, which provides room for numerous and frequently oppressive interpretations of the law, exacerbates this complexity.⁹ This situation creates legal uncertainty and affects the courage of citizens to participate in democratic processes, including expressing opinions and criticising government policies.¹⁰ In particular, activists, journalists, and academics, who are often at the forefront of defending freedom of expression and criticizing government policies, are vulnerable to potential criminalization as a result of these ambiguous articles.¹¹ In addition, the existence of these articles that threaten freedom of speech also affects the dynamics of civil society organizations, which play an important role in government oversight and reform advocacy.¹² Fear of

⁷ Abdul Haris Subarjo and Wita Setianingsih, "Literasi Berita Hoax Di Internet Dan Implikasinya Terhadap Ketahanan Pribadi Mahasiswa (Studi Tentang Penggunaan Media Sosial Pada Mahasiswa STT Adisutjipto Yogyakarta)," *Jurnal Ketahanan Nasional* 26, no. 1 (2020): 1–22, <https://doi.org/10.22146/jkn.51109>.

⁸ Intan Hanisa and Sunny Ummul Firdaus, "Dinamika Demokrasi Dalam Kebijakan Publik: Tantangan Dan Peluang Bagi Sistem Hukum Indonesia," *Sovereignty: Jurnal Demokrasi Dan Ketahanan Nasional* 2, no. 4 (2023): 340–53.

⁹ Ralf Poscher, "Ambiguity And Vagueness In Legal Interpretation," in *The Oxford Handbook of Language and Law*, ed. Lawrence M Solan and Peter M Tiersma (Oxford University Press, 2012), 128–145, <https://doi.org/10.1093/oxfordhb/9780199572120.013.0010>.

¹⁰ Hanisa and Firdaus, "Dinamika Demokrasi Dalam Kebijakan Publik: Tantangan Dan Peluang Bagi Sistem Hukum Indonesia."

¹¹ Judith Bessant, "Democracy Denied, Youth Participation and Criminalizing Digital Dissent," *Journal of Youth Studies* 19, no. 7 (August 8, 2016): 921–37, <https://doi.org/10.1080/13676261.2015.1123235>.

¹² Vincent Guangsheng Huang, "Floating Control: Examining Factors Affecting the Management of the Civil Society Sector in Authoritarian China," *Social Movement Studies* 17, no. 4 (July 4, 2018): 378–92, <https://doi.org/10.1080/14742837.2018.1460264>.

prosecution and the impact on their personal and professional lives can reduce the effectiveness and reach of their activities. Amidst these challenges, there is an urgent need for policymakers, legal practitioners, and civil society to collaborate in reviewing and reforming controversial articles in the new Criminal Code to ensure that criminal law does not become a tool to limit democratic space and violate human rights but instead supports freedom, justice, and broad social participation.¹³

National legal reform through the new Criminal Code, which is intended to embody the spirit of decolonization, democratization, consolidation, harmonization, and modernization, appears to have deviated from its original purpose with the inclusion of articles that can be considered anti-democratic.¹⁴ The democratization process, which should be one of the main pillars in the revision of this criminal law, has not been fully internalized.¹⁵ The existence of articles in the new Criminal Code that the Constitutional Court had previously declared invalid but have since resurfaced or undergone modification is evidence of this. In addition, articles that have received less public attention, such as Article 256 of the new Criminal Code, also raise serious concerns. This article regulates the holding of demonstrations without notification, which could indirectly become a new criminalization tool against people who express their opinions in public spaces.

The implication is that this article not only threatens freedom of expression and assembly but also marks a step backwards in efforts to democratise and strengthen human rights in Indonesia. The presence of articles such as Article 256 suggests that the expected spirit of reform does not yet fully reflect a commitment to democratic principles and the protection of individual human rights, sparking concerns about the potential misuse of the law as a means to restrict civil liberties.

This research foregrounds the utilisation of normative legal methods, which strategically integrate statutory, conceptual,

¹³ Alice M Miller, "Criminalization and International Human Rights," *Proceedings of the ASIL Annual Meeting* 112 (2018): 83–84, <https://doi.org/10.1017/amp.2019.37>.

¹⁴ Andrian Pratama Taher, "Yasonna: Pengesahan RKUHP Titik Awal Dekolonisasi Hukum Pidana," *Tirto.id*, 2022, <https://tirto.id/yasonna-pengesahan-rkuhp-titik-awal-dekolonisasi-hukum-pidana-gztr>.

¹⁵ Darryl K. Brown, "Democracy and Decriminalization," *Texas Law Review* 86, no. 2 (September 1, 2006): 223–75, <https://doi.org/10.2139/SSRN.932667>.

comparative, and futuristic approaches to gain an in-depth understanding of Article 256 of Indonesia's new Criminal Code.¹⁶ With its descriptive-prescriptive nature, this research aims to not only detail the content and context of Article 256, which focuses on the regulation of organising demonstrations without notice, but also to explore the possible impact of its application on freedom of speech.¹⁷ Through content analysis of the data that has been collected, this research reveals how the regulation may affect the dynamics of democracy and civil liberties in Indonesian society while providing recommendations to address its potential negative impacts.¹⁸

The comparative approach in this research allows the analysis of Article 256 in a broader framework by comparing it with similar regulations in other countries, highlighting differences and similarities in the context of regulating demonstrations and free speech. This provides valuable insights into how the principles of democracy and civil liberties are respected and implemented in different jurisdictions, as well as providing perspectives for regulatory improvement in Indonesia.¹⁹ Meanwhile, the futuristic approach offers predictions and scenarios on how Article 256 may affect the relationship between government, society, and individuals in the future practice of public expression. This research seeks to provide a comprehensive view of the long-term potential of the implementation of Article 256 while emphasising the importance of legal reforms that support free speech as a key pillar in a healthy democracy.

¹⁶ Zico Junius Fernando et al., "Robot Lawyer in Indonesian Criminal Justice System: Problems and Challenges for Future Law Enforcement," *Lex Scientia Law Review* 7, no. 2 (November 14, 2023): 1–24, <https://doi.org/10.15294/LESREV.V7I2.69423>.

¹⁷ Zico Junius Fernando et al., "The Freedom of Expression in Indonesia," *Cogent Social Sciences* 8, no. 1 (2022): 1–11, <https://doi.org/10.1080/23311886.2022.2103944>.

¹⁸ Erdianto Effendi et al., "Trading in Influence (Indonesia): A Critical Study," *Cogent Social Sciences* 9, no. 1 (December 31, 2023): 1–13, <https://doi.org/10.1080/23311886.2023.2231621>.

¹⁹ Ferdinand Müller-Rommel and Brigitte Geißel, "Introduction: Perspectives on Democracy," *Politische Vierteljahresschrift* 61, no. 2 (2020): 225–35, <https://doi.org/10.1007/s11615-020-00252-4>.

The Dilemma of Democracy: Between Freedom of Expression and Criminal Regulation in Demonstrations

The use of criminal law as an *ultimum remedium* should ideally be applied, especially in dealing with legal expressions manifested through demonstrations.²⁰ This follows the principle that before considering criminal sanctions, there are other administrative stages and approaches that must be carried out in accordance with the framework set out in Law No. 9 of 1998 on Freedom of Expression in Public.²¹ This law was explicitly created to accommodate and protect citizens' right to freedom of speech and expression in public, emphasizing that the use of criminal law should be the last resort after all non-criminal options have been considered and deemed ineffective. This indicates a legislative effort to ensure that freedom of expression is respected and protected while maintaining public order and tranquilly without rushing to criminal law. The passage of the new Criminal Code has generated widespread concern and debate among civil society, academics, and human rights activists, particularly regarding several articles that are considered potentially harmful to democratic activity and freedom of expression.²² These concerns are rooted in articles that are perceived to be ambiguous, leave wide room for interpretation for law enforcement officials, and thus have the potential to be used to silence criticism and limit public space for discussion and expression. These articles include, but are not limited to, provisions on insulting the government or public officials, spreading fake news or hoaxes, and hate speech, which can be used to ensnare individuals or groups who voice disagreement or criticism of

²⁰ Sheila Maulida Fitri, "Eksistensi Penerapan *Ultimum Remedium* Dalam Sistem Hukum Pidana Indonesia," *De Jure Jurnal Ilmiah Ilmu Hukum* 2, no. 1 (December 12, 2020): 16–27, <https://doi.org/10.33387/DEJURE.V2I1.2688>.

²¹ Dwi Wiharyangti, "Implementasi Sanksi Pidana Dan Sanksi Tindakan Dalam Kebijakan Hukum Pidana Di Indonesia," *Pandecta Research Law Journal* 6, no. 1 (2011): 80–85, <https://journal.unnes.ac.id/nju/index.php/pandecta/article/view/2326>.

²² M Julnis Firmansyah, "Beragam Kekhawatiran Setelah UU KUHP Baru Disahkan," *Fokus Tempo*, 2022, <https://fokus.tempo.co/read/1666960/beragam-kekhawatiran-setelah-uu-kuhp-baru-disahkan>.

government policies.²³ In addition, there are also articles governing unpleasant acts and defamation that are often subjectively interpreted, which risks threatening press freedom and the right of individuals to access information.²⁴

The passage of the new Criminal Code has raised concerns that the law could erode the foundations of democracy, which should guarantee freedom of expression and assembly.²⁵ With articles that can be used to restrict expression, civil society, including activists, journalists, and government critics, are vulnerable to criminalization. This not only threatens the existence of a healthy democracy but also raises questions about the extent to which the state can protect the basic rights of its citizens to express their opinions and express themselves freely without fear of intimidation or punishment.²⁶ The government and law enforcement officials should ideally take an administrative rather than a criminal approach to regulating demonstration activities and other forms of expression.²⁷ This is in line with the spirit of Law No. 9 of 1998 on Freedom of Expression in Public, which prioritizes non-criminal measures in dealing with violations that occur during demonstration or expression activities.

In accordance with Article 15 of the law, the administrative sanction that can be given to protesters who do not meet certain criteria,

²³ Donato Vese, "Governing Fake News: The Regulation of Social Media and the Right to Freedom of Expression in the Era of Emergency," *European Journal of Risk Regulation* 13, no. 3 (2022): 477–513, <https://doi.org/DOI:10.1017/err.2021.48>.

²⁴ Annabelle Lever, "Privacy, Democracy and Freedom of Expression," in *Social Dimensions of Privacy: Interdisciplinary Perspectives*, ed. Dorota Mokrosinska and Beate Roessler (Cambridge: Cambridge University Press, 2015), 162–80, <https://doi.org/DOI:10.1017/CBO9781107280557.010>.

²⁵ The International Federation of Journalists (IFJ), "Indonesia: New Criminal Code Erodes Freedom of Press, Expression - IFJ," ifj.org/media-centre/news/, 2022, <https://www.ifj.org/media-centre/news/detail/category/press-freedom/article/indonesia-new-criminal-code-erodes-freedom-of-press-expression>.

²⁶ Emily Howie, "Protecting the Human Right to Freedom of Expression in International Law," *International Journal of Speech-Language Pathology* 20, no. 1 (January 2, 2018): 12–15, <https://doi.org/10.1080/17549507.2018.1392612>.

²⁷ Angel Nikhio, Cindy Sekarwati Amalia, and Zain Irawan, "Penegakan Hukum Di Indonesia: Peran Pemerintah Dalam Mewujudkannya," *Indigenous Knowledge* 2, no. 6 (2023): 414–23.

such as not following established rules or causing public order disturbances, is dissolution. This shows that the state provides a wide space for its citizens to express their opinions, with restrictions aimed at maintaining public order and security without having to directly refer to criminal sanctions. Furthermore, Law No. 9/1998 also specifically targets individuals or groups that obstruct the expression of opinions in Article 18, where criminal provisions apply to those who deliberately obstruct or disrupt public expression activities. This shows that the law not only protects the right to freedom of expression but also ensures that it can be exercised without interference from others. The approach taken by Law No. 9/1998 illustrates the state's attempt to balance freedom of expression with the need to maintain public order and security, emphasizing the importance of using administrative sanctions as a first step before criminal law considerations are made.

Back in the context of the reform of the new Criminal Code (KUHP), there are provisions that have caused controversy, particularly in relation to Article 256, which regulates "without prior notice" in the context of organizing demonstrations or rallies.²⁸ This provision raises significant concerns as it indicates a shift from the previous paradigm that prioritized freedom of expression. Traditionally, advance notification to the authorities, particularly the police, was intended as a means to ensure that demonstrations could take place smoothly and safely, with the police playing a role in maintaining security and order during such events. However, in practice, this notification requirement is often interpreted and applied rigidly, turning into a formal mechanism that can actually limit the rights of individuals or groups to express opinions. Some people believe that this notification process reduces the space for citizens to express themselves freely and openly rather than serving as a tool to facilitate public expression. In essence, the right to express opinions in public spaces is an integral part of constitutional and civil-political rights guaranteed in various laws and regulations and international human rights instruments.²⁹ This right

²⁸ Willa Wahyuni, "Melihat Kembali Sederet Pasal Kontroversial KUHP Baru," *Hukumonline.com*, 2023, <https://www.hukumonline.com/berita/a/melihat-kembali-sederet-pasal-kontroversial-kuhp-baru-lt63ca672b7dc8d/>.

²⁹ Triwahyuningsih Triwahyuningsih, "The Right to Freedom of Express Opinions in Public Based on Pancasila," *Journal of Transcendental Law* 3, no. 1 (October 14, 2021): 1–14, <https://doi.org/10.23917/JTL.V3I1.15682>.

should be treated with the same principles as other rights recognised in the constitution, including the right to worship and celebrate religious holidays.³⁰ In this context, the police and related institutions should act more as guardians who ensure that all activities, including demonstrations and expressions of opinion, can be carried out safely and peacefully, without the need to face excessive obstacles that could limit these fundamental freedoms. The approach to organizing actions or demonstrations should put more emphasis on guaranteeing and protecting citizens' rights to participate in public dialogue, express criticism, and share views, assuming that such expression is a vital part of the democratic process. As such, notification arrangements should be understood and applied in a way that supports, rather than restricts, the realization of this right.³¹

Article 256, which constitutes a material offence with the condition that it disrupts public interests, causes trouble, or causes riots, opens up opportunities for broad interpretation and application in law enforcement practice. While this article is intended to protect the public interest from serious harm, there are concerns that, in practice, it could be manipulated to target peaceful demonstrations and expressions of opinion. The case of burning down a Transjakarta bus stop during a massive demonstration against the Omnibus Law on the Job Creation Law in 2020 is a striking example of how the situation on the ground can turn violent and then have implications for mass arrests. Unknown individuals who allegedly pretended to be a part of the protest crowd burned down a number of bus stops in this incident. This action not only caused damage to public facilities but also had a direct impact on the public's and authorities' perceptions of the demonstration itself.

Polda Metro Jaya responded to the situation by detaining 69 people, consisting of students and community members. These detentions raise questions about the extent to which law enforcement

³⁰ Jesús García Cívico et al., "Current Issues on Human Rights.," in *Current Issues on Human Rights*. (Dykinson, 2020), 11–14, <https://doi.org/10.2307/J.CTV102BM6P>.

³¹ Edi Sofwan, Muhammad Sopiya, and Ali Masykur Fathurrahman, "The Application of the Right to Freedom of Expression in Demonstration Based on Principles of a Democratic State," *Jurnal Civics: Media Kajian Kewarganegaraan* 19, no. 2 (October 31, 2022): 310–19, <https://doi.org/10.21831/JC.V19I2.53464>.

actions were influenced by acts of destruction committed by a handful of individuals and to what extent those detained were truly responsible for those actions. This circumstance emphasizes the possibility that some parties' actions who might have ulterior motives or be trying to elicit a response from law enforcement could taint peaceful demonstrations. This case also shows the importance of thorough and fair investigations by law enforcement authorities to differentiate between legitimate protest participants and individuals committing criminal acts. It is important to ensure that the rights to assemble and express opinions, as pillars of democracy, are not hampered by law enforcement actions that may be disproportionate or unfair.³² In addition, this incident highlights the need for better dialogue and communication between action organizers, demonstration participants, and security forces to prevent the escalation of violence and ensure that demonstrations can take place in a safe and peaceful environment.

Article 256 of the new Criminal Code has become an important topic of discussion regarding how the law defines and handles disturbances to the public interest, especially in the context of expressing opinions in public spaces. Although this article aims to protect the public interest from disturbances that may arise as a result of certain actions, the explanation does not explicitly specify what is meant by "*disruption of the public interest*." This gives rise to a wide range of interpretations regarding the types of actions that can be considered interference. For example, the non-functioning or inaccessibility of public services, as stated in the explanation of the article, can be interpreted as a disturbance to the public interest. However, without a clear definition of what constitutes "disruption of the public interest," there are concerns that this article could be applied to various forms of expression of opinion, including peaceful protests or social criticism that should be protected in a democracy. These concerns arise because the broad scope and unclear definition could give authorities the power to interpret any act they deem disturbing as a violation, thereby affecting freedom of expression and assembly. When demonstrators choose to block roads or paralyze protocol roads as a form of protest to attract the

³² Sharynne McLeod, "Communication Rights: Fundamental Human Rights for All," *International Journal of Speech-Language Pathology* 20, no. 1 (January 2, 2018): 3–11, <https://doi.org/10.1080/17549507.2018.1428687>.

attention of policymakers, these actions often result in disruption to the use of public facilities. In a context like this, articles referring to interference with the public interest in the new Criminal Code could have a significant impact on how the government responds to such demonstrations. The presence of an article that does not specifically define the boundaries of "disruption to the public interest" can allow for a broad interpretation, thereby providing room for law enforcement to use the article as a basis for charging demonstrators with criminal charges. Demonstrations that result in disruption, such as road blockades, are intended to make a strong statement and encourage change.³³ However, with this article, which can be interpreted broadly, there is the potential that these actions, which may be carried out as an expression of freedom of opinion and assembly, could be considered a violation of the law. This raises concerns about how the balance between the right to demonstrate and the need to safeguard the public interest can be maintained without compromising democratic principles and human rights. The use of this article to ensnare demonstrators can also be seen as an attempt to legitimize legal action against forms of protest, which in turn can limit public space for social discussion and criticism.

Navigating the Right to Assembly and Expression: Implementation Challenges of Article 256 of the Indonesian Criminal Code in the Perspective of Human Rights and International Practices

In the new Criminal Code, Part Four, which regulates disturbances to public order and tranquilly, there is Paragraph 1 that specifically addresses the organization of marches, rallies, or demonstrations in Article 256, which reads as follows "*Any person who, without prior notice to the competent authority, holds a march, rally, or demonstration on a public road or public place that results in disruption of public interest, causes disturbance, or causes a riot in the community shall be punished with a maximum imprisonment of six (six) months or a maximum fine in category*

³³ Matthew Feinberg, Robb Willer, and Chloe Kovacheff, "The Activist's Dilemma: Extreme Protest Actions Reduce Popular Support for Social Movements.," *Journal of Personality and Social Psychology* 119, no. 5 (2020): 1086–1111, <https://doi.org/10.1037/PSP10000230>.

II”³⁴ In the elucidation section of Article 256, what is meant by "disruption of public interest" is the malfunctioning or inaccessibility of public services due to damage arising from marches, rallies, or demonstrations. In the context of human rights, an analysis of Article 256 of the new Indonesian Criminal Code which regulates the organization of marches, rallies or demonstrations without prior notification to the competent authorities raises important questions about the balance between freedom of expression and the need to maintain public order and security. In Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR), the right of every individual to express opinions without interference and the right to seek, receive and disseminate information and ideas through the media is recognized, anything regardless of territorial boundaries.³⁵ Meanwhile, Article 21 of the ICCPR also specifically recognizes the right to peaceful assembly.³⁶ However, these rights are not absolute and may be limited for several reasons, such as to maintain public order or national security. The key to any such restrictions, in accordance with the principles of international human rights law, is that the restrictions must be legal, necessary and proportionate.³⁷ This means that any restrictions on the right to assembly and expression must be stipulated in clear law, aimed at achieving legitimate goals, and must be balanced with the rights being restricted.³⁸

Article 256 of the new Criminal Code, which stipulates sanctions for those who hold marches, rallies or demonstrations without prior

³⁴ Article 256 of Law Number 1 of 2023 concerning the New Criminal Code

³⁵ Trisna Wulandari, "Mengenai Universal Declaration of Human Rights Untuk HAM," Detik.com/edu, 2022.

³⁶ Michael Hamilton, "To Facilitate and Protect: State Obligations and the Right of Peaceful Assembly in International Human Rights Law," *Asia-Pacific Journal on Human Rights and the Law* 21, no. 1 (May 29, 2020): 5–34, <https://doi.org/10.1163/15718158-02101002>.

³⁷ Luka Anđelković, "The Elements of Proportionality as A Principle of Human Rights Limitations," *Facta Universitatis, Series: Law and Politics* 0, no. 0 (December 13, 2017): 235–44, <https://doi.org/10.22190/FULP1703235A>.

³⁸ Mohamed Elewa Badar, "Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments," *The International Journal of Human Rights* 7, no. 4 (December 1, 2003): 63–92, <https://doi.org/10.1080/13642980310001726226>.

notification that result in "*disruption of the public interest*", reflects an attempt to regulate the expression of this right in the context of maintaining public order. However, the use of the term "*disruption to the public interest*" which is described as "*malfunctioning or inaccessibility of public services*" resulting from such activities raises questions about the breadth of interpretation and the potential for misuse of this provision to disproportionately limit freedom of expression. The "*necessary and proportionate*" criteria are crucial in analyzing whether the implementation of this article is consistent with international human rights principles. In this context, it is important for policy makers and law enforcers to ensure that the interpretation and application of Article 256 is carried out in a manner that not only complies with domestic legal provisions but is also consistent with Indonesia's international commitments to human rights. This means that there must be greater legal clarity about what is meant by "harm to the public interest", as well as clear and fair mechanisms for assessing whether restrictions on freedom of expression in a particular case are truly necessary and proportionate to the objectives sought to be achieved, such as maintaining public order or protecting the rights of others. An approach that recognizes the importance of dialogue and negotiation between organizers of actions and authorities, as well as the use of prudent judgment in law enforcement, can be an important step to ensure that human rights are respected and protected in the context of organizing marches, rallies or demonstrations.

It is important to consider the broader international framework relating to the rights to peaceful assembly and expression. The principles of proportionality and necessity in limiting human rights must be interpreted in a way that does not narrow the space for civil liberties.³⁹ In the context of Article 256 of the new Criminal Code, this means that law enforcement must not automatically assume that any march, rally, or demonstration without prior notification inherently disrupts public order or security. Instead, there should be a case-by-case assessment that considers factors such as the intensity of the disruption, the intentions of the organizers, and the likely impact on the wider community.

³⁹ Chica Septia Ningsih et al., "Hak Kebebasan Berpendapat Yang Semakin Menyempit Dan Memburuk," *Jurnal Syntax Fusion* 1, no. 2 (February 27, 2021): 25–39, <https://doi.org/10.54543/FUSION.V1I2.18>.

Furthermore, notification mechanisms for organizing marches or demonstrations should not be a means of preventing the expression of public opinion, but rather a means of enabling the state to provide protection and ensure that other rights are not compromised. Therefore, the interpretation of “without prior notice” in Article 256 must be reviewed in the context of the broader aim of facilitating, not hindering, the rights of assembly and expression. The state's responsibility in this context is not only to enforce the law but also to facilitate and protect human rights.⁴⁰ This includes the obligation to protect demonstration participants from violence, ensure that police action is proportionate and measured, and ensure that there is access to legal recourse for individuals who feel their rights are being violated. In implementing Article 256 and similar regulations, Indonesia must consider recommendations from international human rights bodies, such as the UN Human Rights Committee, which emphasize the importance of protecting civil and political space in the context of democracy. The committee has stressed that restrictions on the right to assembly must be “strictly necessary and in proportion to the interests being protected” and that states should avoid using excessive force against demonstrators. Given the current global context, where there is a trend of increasing restrictions on freedom of assembly and expression, Indonesia has an opportunity to demonstrate leadership in respecting and protecting human rights. By implementing Article 256 wisely and proportionately and by continuing to evaluate and refine the legal framework to ensure that it is consistent with international human rights standards, Indonesia can strengthen its commitment to democracy and human rights. Harmonization between national laws and international standards will not only strengthen domestic human rights protection but also improve Indonesia's position as a country that respects and promotes democratic values on the international stage.

A comparison of arrangements for the rights to assembly and expression between Indonesia and developed countries can provide a useful perspective on how international standards are implemented in various legal and political contexts. The public can see how countries

⁴⁰ Eko Hidayat, “Perlindungan Hak Asasi Manusia Dalam Negara Hukum Indonesia,” *ASAS: Jurnal Hukum Ekonomi Syariah* 8, no. 2 (December 13, 2016): 80–87, <https://doi.org/10.24042/ASAS.V8I2.1249>.

with strong democratic traditions manage the balance between individual freedom and the public interest and how they deal with similar challenges. Take examples such as the United States, Canada, Germany, and England. In the United States, the First Amendment to the Constitution is an important foundation guaranteeing freedom of speech, freedom of the press, the right to peaceably assemble, and the right to petition the government for redress of grievances. This protection reflects a deep commitment to democratic values and is a key element in ensuring the active participation of citizens in the democratic process. The courts in this country have developed the doctrine of "strict scrupulousness" to evaluate any restrictions proposed by the government on these rights.⁴¹ In accordance with this doctrine, restrictions must support a highly significant government interest, for example, national security or public safety, and must be implemented in the least intrusive or restrictive manner to ensure that interference with the right is minimal. This "strict scrutiny" standard creates a legal environment that is highly protective of public expression, giving citizens broad freedom to express opinions, criticism, and protest against government policies. In Germany, with its legal basis contained in the *Grundgesetz*, or Basic Law, it has set high standards for respecting and protecting human rights and civil liberties.⁴² The country guarantees its citizens the right to assemble and express opinions through public demonstrations and marches, subject to prior notification to local authorities. This requirement is not intended as a barrier to public expression but rather as a coordination step to ensure security and order during these activities. Germany's approach to organizing demonstrations emphasizes facilitating and protecting the right to peaceful assembly. Police in Germany have a proactive role in securing demonstration routes and ensuring that participants are protected from interference, both from external parties and the potential for escalation of violence. This reflects a balance between the need to maintain public order and the state's interest in protecting the basic

⁴¹ Charles Fried, "The New First Amendment Jurisprudence: A Threat to Liberty," *The University of Chicago Law Review* 59, no. 1 (1992): 225–53, <https://doi.org/10.2307/1599937>.

⁴² D. R. Dorondo, Sabine Michalowski, and Lorna Woods, "German Constitutional Law: The Protection of Civil Liberties," *German Studies Review* 24, no. 3 (October 2001): 637–38, <https://doi.org/10.2307/1433449>.

rights of its citizens. In Canada, the right to peaceful assembly and expression is given constitutional status through the Canadian Charter of Rights and Freedoms, which is part of the country's constitution.⁴³ The Charter explicitly recognizes and protects freedom of speech and the right to peaceful assembly, reflecting deep democratic values and a commitment to individual freedom. In this context, demonstrations and marches are seen as vital expressions of democratic participation, allowing citizens to voice their opinions and influence public policy. In the UK, the right to assembly and expression is regulated through a complex legal framework, which includes various statutes as well as recognition of the European Convention on Human Rights (ECHR), which is integrated into domestic law through the Human Rights Act 1998.⁴⁴ This right, in particular Article 10 relating to freedom of expression and Article 11 relating to freedom of assembly and association, are valued as essential components of the UK's democracy and legal order. These rights, however, are not absolute and may be limited under certain conditions deemed necessary, such as in circumstances to prevent general annoyance or inconvenience or to prevent criminal acts.

Towards a Democratic Criminal Code: Challenges and Expectations in Updating Indonesian Criminal Law

The team drafting the new Criminal Code, on various occasions in discussions in the media, emphasized the importance of regulations regarding articles relating to interference with the public interest in the new Criminal Code by presenting specific case examples, such as the situation when an ambulance carrying a dying person was obstructed by demonstration activities carried out without notification. They argue that in situations like this, there must be a clear mechanism to determine the responsible party, especially if major losses occur, such as serious injury or death of the patient carried by the ambulance. The case

⁴³ Walter S. Tarnopolsky, "The New Canadian Charter of Rights and Freedoms as Compared and Contrasted with the American Bill of Rights," *Human Rights Quarterly* 5, no. 3 (August 1983): 227–74, <https://doi.org/10.2307/762024>.

⁴⁴ Douglas W Vick, "The Human Rights Act and the British Constitution," *Texas International Law Journal* 37 (2002): 329, <https://api.semanticscholar.org/CorpusID:141179057>.

examples provided by the drafting team aim to highlight the potentially serious risks of disruption to vital public services, such as emergency services. However, the use of examples that are "made up" and not supported by concrete data or statistics can give rise to criticism regarding the validity of the arguments presented. This approach can be seen as an attempt to build understanding and gain public support for the need for stricter regulation of demonstrations that disrupt essential public services. However, without strong empirical evidence, the effectiveness and fairness of these arguments can be questioned, considering the importance of balancing security and freedom of expression. Criticism of the use of non-data-based examples points to the need for more in-depth and evidence-based discussions in formulating legal policies, especially those that have the potential to limit civil rights and public liberties. In the midst of the debate regarding regulations relating to disturbances to the public interest in the context of demonstrations, there is a tendency for the drafting team not to fully take into account the symptoms and phenomena occurring in the field, which in some cases indicate a high intensity of social conflict. Communities that organize themselves to fight land occupation, land confiscation, or detrimental company activities often choose mass action methods as a means of resistance. Such actions, which arise from the urgent need to protect local rights and resources, are often met with repressive responses from police forces. These cases of confrontation between the community and the police in the context of resistance to land occupation and land confiscation should be important indicators that can be measured and taken into consideration in formulating fair and effective regulations. The inability or unwillingness to capture this reality in the policy-making process can result in regulations that not only fail to address the root social problems underlying mass action but also have the potential to criminalise society's legitimate efforts to defend rights and justice. The importance of incorporating perspectives and real-world experiences from the field into regulatory discussions is not only to ensure that laws reflect complex social realities but also to avoid creating laws that unfairly limit civil rights and free speech. A more inclusive and evidence-based approach to the policymaking process can help in designing balanced regulations that recognize the right to demonstration as a means of

public expression while safeguarding the public interest and public safety.

The case of mining resistance in Wawonii Village, Southeast Sulawesi, is a clear example of how conflicts between large economic interests and the rights of local communities can lead to repressive actions by the authorities. Local communities involved in protests against mining activities often face the risk of arbitrary arrest for unclear or invalid reasons. Actions of this kind raise serious concerns regarding law enforcement and the protection of human rights, especially the right to assemble and express opinions. In a context such as Wawonii Village, action against mining is not just a matter of disturbance to the public interest but is an expression of community objection to the potential negative impacts that mining activities can cause, such as environmental damage, eviction, and loss of livelihood.⁴⁵ The arbitrary arrests of individuals involved in these acts of resistance reflect the power imbalance between local communities and business and government interests and demonstrate the urgent need for stronger legal protections for citizens' civil and political rights. Cases such as those in Wawonii Village highlight the importance of regulations that not only focus on regulating mass actions from the perspective of security and public order but also recognize and protect the basic rights of the community to organize, assemble, and voice opinions or objections to projects that impact the environment and their welfare. There must be a clear and fair mechanism in law that allows people to protest as part of democratic participation without having to face the fear of arrest or other repressive measures. Article 162 of the Mineral and Coal Law, which was revised in 2020, is a significant example of how regulations can be created with the aim of regulating or even limiting community activities that are deemed to hinder or disrupt mining business activities. This provision raises concerns about how the law can be used to ensnare individuals or groups who protest or act against mining activities that they consider to have a negative impact on the environment, land rights, and the lives of local communities. By criminalizing actions deemed to constitute obstruction or interference with mining operations, this regulation potentially narrows the space for civil society to voice concerns and advocate for environmental and social issues. This indicates a trend in

⁴⁵ Willa Wahyuni, "Melihat Kembali Sederet Pasal Kontroversial KUHP Baru."

policymaking that prioritizes mining business interests over community rights and environmental protection. Critics of such regulations often emphasize the importance of balancing economic development with human rights and environmental sustainability. Cases such as those in Wawonii Village demonstrate the reality that community protest activities against mining projects are often based on legitimate concerns about the project's negative impacts. Therefore, regulations that effectively criminalize these acts of protest can be seen as a barrier to social and ecological justice. The emergence of regulations such as Article 162 of the Mineral and Coal Law shows the critical need for greater dialogue and balance between mining interests and the protection of community rights and environmental sustainability, ensuring that policies not only encourage economic growth but also pay attention to social welfare and environmental justice.⁴⁶

The ratification of the new Criminal Code by the DPR and the government, which is intended to update and modernize the Indonesian legal system, has apparently raised deep concerns regarding the increased potential for criminalization and the repressive use of legal instruments. Critics of the new Criminal Code often highlight how these regulations do not adequately respond to urgent needs related to the maintenance and development of democracy, especially in a global context experiencing numerous challenges to democratic values. This growing problem of criminalization reflects a worrying trend in many parts of the world, where governments are using legal tools to suppress critical voices and intimidate those who try to voice their opinions or report the truth. In the Indonesian context, activists, journalists, and other elements of civil society who attempt to express criticism of government policies or reveal cases of corruption and human rights violations often face what is referred to as "judicial harassment."

This practice involves the use of legal processes to silence or intimidate political opponents or critics through often unfounded accusations, which can ultimately reduce space for free speech and threaten press freedom. This situation shows the need for legal reform that not only prioritizes adjusting regulations to international standards related to human rights but also actively protects the basic rights of citizens to participate in the democratic process. This includes

⁴⁶ Willa Wahyuni.

protection of freedom of expression, assembly, and the press, as well as guarantees that the legal process is not misused for political purposes or repression. It is important for governments and legislative bodies to listen to the criticisms and concerns expressed by civil society and legal experts and work together to ensure that any changes to the legal system truly support the principles of democracy and justice. The democratization agenda in the process of drafting the Indonesian version of the Criminal Code (KUHP) has the noble aim of updating and modernizing criminal law so that it is in line with democratic values and human rights that are recognized globally. However, there is substantial concern that, without a careful and inclusive approach, a revision of the Criminal Code could inadvertently replicate the repressive outlook typical of the colonial and New Order eras in responding to public expression. These periods were characterized by the implementation of strict laws and policies to limit freedom of speech, assembly, and expression, often under the pretext of maintaining public order and state stability. In the context of democratization, it is crucial to ensure that the new Criminal Code not only adopts a more modern language but also fundamentally reflects the principles of justice, equality, and respect for human rights. This means that every regulation or article in the Criminal Code must be drafted taking into account its impact on citizens' civil liberties and political rights, as well as ensuring that there is sufficient space for citizens to criticize and question government policies without fear of disproportionate legal retribution.

To avoid repeating past mistakes and ensure that the Criminal Code supports the development of democracy in Indonesia, policymakers and law drafters must:

1. Engage Civil Society and Legal Experts

In the context of law reform, particularly the drafting of the Criminal Code (KUHP), the involvement of civil society and legal experts is a fundamental step that reflects the principles of democracy and transparency. This process, which is ideally open and participatory, allows input from a diverse range of stakeholders to enrich and sharpen the content of the KUHP, ensuring that the resulting regulations are not only theoretically sound but also practically relevant and fair. Civil society, with its diversity, brings valuable perspectives on the impact of the

law in everyday life, while legal experts and human rights organizations provide critical insights on the technical aspects and legal implications of the proposed regulations. Their involvement ensures that the legislative process is not only dominated by the views of political and legal elites but also reflects the aspirations and needs of the wider community. This, in turn, helps in formulating a more inclusive Penal Code that is able to accommodate social, economic, and cultural diversity and strengthen the legal foundation that supports justice and sustainability. In addition, involving civil society and experts directly in the law-making process can improve public understanding of the legal system and increase public trust in judicial institutions. This is an important step towards building a legal system that is not only based on the principles of justice but also on transparency and accountability, where every element of society feels ownership and respect in the law-making process.

2. Revisiting Controversial Articles

Revisiting controversial articles in the Criminal Code (KUHP) is a crucial step in ensuring that legislation not only complies with modern legal principles but also respects and protects human rights, including freedom of expression, assembly, and religion. This process requires in-depth and reflective analysis to identify and modify provisions that, either directly or indirectly, could be used to curb individual and collective expression or to justify repressive measures by the state or other actors. In a global context that increasingly values civil and political rights as the foundation of democracy, the Criminal Code must be developed in a way that does not allow room for excessive and subjective interpretation, which could lead to disproportionate restrictions on these rights. This work not only involves legal experts and policymakers but also requires ongoing dialogue with civil society, religious groups, and human rights organisations to ensure that all perspectives and concerns are accommodated. It also includes comparative studies of legal systems in other countries to identify best practices for balancing state security and individual freedoms. By revisiting controversial articles, Indonesia has the opportunity to affirm its

commitment to democratic values and human rights, strengthen public confidence in the justice system, and avoid international criticism and isolation. This step could also prevent the misuse of the law as a tool to suppress critical voices and ensure that the Criminal Code serves as a tool for justice and the protection of rights, rather than an instrument of repression.

3. Adopt International Standards

Adopting international standards in Indonesia's Criminal Code is an essential step in aligning national legislation with global commitments to human rights. This step demonstrates Indonesia's recognition and adherence to internationally agreed norms, as well as affirming its position as a state that respects and protects human rights. The integration of international standards into the Criminal Code not only strengthens the legal framework to protect individual and group rights but also ensures that Indonesia fulfils its obligations under ratified international treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture. This adoption process requires a thorough evaluation of existing regulations to identify and adjust any discrepancies with international standards. This includes the removal or modification of articles that allow discrimination, restriction of freedom of expression and assembly, or other practices that are contrary to human rights principles. In addition, it is important to introduce new provisions that explicitly protect these rights, including mechanisms for the prevention and prosecution of human rights violations. Adopting international standards also means strengthening oversight and accountability mechanisms in the application of the law, as well as ensuring that there is fair and effective access to justice for all. This includes adequate training for law enforcement officials, judges, and lawyers on the standards, as well as raising public awareness of their rights in accordance with international norms. By adopting international standards, Indonesia not only improves human rights protection domestically but also strengthens its position and credibility on the international stage as a country committed to good governance, democracy, and international law. This is an

important step towards building a more just, inclusive, and peaceful society where the rights of all individuals are respected and protected.

4. Monitoring and Evaluation

Monitoring and evaluation are critical components of the legal policy cycle, particularly in the context of the implementation of the Criminal Code (KUHP). It ensures that the Penal Code is implemented in accordance with its original purpose of protecting the rights of citizens and maintaining public order, while also ensuring that the law is not abused for purposes contrary to the principles of justice and human rights. Effective oversight requires a transparent and responsive system where complaints and reports of abuse can be easily filed and followed up with appropriate corrective action. Periodic evaluation of the Penal Code is essential to ensure that its content and application remain relevant to the social, economic, and political dynamics of society. This process should involve various stakeholders, including government agencies, civil society organisations, the academic community, and the private sector, to gain a comprehensive perspective on the effectiveness and impact of the law. The evaluation should also consider international legal developments and best practices from other countries to update and improve the Criminal Code to make it more just and humane. In addition, robust monitoring and evaluation should be complemented by clear accountability mechanisms to ensure that any violations of the law or abuse of power by law enforcement officials can be identified and effectively addressed. This includes strengthening independent oversight institutions, such as human rights commissions, ombudsmen, and other oversight institutions, which have the authority to investigate complaints and recommend sanctions or reforms. The implementation of strong oversight and evaluation mechanisms not only enhances the integrity and fairness of the legal system but also strengthens public confidence in judicial institutions. By ensuring that the Criminal Code remains appropriate and effective in the face of social, economic, and political change, the government and society together can work towards creating a fair, transparent, and accountable legal environment.

Conclusion

According to Law No. 9 of 1998 on Freedom of Expression in Public, the use of criminal law as the last resort to address legal expression through demonstrations emphasizes the significance of a more cautious and proportionate approach to law enforcement. Concerns over ambiguous articles in the new Criminal Code that have the potential to restrict freedom of expression and assembly reflect the urgent need to ensure that legal reforms do not erode democratic principles and human rights. Demonstrations and expressions of opinion, as important pillars of democracy, must be protected under an approach that guarantees citizens' right to participate in public dialogue without fear of intimidation or unfair punishment. Cases such as the burning of Transjakarta bus stops during demonstrations demonstrate the risk of escalation of violence and mass arrests that can occur when law enforcement is not conducted fairly and proportionately. Therefore, it is imperative for the government and law enforcement officials to prioritize dialogue, communication, and administrative sanctions before considering criminal action, with the primary goal of protecting citizens' fundamental rights to express opinions and peaceful assembly while maintaining public order. Article 256 of Indonesia's new Criminal Code, which provides for the organization of marches, public meetings, or demonstrations without prior notice, raises critical questions regarding the balance between freedom of expression and the need to maintain public order and security. In the international human rights context, the principles of necessity and proportionality are key in assessing restrictions on the right to assembly and expression. While this right is recognised and protected by global human rights instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, restrictions must be legal, necessary, and proportionate. The implementation of Article 256 must ensure compatibility with Indonesia's international commitments to human rights, requiring legal clarity and a fair assessment mechanism for "interference with the public interest." Comparisons with other democratic countries such as the United States, Germany, Canada, and the United Kingdom show a variety of approaches to balancing human rights and public interest, often

emphasizing dialogue, coordination, and active protection of the rights of assembly and expression. Indonesia, in implementing Article 256 and similar regulations, is in a position to affirm its commitment to democratic principles and human rights, requiring a thoughtful and proportionate approach that not only complies with domestic legal provisions but also strengthens human rights protections in accordance with international standards. Discussions on regulations governing interference with the public interest in the context of demonstrations in Indonesia underscore the importance of finding a balance between security and freedom of expression. Drafters and policymakers are faced with the challenge of formulating laws that not only prevent disruption to vital public services such as emergency services but also respect people's right to assemble and voice opinions. To ensure that the Criminal Code (KUHP) supports the development of democracy in Indonesia and avoids repeating past mistakes, policymakers and lawmakers must adopt an inclusive, transparent, and human rights-oriented approach. Involving civil society and legal experts in the Criminal Code drafting process, revisiting controversial articles to protect freedom of expression, assembly, and religion, adopting international standards that reflect global commitments to human rights, and implementing robust monitoring and evaluation mechanisms are key steps to building a fair and responsive legal system. This approach not only strengthens the legal framework for protecting individual and group rights but also enhances public confidence in judicial institutions and promotes good governance. As such, the Criminal Code can be an effective tool to promote justice, maintain public order, and facilitate social dialogue while ensuring that Indonesia remains in line with democratic principles and respect for human rights in the international arena.

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