

## Potential Overcriminalization in Religious Offenses: A Critical Analysis of The Formulation of The New National Criminal Code (Law 1 Number 2023)

### *Potensi Overkriminalisasi Dalam Tindak Pidana Agama: Analisis Kritis Terhadap Perumusan Kitab Undang-Undang Hukum Pidana Nasional Baru (UU No. 1 Tahun 2023)*

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**ABSTRACT:** *Overcriminalization in the context of criminal law refers to the phenomenon where too many behaviors are defined as criminal offenses, which ultimately results in the expansion of law enforcement powers and an increase in the number of individuals caught up in the criminal justice system. This study examines overcriminalization in the formulation of religious offenses contained in Law Number 1, the Year 2023 on the Criminal Code (KUHP), focusing on Article 302 on incitement of a person to no religion or belief adopted in Indonesia and its impact on atheists or non-religious communities. The analysis highlights several important issues, such as the unclear definition of “inciting” in the article, its impact on freedom of speech, potential discrimination against minorities, and misuse of the law for political purposes. The research was conducted using a qualitative method, combining document studies, literature reviews, and analysis of relevant case law. The results show that Article 302 of the New National Criminal Code may lead to overcriminalization, as it regulates acts that can be considered part of freedom of expression and religion. This article can also be considered as limiting the right of individuals to choose their beliefs or religion, including the right not to have religious beliefs. In addition, this research highlights that this article is vulnerable to abuse by parties who have political interests or want to target specific groups. As a recommendation, this study suggests the need to reform the formulation of Article 302 of the National Criminal Code to reduce the impact of overcriminalization and protect human rights, such as freedom of speech.*

**ABSTRAK:** Overkriminalisasi dalam konteks hukum pidana merujuk pada fenomena di mana terlalu banyak perilaku yang didefinisikan sebagai tindak pidana, yang pada akhirnya berakibat pada perluasan kewenangan penegak hukum dan peningkatan jumlah individu yang terjebak dalam sistem peradilan pidana. Studi ini mengkaji overkriminalisasi dalam perumusan tindak pidana agama yang terdapat dalam Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana (KUHP), dengan fokus pada Pasal 302 tentang penghasutan agar seseorang tidak menganut agama atau kepercayaan yang dianut di Indonesia dan dampaknya terhadap komunitas ateis atau non-agama. Analisis ini menyoroti beberapa isu penting, seperti ketidakjelasan definisi “menghasut” dalam pasal tersebut, dampaknya terhadap kebebasan berpendapat, potensi diskriminasi terhadap kelompok minoritas, dan penyalahgunaan hukum untuk tujuan politik. Penelitian ini dilakukan dengan menggunakan metode kualitatif, dengan menggabungkan studi dokumen, tinjauan literatur, dan analisis terhadap kasus-kasus yang relevan. Hasil penelitian menunjukkan bahwa Pasal 302 KUHP Baru dapat menyebabkan overkriminalisasi, karena pasal ini mengatur tindakan-tindakan yang dapat dianggap sebagai bagian dari kebebasan berekspresi dan beragama. Pasal ini juga dapat dianggap membatasi hak individu untuk memilih keyakinan atau agama mereka, termasuk hak untuk tidak memiliki keyakinan agama. Selain itu, penelitian ini menyoroti bahwa pasal ini rentan disalahgunakan oleh pihak-pihak yang memiliki kepentingan politik atau ingin menasar kelompok tertentu. Sebagai rekomendasi, penelitian ini menyarankan perlunya reformasi perumusan Pasal 302 KUHP untuk mengurangi dampak overkriminalisasi dan melindungi hak asasi manusia, seperti kebebasan berpendapat.

#### **Keywords:**

Overcriminalization;  
Religious Offenses;  
New Criminal Code;  
Indonesia

#### **Kata Kunci:**

Overkriminalisasi;  
Pelanggaran Agama;  
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## 1. Introduction

Overcriminalization is a phenomenon that has become a global concern in recent decades. This refers to a situation where too much behavior is defined as a crime, resulting in the expansion of law enforcement powers and an increase in the number of individuals caught up in the criminal justice system.<sup>1</sup> In criminal law, this phenomenon can create severe problems in maintaining a balance between protecting society and human rights.<sup>2</sup> Barda Nawawi Arief, a leading legal expert, provides another perspective on overcriminalization. According to him, overcriminalization is a phenomenon in which many or an abundance of crimes and acts are criminalized. This phenomenon arises due to the ongoing process of criminalization with a valid assessment and evaluation of its impact on the entire system.<sup>3</sup> Indonesia formulated Law Number 1 2023 concerning the Criminal Code (KUHP). The new Criminal Code (KUHP), although ratified on December 6, 2022, and promulgated through Law Number 1 of 2023 on January 2, 2023, will begin to be implemented in 2026.<sup>4</sup> This transitional period provides time for the government, law enforcement, and society to adjust to changes in criminal law.<sup>5</sup> This law represents an important step in criminal law reform, to bring the law into line with society's changing norms, values, and needs. Through this renewal, the government seeks to overcome several problems in the criminal law system. In addition, the new Criminal Code also has the potential to influence other aspects of law and social order, including protecting human rights, upholding justice, and applying the law more consistently and transparently. The formulation of this law reflects the need to regulate various aspects of people's lives, including religious offenses.

The case of Lina Mukherjee, sentenced to two years in prison for blasphemy connected to her social media activity, strikingly illustrates the profound implications of overcriminalization, particularly in the realm of crimes involving religion and belief. In addition to the prison term, the judges at the Palembang District Court also imposed a hefty fine of Rp 250 million on her, whose real name is Lina Lutfiawati. This decision not only penalizes Mukherjee for her actions but also sets a precedent with far-reaching consequences.<sup>6</sup> Such a stringent punishment for a social media post reflects an intense judicial stance on religious sensitivity and raises critical questions about the balance between upholding respect for religious beliefs and ensuring freedom of expression. The imposition of a substantial fine, along with the prison sentence, suggests an overly punitive approach, potentially discouraging open and constructive discourse on religious matters. This case serves as a stark example of how legal systems can sometimes disproportionately respond to acts perceived as blasphemous, thereby risking the infringement of individual rights and freedoms. It underscores the need for a more nuanced and balanced application of laws, particularly those related to religious and belief crimes, to prevent the undue stifling of personal expression and to safeguard the fundamental principles of justice and human rights.

However, Article 302 of the New Criminal Code regarding incitement against a person's religion or belief in Indonesia has become the center of the debate. The ambiguity in the article's definition of "incitement" raises questions about its impact on freedom of speech, the potential for discrimination against minority groups, and the misuse of the law for political purposes. Atheist or non-religious communities in Indonesia, which may be a minority group in the context of religion, have the potential to be affected by this article. There is concern that this article could be used to target or discriminate against individuals based on religious belief or lack of belief. Given the complexity and potential impact of Article 302, there is an urgent need for in-depth research into its implications. This research takes a severe approach to examine the issue of overcriminalization, especially in the context of religious offenses in the new Criminal Code.<sup>7</sup>

This analysis focuses on several critical aspects of law enforcement and its impact on society. First, this study highlights the ambiguity in the definition of "incitement" in the relevant articles. This ambiguity can lead to arbitrary and inconsistent law enforcement, which has the potential to undermine freedom of expression. Without a clear and firm definition, there is a risk that the law may be overly interpreted or misused by law enforcement to suppress dissenting or unpopular views. Second, the impact of this vague definition on freedom of speech is

- 1 Paul J. Larkin, "Public Choice Theory and Overcriminalization," *Harvard Journal of Law and Public Policy* 36, no. 715 (29 Juli 2013), <https://papers.ssrn.com/abstract=2302913>.
- 2 Aziz Nurbela, "Urgensi Delik Agama Dalam Kitab Undang-Undang Hukum Pidana," *Jurnal Recidive* 2, no. 3 (2013): 246–54.
- 3 Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Bandung: Citra Aditya Bakti, 2005).
- 4 Carlos Fajar Kajarta, "Presiden Jokowi Resmi Teken UU KUHP, Mulai Berlaku pada 2026," <https://www.inews.id/>, 2023.
- 5 Rumadi Ahmad, "KUHP dan Kebebasan Beragama," [kompas.id](https://www.kompas.id/baca/opini/2023/01/04/kuhp-dan-kebebasan-beragama), 2023, <https://www.kompas.id/baca/opini/2023/01/04/kuhp-dan-kebebasan-beragama>.
- 6 BBC News Indonesia, "Lina Mukherjee Divonis Dua Tahun Atas Penistaan Agama, Dinilai 'Berlebihan': 'Itu Juga Dosa Dia, Bukan Dosa Kita,'" <https://www.bbc.com/indonesia/>, 2023, <https://www.bbc.com/indonesia/articles/ckrk1rp9yrdo>.
- 7 Zainal Abidin Bagir, "Agama dalam KUHP: Kemajuan Setengah Jalan," [crcs.ugm.ac.id](https://crcs.ugm.ac.id/), 2023, <https://crcs.ugm.ac.id/agama-dalam-kuhp-kemajuan-setengah-jalan/>.

a deep issue. Freedom of expression is one of the pillars of democracy, and unclear laws can suppress critical voices, especially on sensitive issues such as religion.<sup>8</sup> This creates a climate of fear and restraint, undermining open and critical dialogue within society. Third, this study also highlights the potential for discrimination against minority groups. Vague laws and selective interpretations can be used as tools to target specific groups, especially those with different religious beliefs or practices.<sup>9</sup> This can create a hostile and intolerant environment where minorities feel threatened and marginalized. Fourth, this analysis reveals the potential for misusing the law for political purposes. Without strict control and supervision, the law can become a tool the authorities use to suppress political opposition or social criticism, especially in the context of religion, which is often an emotional and political issue.

Previous research on overcriminalization has revealed various important aspects in the context of law and legislation. One of them is a study by Mahrus Ali entitled “Overcriminalization in Indonesian Legislation.” This study highlights the increase in criminalization, especially in administrative offenses, which has the potential to lead to overcriminalization.<sup>10</sup> Marthen H. Toelle, in his research “*Kriminalisasi Berlebih (Overcriminalization) Dalam Kriminalisasi Korupsi*,” criticized the practice of overcriminalization in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law. Toelle emphasized that the existing protection of state finances is sufficient, so there is no need to overcriminalize actions that harm state finances.<sup>11</sup> Meanwhile, Youngjae Lee, in “Mala Prohibita, the Wrongfulness Constraint, and the Problem of Overcriminalization”, discusses the wrongfulness constraint as a criminalization principle that aims to prevent criminalization in the absence of wrongfulness. He examines how this constraint can help reduce overcriminalization, especially in cases of mala prohibita offenses.<sup>12</sup> Douglas Husak, in “Overcriminalization: The Limits of the Criminal Law,” highlights the problem of overcriminalization in the United States, stating that too many criminal laws and punishments conspire to produce great injustice. Husak emphasized the need for a theory of criminalization to limit the authority of the state in establishing and enforcing criminal offenses.<sup>13</sup> The focus of this study is different from those of others because it looks at how Law No. 1 of 2023 on the Criminal Code overcriminalizes religious offenses. In particular, it looks at Article 302 on soliciting non-religion or belief in Indonesia and how it affects atheist or non-religious communities. This analysis highlights important issues such as the vague definition of “inciting” in the article, its impact on freedom of speech, potential discrimination against minorities, and the misuse of the law for political purposes.<sup>14</sup>

The purpose of this research is to conduct a comprehensive analysis of the overcriminalization that occurs in the formulation of criminal acts related to religion and belief in Law No. 1 Year 2023 on the Indonesian Criminal Code, with a particular focus on Article 302. This research aims to identify and understand the impact of the ambiguous definition of “inviting” in Article 302, particularly on freedom of speech and potential discrimination against minority groups, including atheist or non-religious communities. Furthermore, this research aims to evaluate how the formulation of Article 302 may contribute to an increase in law enforcement powers and an increase in the number of individuals caught up in the criminal justice system. This research also aims to assess how Article 302 may limit the right of individuals to choose their faith or religion, including the right to non-religion. In addition, this research examines the potential misuse of Article 302 by parties with political interests or who wish to target certain groups. Finally, this study aims to provide recommendations regarding the reformulation of Article 302 of the Criminal Code to reduce the impact of overcriminalization and protect human rights, such as freedom of speech.

- 8 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>.
- 9 Benjamin Schonthal et al., “Is the Rule of Law an Antidote for Religious Tension? The Promise and Peril of Judicializing Religious Freedom,” *American Behavioral Scientist* 60, no. 8 (20 Oktober 2015): 966–86, <https://doi.org/10.1177/0002764215613380>. This article analyzes the role of legal processes and institutions in hardening boundaries and sharpening antagonisms among religious communities. Using case studies from Sri Lanka, India, Malaysia, and Pakistan, we highlight four specific mechanisms through which legal procedures, structures, and instruments can further polarize already existing religious conflicts. These mechanisms include the procedural requirements and choreography of litigation (Sri Lanka)
- 10 Mahrus Ali, “Overcriminalization Dalam Perundang-Undangan Di Indonesia,” *Jurnal Hukum Ius Quia Iustum* 25, no. 3 (2018): 450–71, <https://doi.org/10.20885/iustum.vol25.iss3.art2>.
- 11 Marthen H. Toelle, “Kriminalisasi Berlebih (Overcriminalization) Dalam Kriminalisasi Korupsi,” *Refleksi Hukum: Jurnal Ilmu Hukum* 9, no. 2 (2015): 113–32, <https://doi.org/10.24246/jrh.2015.v9.i2.p113-132>. perlindungan terhadap keuangan negara sudah memadai sehingga tindakan merugikan keuangan negara tidak perlu dikriminalisasi atau dipidana berdasarkan Pasal 2 ayat (1)
- 12 Youngjae Lee, “Mala Prohibita, the Wrongfulness Constraint, and the Problem of Overcriminalization,” *Law and Philosophy* 41, no. 2 (2022): 375–96, <https://doi.org/10.1007/s10982-022-09443-z>.
- 13 Douglas Husak, *Overcriminalization: The Limits of the Criminal Law*, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2007), <https://doi.org/10.1093/ACPROF:OSO/9780195328714.001.0001>.
- 14 Hukum Online, “Delik Agama dalam RUU KUHP, Overcriminalization!,” <https://www.hukumonline.com/berita/a/delik-agama-dalam-ruu-kuhp-i-overcriminalizationi-hol15437?page=1>, 2006, <https://www.hukumonline.com/berita/a/delik-agama-dalam-ruu-kuhp-i-overcriminalizationi-hol15437?page=1>.

In this discussion, researchers will investigate the complex issues surrounding the legal treatment of religious and belief crimes, focusing on three main aspects. First, we examine the impact of over-criminalization in this context, highlighting how relying too heavily on criminal law to regulate religious practices or beliefs often leads to violations of fundamental human rights, including freedom of religion and expression. Second, authors analyze Article 302 of the New Criminal Code, looking at its potential pitfalls such as legal vagueness, discriminatory application, and opportunities for abuse. Third, it proposes recommendations and reform strategies aimed at ensuring fair and equitable law enforcement.

## 2. Method

This research employs qualitative methods, including document studies, literature reviews, and analysis of relevant case law, providing a solid framework for understanding and critiquing the construction and application of this law.<sup>15</sup> Combining multiple sources and analytic approaches, this research provides an in-depth and multifaceted overview of the complex issues associated with overcriminalization in religious offenses. This research makes a significant contribution to the field of legal studies, particularly in its understanding of the application of criminal law and its broader impact on society. It delves into the complexities of law enforcement, particularly in the context of religious offenses, a sensitive and intricate area. This research highlights the critical importance of transparency, clarity, and fairness in creating and implementing laws. On religious violations, it underscores the delicate balance required in legal frameworks to ensure they are just and effective while also being respectful of diverse religious sentiments and practices. The research thus offers valuable insights into the nuanced interplay between legal principles and societal values, emphasizing the need for thoughtful and equitable legal processes in areas fraught with moral and ethical considerations.

## 3. Findings and Discussion

### 3.1 The Impact of Overcriminalization in the Context of Religious and Belief Crime

Expanding the list of behaviors that are illegal in religious and belief criminal law, including behaviors that were not previously seen as illegal or morally unclear, causes a lot of problems and issues. This expansion can lead to an increase in the prison population, causing overcrowding and associated health, security, and human rights concerns. Overcrowded prisons not only become unhygienic, heightening the risk of disease transmission, but also increase tensions and potential violence, complicating inmate health and safety management.<sup>16</sup> Unequal law enforcement is another issue where prioritization becomes difficult due to the sheer volume of criminalized acts. This can result in arbitrary or inconsistent enforcement, undermining public confidence in the legal system and diverting attention from more serious crimes, thus impacting public safety. Overcriminalization also exerts profound negative social effects. Individuals entangled in the criminal justice system, even for minor offenses, face long-term consequences such as job discrimination, educational hurdles, and potential cycles of poverty and criminal behavior. These effects extend to families and communities, creating broader economic and social pressures. The financial implications of overcriminalization are substantial, with the criminal justice system's resources stretched thin. These resources could potentially be more effectively allocated to preventative measures like education and social services, which address the root causes of crime. Overcriminalization can also erode public trust in the legal system. When laws criminalize a wide array of behaviors, the justice system can appear arbitrary or overly punitive, causing people to lose faith in its fairness and legitimacy. This erosion of trust can lead to reduced cooperation with law enforcement and a general skepticism toward government institutions. Furthermore, overcriminalization can significantly impinge on human rights. Excessive detention, disproportionate punishment, privacy violations, discrimination, and the impact on other fundamental rights are all potential outcomes. This approach can disproportionately affect vulnerable groups, leading to inequality and injustice. Overcriminalization extends beyond the mere regulation of religious and belief systems, it poses a significant threat to the fundamental freedoms of opinion and assembly, which are cornerstones of a democratic society. This phenomenon, often stemming from well-intentioned efforts to maintain order and protect societal values, can inadvertently lead to the excessive penalization of behaviors that might not warrant such severe legal repercussions. This expansive application of criminal law can, in turn, stifle free expression, inhibit public discourse, and suppress civic engagement, undermining the very democratic ideals it seeks to protect.

15 I Gusti Ketut Ariawan, "Metode Penelitian Hukum Normatif," *Kertha Widya* 1, no. 1 (31 Desember 2013): 21–30, <https://doi.org/10.37637/KW.V1I1.419>.

16 J. García-Guerrero dan A. Marco, "Overcrowding in Prisons and its Impact on Health.," *Revista española de sanidad penitenciaria* 14, no. 3 (2012): 106–13, <https://doi.org/10.4321/s1575-06202012000300006>.

The intricate issues arising from overcriminalization call for a thorough and nuanced reconsideration of legal frameworks. It is imperative that reforms are enacted to strike a delicate balance between the goals of criminal law such as maintaining public order and protecting societal norms and the overarching principles of justice, fairness, and human rights. Such a balance is essential not only for the protection of individual liberties but also for the preservation of a healthy, dynamic, and inclusive democratic society. This requires a careful evaluation of laws to ensure they are not overly broad or vague and that they serve a legitimate purpose without infringing upon essential human rights and freedoms.

Lon L. Fuller's legal theory is very relevant in the context of the impact of overcriminalization in religion and belief crimes. Fuller argues that justice in law can be achieved by correctly applying the six principles he proposes.<sup>17</sup> First, the principle of wholeness or harmony requires the law to be consistent and non-contradictory, which is particularly important in cases of religion and belief where interpretations of the law are often diverse and subjective. Second, the principle of openness ensures that the law is accessible and understandable to all, including in sensitive cases such as religion and belief crimes. Third, the principle of fair law-making emphasizes the importance of fair procedures in law-making, especially in these often emotional and controversial contexts. Fourth, the principle of reasonable compliance with the law urges fair and proportional application of the law, which is crucial to avoid overcriminalization. Fifth, the principle of protection of individual rights highlights the need for laws to respect and protect personal rights, including freedom of religion and belief. Finally, the principle of compliance with legitimate law asserts that all members of society must abide by the law, ensuring the inclusion and non-discrimination of all groups and individuals, including in the context of religion and belief. In the context of religion and belief crimes, the application of Fuller's principles is crucial to avoid overcriminalization, which often occurs due to a lack of clarity, accessibility, or fair procedures in the formation and application of laws. A just and stable law, in accordance with Fuller's view, should accommodate diversity of beliefs in a harmonious and proportionate manner, ensuring that individual rights are respected and protected while maintaining social order and justice.

Overcriminalization has become a global phenomenon that has received serious attention in the last few decades.<sup>18</sup> In some cases, overcriminalization has even penetrated areas that should be personal or communal, such as religious crimes. This phenomenon raises practical problems in law enforcement, such as overcrowded prisons or inefficiently allocated resources, and ethical and philosophical challenges in maintaining a balance between the need to protect society and safeguard human rights.<sup>19</sup> This can seriously affect society, including discrimination against minority groups, abuse of the law for political purposes, and loss of confidence in the legal system as a fair and impartial institution.

Over-criminalization in the context of religious crimes presents a complex and multifaceted challenge, intertwining with the sensitive and personal aspects of human life. Firstly, such overcriminalization often leads to excessive restrictions on religious expression and practice. When aspects of religion, traditionally considered private or communal, are criminalized, it fosters an environment of fear and apprehension among individuals when expressing their beliefs or engaging in their practices. This not only threatens the fundamental freedom of religion but can also generate social pressures and tensions between different religious communities. Additionally, the ambiguity inherent in laws governing religious crimes can create significant issues. The vague and subjective nature of these laws allows for broad and potentially discriminatory interpretations, leading to a situation where minority groups could be disproportionately targeted or the law could be used as a tool for arbitrary enforcement by those in power. This legal uncertainty not only jeopardizes the principles of justice but also erodes public trust in the legal system.

Moreover, overcriminalization in religious matters is often deeply entangled with political dynamics. Laws and their enforcement may be manipulated to target certain religious groups, serve political agendas, or garner political support by exploiting religious issues. This misuse of the law for political purposes poses a serious threat to the rule of law and can significantly disrupt social harmony and cohesion. In the end, making too many religious crimes raises serious concerns about how much the government should be involved in religious matters. It also shows how hard it is to protect basic human rights like freedom of religion and expression while also keeping the public safe. Addressing this issue demands a judicious and balanced approach, one that respects the diversity of beliefs and upholds democratic principles.

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17 TAMBNAS, "Teori Hukum Lon L. Fuller: Fokus pada Konsep Keadilan," [www.tambnas.com/](http://www.tambnas.com/), 2023, <https://www.tambnas.com/2023/04/teori-hukum-lon-l-fuller-fokus-pada.html>.

18 Shannon Rosemary Bernadika dan Maura Kavita, "Overkriminalisasi dan Ketidakadilan Gender: Norma Kesuksesan Sebagai Dasar Pembatasan Kebebasan Berpakaian Perempuan di Muka Umum," *Binamulia Hukum* 10, no. 2 (2021): 133–49, <https://doi.org/10.37893/jbh.v10i2.560>.

19 Peter Ramsay, "Overcriminalization as Vulnerable Citizenship," *New Criminal Law Review* 13, no. 2 (Maret 2010): 262–85, <https://doi.org/10.1525/NCLR.2010.13.2.262/0>.

### 3.2 Analysis of Article 302 of the New Criminal Code: Obscurity, Discrimination, and Opportunities for Abuse

Overcriminalization in criminal legislation, encompassing various forms, fundamentally challenges the principles of justice and fairness within the legal system. Firstly, recriminalization of offenses, or overlapping crimes, introduces redundancy in law enforcement, creating potential conflicts and undermining the principle of “ne bis in idem,” or double jeopardy. This principle, essential in many legal systems, prohibits trying a person more than once for the same offense, but overlapping laws risk violating this safeguard. Secondly, the vague formulation of offenses, contrary to the principle of *lex certa*, results in laws with unclear or broad definitions. This vagueness can lead to arbitrary law enforcement and abuses of authority, as the rule of law is compromised when individuals cannot clearly discern what constitutes a criminal act.

Furthermore, criminalizing acts that should be mere administrative violations represents an overreach of criminal law. This misapplication not only strains legal resources but also goes against the principle of proportionality, potentially branding a larger segment of the population as criminals for minor regulatory breaches. Finally, the issue of disproportionate sentencing, where the punishment exceeds the seriousness of the crime, violates the same principle of proportionality. Such imbalances erode public confidence in the justice system and distort the fundamental notion of justice, which seeks to equitably balance the scales of crime and punishment. To fix these kinds of overcriminalization, all of the laws need to be looked at again to make sure they follow the rules of clarity, necessity, and fairness. This will bring them back in line with the larger goals of a fair legal system.

In the new Criminal Code in article 302, there is a possibility of overcriminalization. Chapter VII of this law focuses on the regulation and protection of religions, beliefs, and religious life or beliefs in the context of criminal law. Article 302 reads as follows:

#### CHAPTER VII CRIMINAL ACTS AGAINST RELIGION, BELIEFS, AND RELIGIOUS LIFE OR BELIEFS

##### Part One Crimes Against Religion and Beliefs

##### Article 302

- 1) Any person who in public incites people with the intention that a person has no religion or belief adhered to in Indonesia shall be imprisoned for a maximum of 2 (two) years or a maximum fine of category III.
- 2) Any person with violence or threats of violence forcing someone to become irreligious or religious or to change religions or beliefs adhered to in Indonesia shall be imprisoned for a maximum of 4 (four) years or a maximum fine of category IV.

The analysis of Article 302 Paragraph 1 in the context of incitement as related to religious beliefs in Indonesia raises significant concerns about the ambiguity and potential overreach of the legal definition. The term “incitement,” as used in this context, implies encouraging or provoking someone to abandon their religion or belief system. However, as illuminated by the explanation of Article 246, the definition of “incitement” contains several ambiguous elements that need to be clarified for a more precise and fair application of the law.<sup>20</sup> Firstly, the expression “encouraging, inviting, or inciting people to do something” lacks specificity. It is crucial to determine whether this encompasses all forms of encouragement and invitation or is limited to actions that are unlawful or harmful. This clarification is necessary to differentiate between incitement and ordinary persuasion, which is a fine line in legal interpretation. Furthermore, the phrase “done in public” also requires a more nuanced understanding, especially in the age of digital communication. Due to the broad definitions of public spaces, which include digital platforms like social media and online forums, it is important to set clear boundaries for what is considered public incitement in these settings. In addition, the inclusion of “orally or in writing” as a medium of expression opens the door to a wide array of interpretative challenges. This raises the question of whether symbols, codes, or non-verbal forms are also considered under this definition. The distinction between direct and implied expression becomes crucial here, alongside the context in which the expression is made.<sup>21</sup>

To provide a clearer and more effective legal framework, a detailed re-examination of Article 246 and Article 302 Paragraph 1 is essential. This re-examination should aim to clarify the types of acts that are considered incitement, the contexts and mediums in which incitement can occur, and the specific limitations that should apply,

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20 Elucidation of Article 246 of Law Number 1 Year 2023 on the Criminal Code

21 Kevin McGravey, “Digital Public Forums: Power and Representation in the Internet’s Public Squares,” *New Political Science* 42, no. 3 (2 Juli 2020): 253–71, <https://doi.org/10.1080/07393148.2020.1807274>.

particularly in relation to contemporary technology and communication media.<sup>22</sup> Such a re-evaluation is critical not only for the fair and appropriate application of the law but also to safeguard against the potential threats to freedom of expression that could arise from over-interpretation or misapplication of these legal provisions. In the researcher's analysis, according to the article above, Article 302 Paragraph (1) regulates the actions of a person who openly incites other people to become irreligious or adherent to beliefs in Indonesia.

The legal provisions pertaining to seditious acts, especially in the realm of religion and belief systems, are multifaceted and encompass critical elements. Notably, the use of "in public" in the law is pivotal, as it demands that such acts be executed in an open manner, accessible or visible to the public. This encompasses various forms of expression, including social media posts, public speeches, and written publications, reflecting the complexities of moderating speech in the digital era.<sup>23</sup> Moreover, it is imperative to recognize that the legislation aims not to curb individual religious freedom or personal choice in religious conversion. Instead, it focuses on actions that actively support or oppose certain religions or beliefs. This shows a dedication to finding a balance between protecting religious freedom and stopping actions that could cause trouble in public or between religions. Furthermore, the discussed legal provision also establishes criminal penalties for those convicted of such seditious acts, with consequences including up to two years in prison or monetary fines. This emphasizes the severity with which the law regards such actions, denoting the substantial interest of the state in maintaining religious peace and averting public disturbances. The imposition of these sanctions opens a dialogue on the proportionality and effectiveness of using criminal law to address matters involving freedom of expression and religious convictions, calling for a thoughtful and sensitive application of these legal measures.<sup>24</sup>

In its application, Article 302 Paragraph (1), which regulates acts of inciting against religion or belief, can present several significant challenges. One of the main problems is the definition of "incitement", which can be ambiguous. What is considered inciting by one party may be considered an expression of freedom of expression by another party. This requires a careful and judicious interpretation of this law to ensure its enforcement does not impair the right to freedom of expression and religion.<sup>25</sup> The balance between addressing actual acts of inciting and protecting religious freedom is complex and requires a fair and proportionate approach. Suppose the enforcement of this article is carried out in a way that is too broad or arbitrary. In that case, it can generate fear and suspicion in society and even suppress freedom of religion and expression. Therefore, the implementation of this article requires explicit guidelines, adequate training for law enforcers, and close supervision from independent legal institutions. This will help ensure that this article is used correctly to protect the integrity and harmony between religions without threatening the rights and freedoms of individuals to express and practice.<sup>26</sup>

Article 302 Paragraph presents a robust stance against the use of violence or the threat thereof in influencing an individual's religious beliefs or practices. This paragraph distinctively addresses the more direct and aggressive actions of trying to alter someone's religious or belief choices, differing from Paragraph (1)'s emphasis on "incitement." It specifically targets scenarios where a person employs physical or psychological violence or threats to coerce others into becoming irreligious, adopting a religion, or changing their current religion or beliefs. The critical elements of this crime include the actual use of force or threats of violence and the intent to forcibly change a person's religious beliefs against their will, covering a wide range of potential actions against an individual's freedom of religion.<sup>27</sup>

The severity of the crime is reflected in its punishment, which is more stringent than that outlined in Paragraph (1), including up to four years of imprisonment or a maximum fine in category IV. This underlines the Indonesian legal system's commitment to protecting the freedom of religion and belief in a diverse and pluralistic society. The enforcement of this article requires careful interpretation and application to avoid overreach that could impinge on freedoms of speech and religion, yet it must be robust enough to protect individuals from

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22 Łukasz Żelechowski, "Invoking Freedom of Expression and Freedom of Competition in Trade Mark Infringement Disputes: Legal Mechanisms for Striking a Balance," *ERA Forum* 19, no. 1 (1 Agustus 2018): 115–35, <https://doi.org/10.1007/S12027-018-0498-3/METRICS>.

23 Yisi Sang, Lizhen Liang, dan Jeffrey Stanton, "Content Moderation of Speech in Political Discussions," *Proceedings of the Association for Information Science and Technology* 58, no. 1 (1 Oktober 2021): 537–42, <https://doi.org/10.1002/PRA2.493>.

24 Carto Nuryanto dan Central Java Police, "Criminal Sanctions and Actions in Religious Justice Crime Law Enforcement," *International Journal of Law Reconstruction* 3, no. 2 (16 Januari 2020): 78–85, <https://jurnal.unissula.ac.id/index.php/lawreconstruction/article/view/7793>.

25 Heiner Bielefeldt, "Freedom of Religion or Belief—A Human Right under Pressure," *Oxford Journal of Law and Religion* 1, no. 1 (1 April 2012): 15–35, <https://doi.org/10.1093/ojlr/rwr018>.

26 Rossa Ilma Silfiah et al, "Phylosophical and Constitutional Protection," *Brawijaya Law Journal: Journal of Legal Studies* 3, no. 2 (2015): 151–75, <https://doi.org/https://doi.org/10.21776/ub.blj.2016.003.02.04>.

27 Kim McGuire dan Michael Salter, "Legal Responses to Religious Hate Crime: Identifying Critical Issues," *King's Law Journal* 25, no. 2 (3 Oktober 2014): 159–84, <https://doi.org/10.5235/09615768.25.2.159>.

coercion and threats regarding their beliefs. Article 302's two separate parts work together to make it possible for Indonesia's courts to deal with crimes involving inciting and coercing people to change their religion or belief. While the first part prohibits public incitement to irreligion or changing religious adherence, with penalties including imprisonment or fines, the second part imposes stricter penalties for acts involving violence or threats. This legislative approach reflects the state's dedication to fostering harmony and tolerance among various religious and belief groups, ensuring individuals' rights to choose and practice their beliefs without fear of persecution or undue pressure.<sup>28</sup> But it's hard to make and use because it's not clear what "inciting" means, protecting religious rights while also allowing free speech, and stopping people from abusing the law for political or unfair reasons.

Implementing Article 302 in Indonesia, particularly in defining and applying the term "inciting," presents significant challenges. This ambiguity in the law can lead to varied interpretations by law enforcement and judicial authorities, potentially targeting individuals or groups unfairly or failing to enforce the law effectively. This situation risks eroding public trust in the justice system and causing injustice, necessitating clearer definitions and consistent interpretation guidelines to ensure fairness and protection of freedom of religion and belief. Additionally, the influence of Article 302 on freedom of opinion and religion is a critical concern. The potential for misinterpretation of "inciting" could inadvertently restrict free speech or religious expression, such as labeling criticism of a religion or atheistic views as incitement. This ambiguity poses a threat to the fundamental democratic values of freedom of thought and speech, highlighting the need for a balanced application of the law that respects and protects these freedoms. The vagueness of "inciting" also raises the issue of potential discrimination against minority groups. Without clear guidelines, the law could be misused to discriminate against vulnerable communities or suppress dissenting opinions, undermining social cohesion and the principles of justice, freedom, and human rights. Ensuring clarity and consistency in the law's application is crucial to preventing its abuse and protecting the rights of all groups. Furthermore, the aspect of Article 302 dealing with violence or threats of violence in religious contexts underscores serious security and human rights concerns. Distinguishing between acts of violence or threats and legitimate criticism or dialogue about religion is vital to avoiding human rights violations. Proper understanding and fair enforcement of this part of the law are essential to protecting freedom of religion and belief, as well as other fundamental democratic principles and human rights. The goal is to achieve a balance that respects the integrity of religion and belief while upholding democratic values and human rights.

### 3.3 Reform Recommendations and Strategies: Towards Fair and Equitable Law Enforcement

Sanford H. Kadish, in his article entitled "the crisis of overcriminalization", written in 1968, became one of the leading figures discussing the phenomenon of overcriminalization. According to Kadish, criminal law has evolved in such a way as to cover a wide range of behaviors that are far different from traditional crimes that cause significant harm or harm. He highlighted that many behaviors previously considered moral or ethical violations have now entered the realm of criminal law. Kadish criticized this expansion as a crisis, stressing that equating actions that did no serious harm, or even no harm at all, with more severe crimes could erode the legitimacy of criminal law. According to him, this has the potential to threaten the basic principles of fairness and proportionality in the criminal justice system and can also have detrimental side effects, such as an increase in the size of the prison population and wasted resources dealing with relatively insignificant offenses. Kadish's article became a critical starting point in academic and legal discussions on overcriminalization, and her views continue to influence thinking on the issue today.<sup>29</sup> The concept of overcriminalization articulated by Sanford H. Kadish is essential in studying criminal law. Kadish sees overcriminalization as using criminal law inappropriately or unjustifiably, particularly in implementing public policy objectives.<sup>30</sup>

In Indonesia, achieving equitable and just law enforcement in cases involving crimes against religion and belief, particularly under the purview of Article 302, requires a comprehensive and thoughtful reform strategy. This strategy begins with a detailed assessment of existing laws and regulations to ensure they adequately protect individual and community rights, including freedom of expression and religion. This step involves assembling a diverse group of experts, such as legal professionals, academics, government representatives, and civil society members, to provide a range of perspectives and expertise. The team then undertakes a thorough review of the laws, examining their text, implementation, and social impact. This review aims to identify areas needing refinement, such as vague regulations or loopholes that could lead to human rights infringements. Following this, extensive consultations with various community groups, including religious and human rights organizations,

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28 Keith Gunnar Bentele et al., "Breaking Down the Wall between Church and State: State Adoption of Religious Inclusion Legislation, 1995–2009," *Journal of Church and State* 56, no. 3 (1 September 2014): 503–33, <https://doi.org/10.1093/jcs/css145>.

29 Ali, "Overcriminalization Dalam Perundang-Undangan Di Indonesia."

30 Sanford H. Kadish, "The Crisis of Overcriminalization," *The ANNALS of the American Academy of Political and Social Science* 374, no. 1 (1 November 1967): 157–70, <https://doi.org/10.1177/000271626737400115>.



are conducted to incorporate a wide range of societal views into the assessment. A crucial step is the impact analysis of potential regulatory changes, striving to balance the effects on individual and community rights. The team then compiles a comprehensive report with findings, recommendations, and justifications, emphasizing transparency and public accessibility. This report guides the reform of existing regulations, involving legislators and other stakeholders in the process. Continuous monitoring and evaluation are essential to ensuring these changes effectively safeguard the intended rights. Another key aspect of the strategy is defining legal terms clearly to avoid misinterpretation and misuse, thereby ensuring fairness in law enforcement and strengthening public trust in the justice system. Protecting freedom of opinion and religion is also pivotal. Laws related to offenses of religion and belief must not suppress dissent or target minorities, and the right to openly discuss religion, including criticism or rejection, is vital for human rights and a pluralistic society. Furthermore, the strategy includes robust supervision and training for law enforcement officials, focusing on human rights principles, and balancing various rights. Regular monitoring of law enforcement agencies is crucial to preventing abuses of power and ensuring the consistent and fair application of laws. Finally, the strategy underscores the importance of societal participation in the law reform process. Engaging diverse religious groups, civil society organizations, legal experts, and the public in law-making enhances transparency, responsiveness, and inclusivity. Such broad involvement strengthens democracy and builds public trust in the legal system, fostering a sense of collective responsibility for justice and law in society.

This proposed reform strategy underscores the need for a holistic and careful approach to dealing with issues related to religion and belief in Indonesia. The success of this strategy depends on recognizing the complexity and diversity of Indonesian society and how these elements interact in social, political, and legal contexts.<sup>31</sup> First, this approach emphasizes collaboration between various stakeholders, including government, law enforcement, civil society, and religious communities. Each group has important roles and unique viewpoints, and effective collaboration will ensure that reform strategies accommodate different needs and views. Second, this strategy recognizes that legal reform is a complex process. This requires an in-depth understanding of the history, culture, and social dynamics that exist, and a willingness to invest time and resources in a careful planning and execution process. Third, this approach prioritizes inclusivity and justice to create a legal system that represents and protects all citizens, regardless of religious or religious background. This requires a solid commitment to the principles of democracy and human rights and the recognition that freedom of speech and religion is an essential part of a healthy and harmonious society.<sup>32</sup> Finally, this approach recognizes that legal reform in this context is not the end of the process but part of an ongoing effort to build a more tolerant, respectful, and united society. In the long term, investing in these well-planned reforms will help foster a more responsive and empathetic legal culture and support building more peaceful and prosperous societies. This holistic and careful approach provides a realistic and meaningful way to deal with the complex and often sensitive challenges associated with religion and belief in Indonesia. With firm commitment and collaboration between all sectors of society, significant steps can be taken towards creating an environment that truly respects and protects the diversity that is at the core of national identity.

Moreover, supports the development of a more peaceful and prosperous society. This holistic and careful approach provides a realistic and meaningful way to deal with the complex and often sensitive challenges associated with religion and belief in Indonesia. With firm commitment and collaboration between all sectors of society, significant steps can be taken towards creating an environment that truly respects and protects diversity at the core of national identity. Moreover, supports the development of a more peaceful and prosperous society. Taken together, this holistic and careful approach provides a realistic and meaningful way forward in dealing with the complex and often sensitive challenges associated with religion and belief in Indonesia. With firm commitment and collaboration between all sectors of society, significant steps can be taken towards creating an environment that truly respects and protects diversity at the core of national identity.

#### 4. Conclusion

In a society with a lot of different kinds of people and beliefs, making laws and rules about religious and belief-based crimes is a difficult and delicate job. Article 302 of Indonesia's new Criminal Code is an example of this. A close study of this article shows several possible problems. These include the risk of overcriminalization,

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31 Nicola Colbran, "Realities and Challenges in Realising Freedom of Religion or Belief in Indonesia," *The International Journal of Human Rights* 14, no. 5 (1 September 2010): 678–704, <https://doi.org/10.1080/13642980903155166>.

32 Jack Holland, "Democracy and Human Rights," in *Selling War and Peace: Syria and the Anglosphere*, ed. oleh Jack Holland (Cambridge: Cambridge University Press, 2020), 1–146, <https://doi.org/DOI: 10.1017/9781108774314.005>.

which could target actions that should be legally protected; unclear legal definitions that allow for different interpretations and possible abuse; and worries about violating freedoms of speech and religion. Furthermore, there's a danger of inadvertently discriminating against certain groups or marginalizing unpopular opinions, thereby undermining democratic values and human rights. To navigate these challenges, a judicious and fair approach in both the formulation and application of such laws is crucial. The suggested plan for reform includes a full examination of present laws and rules, with the goal of achieving clearer and more precise definitions while protecting basic rights like freedom of speech and religion. This reform process should engage a broad spectrum of stakeholders, including government bodies, religious communities, civil societies, and individuals, to ensure a holistic and inclusive perspective. Although this reform may demand considerable time, effort, and resources, it is vital for bolstering the pillars of democracy in Indonesia, such as freedom of expression, human rights, and respect for diversity. By focusing on these core values through an inclusive, transparent, and responsive methodology, Indonesia can progress toward a legal system that mirrors its rich diversity and complexity.

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