

# ICLU

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Criminal Law  
Update

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## INDONESIA'S LEGAL FRAMEWORK ON HATE SPEECH



INSTITUTE FOR  
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# ICLU | Indonesia Criminal Law Update



## Letter From Editor

This edition of ICLU elaborates the legal framework on hate speech law in Indonesia. The discussion will cover all provisions regarding hate speech in criminal law currently incorporated in various Indonesian laws.

It is noteworthy that the current situation on freedom of expression in Indonesia becomes more interesting for discussion. In particular, the discussion regarding the hate speech related to the freedom of expression.

We hope that this edition of ICLU will help the readers to understand the issues on hate speech in Indonesia.

**Syahrial M. Wiryawan**

*Editor in Chief/Chairperson of the ICJR Governing Board*

# Indonesia's Legal Framework on Hate Speech

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**About ICJR**

Since its establishment in 2007, the Institute for Criminal Justice Reform (ICJR) commits to take the initiatives in supporting overall criminal justice reform. ICJR is formed with a mission to support collective actions in honoring the Rule of Law and realizing criminal justice system with strong human rights protection.

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*In the Indonesian Criminal Code (KUHP), provisions relating to the prohibition of hate speech are well regulated. However, there are also several other provisions regarding the prohibition of hate speech in other regulations outside of the Criminal Code*



## Overview

Freedom of expression is one of the important basic foundations in law of states. Therefore, the freedom of expression is fundamentally guaranteed under constitutions of a number of states, including Indonesia.

However, freedom of expression is part of human rights that can be limited. One of the things that can be limited is hate speech. Human rights law requires states to criminalize hate speech.

At present, one of the challenges that must be overcome in Indonesia is the rise of hate speech through social media. In the Indonesian Criminal Code (KUHP), provisions relating to the prohibition of hate speech are well regulated. However, there are also several other provisions regarding the prohibition of hate speech in other regulations outside of the Criminal Code

This edition of ICLU will discuss various legal frameworks which pertain to the freedom of expression applicable in Indonesia, including several restrictions permitted under Indonesian law. This article will also discuss various legal provisions related to the criminalization of hate speech.

## Constitutional Framework

Since its enactment on 18 August 1945, the 1945 Constitution has guaranteed freedom of speech and expression, which is evident from Article 28 quoted below:

*"The freedom to associate and to assemble, to express written and oral opinions, and so forth, shall be regulated by law".*

After the demise of the New Order, constitutional guarantee on freedom of speech was later affirmed under Article 28E (3), which states:

*"Every person shall have the right to the freedom to associate, to assemble and to express opinions"*

And Article 28F, which states:

*"Every person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by utilizing all available types of channels."*

Nevertheless, freedom of speech and expression—in essence—are part of human rights that subject to limitation. Therefore the abovementioned articles are limited by Article 28J (2), which states that

*"In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society."*

## Legal Framework on Freedom of Expression

In the relation between defamation and freedom of speech/expression, some legislations are incorporating the protection of freedom of speech and expression, such as Law No. 39 of 1999 on Human Rights ("Human Rights Law").<sup>1</sup>

Article 14

*"(1) Every person has the right to communicate and obtain information they need to develop themselves as individuals and to develop their social environment;*

*(2) Every person has the right to seek, obtain, own, store, process, and deliver information*

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<sup>1</sup> Law No 39 of 1999 on Human Rights, available at: <http://peraturan.go.id/uu/nomor-39-tahun-1999.html>

*using all available facilities”*

### **Article 23 (2)**

*“Every person has the freedom to hold, impart and widely disseminate his beliefs, orally or in writing through printed or electronic media, taking into consideration religious values, morals, law and order, the public interest and national unity.”*

### **Article 25**

*“Every person has the right to express his opinion in public, and this includes the right to strike, according to the prevailing laws and regulations.”*

In ensuring the freedom of expression, human rights law incorporates strict limitations under the articles below:

### **Article 70**

*In executing his rights and obligations, everyone shall observe the limitations set forth in the provisions in this Act, in order to ensure that the rights and freedoms of others are respected, and in the interests of justice, taking into account the moral, security, and public order considerations of a democratic society.*

### **Article 73**

*The rights and freedoms governed by the provisions set forth in this Act may be limited only by and based on law, solely for the purposes of guaranteeing recognition and respect for the basic rights and freedoms of another person, fulfilling moral requirements, or in the public interest.*

In addition, Indonesia has also ratified the ICCPR under Law No. 12 of 2005.<sup>2</sup> Therefore, all protection guaranteed and limitation under Article 19 of the ICCPR are embedded into the Indonesian national legal system, including banning the hate speech.

Article 20 paragraph 2 of the ICCPR stipulates that: any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Additionally, Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>3</sup> stipulates that:

*Shall declare an offence punishable by law all dissemination of ideas based on racial superiority*

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<sup>2</sup> Law No. 12 of 2005, available at <http://www.peraturan.go.id/uu/nomor-12-tahun-2005.html>

<sup>3</sup> ICERD has been ratified through Law No. 29 of 1999 on Ratification of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.

*or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;*

## **Hate Speech Under the Criminal Code (KUHP)**

Hate speech under the criminal code is regulated under Book II Chapter V on Crimes Against the Public Order<sup>4</sup>, specifically under the following articles:

### **Article 154<sup>5</sup>**

*Any person who publicly gives expression to feelings of hostility, hatred or contempt against the Government of Indonesia, shall be punished by a maximum imprisonment of seven years or a maximum fine of three hundred Rupiahs.*

### **Article 155 (1)<sup>6</sup>**

*Any person who disseminates, openly demonstrates or puts up a writing where feelings of hostility, hatred or contempt against the Government of Indonesia are expressed with intent to give publicity to the contents or to enhance the publicity thereof, shall be punished by a maximum imprisonment of four years and six months or a maximum fine of three hundred Rupiahs.*

### **Article 156**

*Any person who publicly gives expression to feelings of hostility, hatred or contempt against one or more groups of the population of Indonesia, shall be punished by a maximum imprisonment of four years or a maximum fine of three hundred Rupiahs.*

### **Article 157**

*Any person who disseminated, openly demonstrates or puts up a writing or portrait where feelings of hostility, hatred or contempt against or among groups of the population of Indonesia are expressed, with intent to give publicity to the contents or to enhance the publicity thereof, shall be punished by a maximum imprisonment of two years and six months or a maximum fine of three hundred Rupiahs.*

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<sup>4</sup> Criminal Code of Indonesia (KUHP), available at: [http://www.hukumonline.com/pusatdata/detail/lt4c7b7fd88a8c3/nppt/38/wetboek-van-strafrecht-\(wvs\)-kitab-undang-undang-hukum-pidana-\(kuhp\)](http://www.hukumonline.com/pusatdata/detail/lt4c7b7fd88a8c3/nppt/38/wetboek-van-strafrecht-(wvs)-kitab-undang-undang-hukum-pidana-(kuhp)). KUHP was declared as criminal code applicable in Indonesia according to Law No. 1 of 1946. See: <http://www.dpr.go.id/dokjdih/document/uu/814.pdf>

<sup>5</sup> Article 154 of the Criminal Code has been declared to be conflicted with the 1945 Constitution by the Constitutional Court through Decision No. 6/PUU-V/2007

<sup>6</sup> Article 155 of the Criminal Code has been declared to be conflicted with the 1945 Constitution by the Constitutional Court through Decision No. 6/PUU-V/2007

If the offender commits the crime in his profession and during the commission of the crime five years have not yet elapsed since an earlier conviction on account of a similar crime has become final, he may be deprived of the exercise of said profession.

## Hate Speech outside of the Criminal Code

As a criminal offence, hate speech is also regulated under several legal frameworks in Indonesia, among others:

Law No 40 of 2008 on The Elimination of Racial and Ethnic Discrimination,<sup>7</sup> specifically under Article 4 letter b and Article 16 which stipulate that:

*"Any person who publicly gives expression to feelings of hostility or hatred against people due to racial and ethnic differences by:*

1. *Making any posts or drawings to be placed, affixed, or disseminated in public places or other places with intent to give publicity to the contents or to enhance the publicity thereof;*
2. *Delivering or expressing speeches or certain words in public places or other places with intent to give publicity to the contents or to enhance the publicity thereof;*
3. *Wearing something in himself in the form of objects, words, or pictures in public places or other places with intent to give publicity to the contents or to enhance the publicity thereof.*

*shall be punished by a maximum imprisonment of five years or a maximum fine of IDR 500,000,000 (five million Rupiahs).*

Under Law No. 19 of 2016 on the Amendment to Law No. 11 of 2008 on Information and Electronic Transaction,<sup>8</sup> specifically under Article 28 paragraph (2) and Article 45a paragraph (2), it is also enshrined that:

*"Any Person who deliberately and without authority disseminates information with intention for inflicting hatred or dissension on individuals and/or certain groups of community based on ethnic groups, religions, races, and inter-groups (SARA) shall be punished by a maximum imprisonment of six years or a maximum fine of IDR 1,000,000,000 (one trillion Rupiahs)"*

<sup>7</sup> See Law on The Elimination of Racial and Ethnic Discrimination, available at: <http://peraturan.kemendikhum.go.id/uu/nomor-40-tahun-2008.html>

<sup>8</sup> See Law on Information and Electronic Transaction, available at: <http://peraturan.kemendikhum.go.id/uu/nomor-11-tahun-2008.html> and also its amendment, available at: <http://www.hukumonline.com/pusatdata/detail/lt584a7363785c8/node/534/undang-undang-nomor-19-tahun-2016>



*Articles 154 and 155 can also be said to be irrational because a citizen of an independent and sovereign state is unlikely to be hostile to his own state and government, except in the case of a treason and treason is already covered in a separate chapter.*

## Related Court Decision

### Constitutional Court Decision No. 6/PUU-V/2007<sup>9</sup>

In this decision, the Constitutional Court declares that the provisions of Article 154 and Article 155 of the Criminal Code are contradictory to the 1945 Constitution with the following legal considerations:

1. Whereas Article 5 of Law No 1 of 1946 on the Rule of Criminal Law which implements Wetboek van Strafrecht in Indonesia stipulates that: "Criminal law which in whole or in part can not be executed or contradictory to the position of the Republic of Indonesia as an independent state or has no meaning anymore, shall be deemed entirely or partly invalid". Therefore, since the beginning of the legislators realized that there is a provision in the Criminal Code that is not in accordance with the position of the Republic of Indonesia as an independent state. B
2. That the qualification of the offense in Articles 154 and 155 is a formil offense which requires only the fulfillment of the prohibited element of action without regard to the consequences of an act. As a result, the formulation of the two articles raises a tendency to abuse of power because it is easily interpreted according to the taste of the authorities. A citizen who wishes to convey criticism of his constitutional rights will be very easy to be qualified as "feelings of hostility, hatred or contempt" against the government because there are no definite criteria in the formulation of Articles 154 and 155 which distinguish criticism or statements of opinion with feelings of hostility or insult.
3. Articles 154 and 155 can also be said to be irrational because a citizen of an independent and sovereign state is unlikely to be hostile to his own state and government, except in the case of a treason and treason is already covered in a separate chapter. Historically, Articles 154 and 155 were intended to ensnare

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<sup>9</sup> See Constitutional Court Decision No. 6/PUU-V/2007, available at: <http://www.mahkamahkonstitusi.go.id/index.php?page=download.Putusan&id=183>

figures of the Indonesian independence movement in colonial era, making it clear that the article contradicts Indonesia's position as an independent state, as meant under Article 5 of Law No. 1 of 1946.

4. Whereas, on the one hand the provisions of Articles 154 and 155 of the Criminal Code do not guarantee the existence of legal certainty so that it is contradictory to Article 28D paragraph (1) of the 1945 Constitution. On the other hand, as a consequence disproportionately prevents independence from expressing thoughts and attitudes and freedom of expression so that it is contradictory to Article 28 and 28E paragraph (2) and paragraph (3) of the 1945 Constitution<sup>10</sup>.

## Upcoming Regulation

Since 2015 until present, the government and the House of Representatives are discussing the Draft Bill on the Criminal Code. The Draft Bill on Criminal Code also restates provisions on hate speech.

### Article 261

*Any person who publicly **gives expression to feelings of hostility, hatred or contempt against one or more groups of the population** of Indonesia based on **ethnic groups, religions, races, and inter-groups** or against groups based on **genders, ages, mental disabilities, or physical disabilities** shall be punished by a maximum imprisonment of one year or a maximum fine of Category II*

### Article 262

1. *Any Person who **broadcasts, displays, or attaches a text or graphic** so as to be publicly visible or to make the tape **publicly heard** or **disseminated by means of an information technology** means containing a **hate speech** with the intention that its content be known or more generally known to **one or several groups of the Indonesian population which may be determined by race, nationality, ethnicity, color, and religion, or against groups by sex, age of mental disability, or physical disability that causes violence** against persons or goods shall be punished by a maximum imprisonment of four years*
2. *If the offender as referred to in paragraph (1) performs such acts in carrying out his profession and at that time has not been within 2 (two) years since the decision of punishment which has obtained permanent legal force for committing the same offense, the said offenders may be imposed with additional criminal offence in the*

<sup>10</sup> Article 28E paragraph (3) of the 1945 Constitution stipulates that: "Everyone has the right to freedom of association, assembly and expression"

form of revocation of rights as referred to in Article 96 letter f.

### Article 263 paragraph (2)

Any person who express **hatred or contempt against other person based on discriminations of races and ethnics** shall be punished by a maximum imprisonment of five years or a maximum fine of Category III

### Article 265

1. Any Person who **broadcasts, displays, or attaches a text or graphic** so as to be publicly visible or to make the tape **publicly heard** or **disseminated by means of an information technology** means containing a **hate speech** with the intention that its content be known or more generally known to **one or several groups of the Indonesian population** which may be determined **by race, nationality, ethnicity, color, and religion, or against groups by sex, age of mental disability, or physical disability)** shall be punished by a maximum imprisonment of four years or a maximum fine of Category IV
2. In case the act as referred to in paragraph (1) resulting in a violation against a person or goods shall be punished by a maximum imprisonment of ... year or a maximum fine of ...

Similar articles in the Criminal Code (i.e., Articles 154 and 155) are declared unconstitutional by the Constitutional Court through Decision No. 6/PUU-V/2007, has been strived for criminalization in the form of the provisions of Articles 259 and 260 of Draft Bill on Criminal Code (Chapter V - Crime Against Public Order)

#### Article 259 of Draft Bill on Criminal Code

Any person who publicly gives expression to feelings of hostility, hatred or contempt against the legitimate government of Indonesia and results in a misconduct in the society shall be punished by a maximum imprisonment of three years or a maximum fine of Category IV

#### Article 154 of Criminal Code

Any person who publicly gives expression to feelings of hostility, hatred or contempt against the Government of Indonesia, shall be punished by a maximum imprisonment of seven years or a maximum fine of three hundred Rupiahs.

**Article 260 of Draft Bill on Criminal Code**

Any person who broadcasts, displays or attaches the text or images so publicly visible, makes the tape publicly heard, or disseminates by means of information technology which contains defamation to a legitimate government, with intent to give publicity to the contents or to enhance the publicity thereof, shall be punished by a maximum imprisonment of three years or a maximum fine of of Category IV.

**Article 155 (1) of Criminal Code**

Any person who disseminates, openly demonstrates or puts up a writing where feelings of hostility, hatred or contempt against the Government of Indonesia are expressed with intent to give publicity to the contents or to enhance the publicity thereof, shall be punished by a maximum imprisonment of four years and six months or a maximum fine of three hundred Rupiahs.

## The Authors

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## ***About ICLU***

*Indonesia Criminal Law Updates (ICLU) is a feature from Institute for Criminal Justice Reform (ICJR). ICLU is presented by the ICJR as one of the instrument and communication medium to inform the recent development on criminal law and criminal justice system reforms in Indonesia.*