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MIMBAR KEADILAN

Criminalization, Freedom of Expression, and Democratic Values: An Assessment of Decision Number 675/Pid.Sus/2025/PN Jkt. Sel

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Abstract

The increasing use of criminal law to regulate online expression has intensified concerns about protecting freedom of expression within Indonesia's democratic legal system. Decision Number 675/Pid.Sus/2025/PN Jkt. Sel. presents an important case illustrating the tension between maintaining public order and safeguarding constitutional rights in the digital era. This study aims to examine the consistency of the court's interpretation of Articles 160 and 161 of the Indonesian Criminal Code (KUHP) from the perspectives of freedom of expression, constitutional law, and international human rights standards. Employing normative legal research, this article adopts statutory, conceptual, case, and human rights approaches by analyzing legislation, judicial decisions, legal doctrine, and international instruments, particularly the International Covenant on Civil and Political Rights (ICCPR) and the Rabat Plan of Action. The findings indicate that the court correctly rejected the application of Article 160 because the prosecution failed to establish the material element of actual consequences as required by Constitutional Court Decision Number 7/PUU-VII/2009. However, the conviction under Article 161 reveals doctrinal inconsistency by treating the offence as purely formal without requiring proof of actual or imminent harm. Such an interpretation risks expanding criminal liability for online political expression, undermining legal certainty, and producing a chilling effect on democratic participation. The study concludes that Article 161 should be interpreted consistently with constitutional guarantees of freedom of expression and international human rights principles by requiring a demonstrable and imminent threat before criminal sanctions may be imposed. Such an approach would better balance the protection of public order with democratic constitutional values.

1. Introduction

Indonesia's democratic transition has been accompanied by an expanding digital public sphere, where social media functions as an important arena for political participation, public criticism, and civic engagement. At the same time, the increasing use of criminal law to regulate online expression has generated persistent concerns regarding the protection of freedom of expression and democratic values.[1] While it guarantees freedom of opinion and expression, the enforcement of criminal provisions against online speech has frequently produced tensions between maintaining public order and safeguarding fundamental rights.[2] This tension became particularly visible in Decision Number 675/Pid.Sus/2025/PN Jkt. Sel., which raises significant questions regarding the interpretation of incitement offences, constitutional principles, and international human rights standards.

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[1] Peter Coe, "The Social Media Paradox: An Intersection with Freedom of Expression and the Criminal Law," *Information & Communications Technology Law* 24, no. 1 (2015): 16–40, https://doi.org/https://doi.org/10.1080/13600834.2015.1004242.
[2] Gehan Gunatilleke, "Justifying Limitations on the Freedom of Expression," no. October 2020 (2021): 91–108.

The case emerged amid widespread political unrest in August 2025, when mass demonstrations involving students and civil society demanded greater governmental accountability, including transparency in parliamentary benefits and institutional reform within the Indonesian National Police.[3] Public outrage intensified following the death of Affan Kurniawan, an online motorcycle taxi driver who was fatally struck by a police tactical vehicle during a protest in front of the National Police Headquarters.[4] The incident rapidly spread across social media, generating extensive public criticism and emotional responses.

Against this backdrop, Laras Faizati Khairunnisa posted several Instagram Stories expressing grief and solidarity with demonstrators. One particular statement, "Send strength to all protesters," became the basis for criminal prosecution. The Public Prosecutor charged the defendant under multiple provisions of Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Electronic Information and Transactions (Law No. 19/2016) as well as Articles 160 and 161 of the Indonesian Criminal Code (KUHP),[5] arguing that the post constituted criminal incitement against law enforcement institutions. The defence maintained that the statement represented spontaneous emotional expression rather than a deliberate call for violence, emphasizing that the language reflected common patterns of digital communication among younger generations characterized by hyperbole, irony, and figurative expression.

The proceedings highlighted disagreement among expert witnesses from criminal law, linguistics, digital communication, criminology, and human rights. Linguistic experts emphasized that online communication cannot be interpreted solely through literal textual analysis without considering social context, audience perception, and digital communication culture. More importantly, the District Court adopted the six-part threshold test contained in the Rabat Plan of Action, assessing context, speaker status, intent, content, extent of dissemination, and likelihood of harm before evaluating whether the defendant's expression constituted punishable incitement. The use of this international human rights framework represents a noteworthy development within Indonesian judicial practice.[6]

Nevertheless, the final judgment presents an important legal paradox. The court rejected the charge under Article 160 KUHP, which, following the Constitutional Court's interpretation in Decision Number 7/PUU-VII/2009 changing the legal status of Article 160 of the Criminal Code (KUHP) regarding incitement from a formal offense to a material offense, requires proof that the alleged incitement resulted in actual consequences. However, the court simultaneously convicted the defendant under Article 161 paragraph (1) KUHP for disseminating the same expression, imposing a six-month prison sentence suspended for one

[3] Ady Anugrahadi, "Perjalanan Laras Faizati: Ditangkap Atas Tuduhan Hasut Demonstran, Hingga Divonis 6 Bulan Tapi Bebas Dari Penjara," Liputan6.com, 2025, https://www.liputan6.com/news/read/6258303/perjalanan-laras-faizati-ditangkap-atas-tuduhan-hasut-demonstran-hingga-divonis-6-bulan-tapi-bebas-dari-penjara.
[4] Jihan Ristiyanti, "Kronologi Penangkapan Laras Faizati Oleh Mabes Polri," Tempo, 2025, https://www.tempo.co/hukum/kronologi-penangkapan-laras-faizati-oleh-mabes-polri-2067904.
[5] Intan Setiawanty, "Empat Pasal Yang Menjerat Laras Faizati Dalam Kasus Unggahan 'Bakar Mabes Polri,'" Tempo, 2025, https://www.tempo.co/hukum/empat-pasal-yang-menjerat-laras-faizati-dalam-kasus-unggahan-bakar-mabes-polri--2088058.
[6] C S A Teddy Lesmana, "Implementasi Kebebasan Berpendapat Dan Berekspresi Di Indonesia Saat Ini" 2, no. 01 (2023): 45–49.

year. This reasoning raises a question regarding doctrinal consistency: if direct incitement cannot be established because the material consequences required under Article 160 are absent, can dissemination of the identical expression nevertheless be punished under Article 161 as a formal offence? Such inconsistency potentially undermines legal certainty, proportionality, and constitutional guarantees against arbitrary criminalization.

Beyond doctrinal issues, the case reflects broader concerns regarding criminal liability for online expression. The defendant consistently argued that her posts were motivated by grief and frustration over a tragic event rather than any intention to encourage unlawful conduct. This defence directly engages the criminal law principle requiring proof of *mens rea*, particularly where criminal sanctions are imposed upon political expression. The case also illustrates the broader challenge of interpreting digitally mediated communication, especially where expressions employ sarcasm, exaggeration, or symbolic language commonly found within contemporary social media discourse. Failure to account for these contextual dimensions risks expanding criminal liability beyond the legitimate limits established by constitutional and international human rights principles.

The prosecution of Laras Faizati also forms part of a broader pattern of criminalization of digital expression in Indonesia. Civil society organizations have repeatedly documented the use of criminal law provisions, including Law No. 19/2016 and the KUHP, against individuals criticizing public institutions or expressing political dissent online.[7] Scholars have argued that such practices generate a chilling effect by discouraging citizens from participating in democratic discourse for fear of criminal prosecution. Although recent Constitutional Court decisions have narrowed several provisions of the Law No. 19/2016 to better protect freedom of expression, judicial application at the trial court level continues to demonstrate inconsistent adherence to constitutional and human rights standards.

This case is particularly significant because it coincided with Indonesia's transition to the new Criminal Code under Law Number 1 of 2023, which retains offences concerning incitement despite certain legislative modifications. Consequently, judicial interpretation of Articles 160 and 161 remains highly relevant for future enforcement under the new penal regime. The present case, therefore, provides an important opportunity to examine how criminal law should balance legitimate state interests in maintaining public order with constitutional commitments to democratic participation and freedom of expression.

Accordingly, this article critically assesses Decision Number 675/Pid.Sus/2025/PN Jkt. Sel. from the perspectives of criminal law doctrine, interpretation, and international human rights law. It argues that the judgment reveals unresolved tensions concerning the relationship between Articles 160 and 161 KUHP, the proportionality of restrictions on political expression, and the appropriate interpretation of digital communication within a democratic society. By addressing these issues, the article contributes to ongoing debates on criminalization, freedom of expression, and democratic constitutionalism in Indonesia.

[7] Tri Angga Kriswaningsih, "Kronologi Laras Faizati Ditangkap Sampai Divonis Pidana 6 Bulan Tanpa Bui," Kompas.tv, 2026, https://www.kompas.tv/nasional/644206/kronologi-laras-faizati-ditangkap-sampai-divonis-pidana-6-bulan-tanpa-bui?page=all#goog_rewarded.

2. Methods

This study employs normative legal research, which examines legal norms, principles, and doctrines to address legal issues concerning the application of Articles 160 and 161 of the Indonesian Criminal Code (KUHP) in Decision Number 675/Pid.Sus/2025/PN Jkt. Sel. The research adopts a statutory approach to analyze relevant legislation, including the 1945 Constitution, the Criminal Code, Law Number 1 of 2023 concerning the Criminal Code, Law Number 39 of 1999 on Human Rights, and Law Number 12 of 2005 ratifying the International Covenant on Civil and Political Rights (ICCPR), alongside a conceptual approach to examine the doctrines of freedom of expression, incitement, and human rights limitations, as well as a case approach focusing on the judicial reasoning contained in Decision Number 675/Pid.Sus/2025/PN Jkt. Sel. and Constitutional Court Decision Number 7/PUU-VII/2009. Primary legal materials consist of legislation and court decisions, while secondary legal materials include legal textbooks, scholarly journals, and expert opinions collected through library research. The legal materials are analyzed qualitatively using a deductive method to formulate legal arguments and evaluate whether the court's interpretation is consistent with constitutional guarantees of freedom of expression and internationally recognized human rights principles.

3. Results and Discussion

3.1. Analysis of Decision Number 675/Pid.Sus/2025/PN Jkt. Sel. from the Perspective of Freedom of Expression

Freedom of opinion and expression constitutes one of the fundamental rights that underpins a democratic state.[8] This right protects not only speech that is popular or socially accepted, but also expression that is controversial, critical, or unsettling to certain segments of society. Within the Indonesian legal system, the constitutional guarantee of freedom of expression is explicitly enshrined in Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia (UUD NRI Tahun 1945)[9], which provides that every person has the right to freedom of association, assembly, and expression of opinion. This protection is further reinforced by Law Number 39 of 1999 on Human Rights, as well as various international human rights instruments ratified by Indonesia, including the ICCPR.

Decision Number 675/Pid.Sus/2025/PN Jkt. Sel. presents a compelling legal issue because it lies at the intersection of the State's legitimate interest in maintaining public order and an individual's right to express opinions through social media. In this case, a series of Instagram Stories posted by the defendant, Laras Faizati Khairunnisa, was deemed to constitute criminal incitement, resulting in her prosecution under Articles 160 and 161 of the KUHP. Accordingly, the judgment warrants examination not only from the perspective of

[8] G. Stuart Adam, "Truth, the State, and Democracy: The Scope of the Legal Right of Free Expression," *Canadian Journal of Communication* 17, no. 3 (1992), https://doi.org/https://doi.org/10.22230/cjc.1992v17n3a679.

[9] Sofian Sofian Dwi Saleha, Arief Fahmi Lubis, Dian Eriani, "Tinjauan Hukum Pasal 28E Ayat (3) UUD 1945 Dalam Pembatasan Kebebasan Berpendapat Di Media Sosial Di Indonesia," *Sanskara Hukum Dan HAM* 4, no. 3 (2026), https://doi.org/https://doi.org/10.58812/shh.v4i03.790.

criminal law but also through the broader lens of constitutional protection of freedom of expression and internationally recognized human rights standards.[10]

1. Freedom of Expression as a Constitutional Right in a Democratic State

In a democratic state, freedom of expression occupies a central constitutional position because it enables citizens to participate in political life, hold public authorities accountable, and criticize governmental policies.[11] Democracy should not be understood merely as a system of periodic elections, but as a constitutional order that guarantees individuals the freedom to express their opinions without fear of arbitrary state interference or punitive measures.[12] Consequently, freedom of expression serves not only as an individual right but also as an essential precondition for democratic governance, public deliberation, and governmental accountability.

In On Liberty, John Stuart Mill argues that freedom of opinion is indispensable to the pursuit of truth within a democratic society.[13] An opinion should not be suppressed simply because it is considered erroneous or unpopular by the majority. Even an incorrect opinion possesses intrinsic value, as its contestation through public debate may ultimately reinforce society's understanding of the truth. From this perspective, the State must exercise considerable restraint when resorting to criminal sanctions to restrict expression, since excessive criminalization risks undermining democratic discourse and the marketplace of ideas upon which constitutional democracy depends.

Viewed against this theoretical framework, the defendant's social media posts in the present case constituted an expression made in response to an event of public concern. The Instagram Stories were published amid heightened social and political tensions characterized by widespread grief, anger, and public dissatisfaction following an incident that had attracted extensive national attention. In such circumstances, social media functions as a digital public sphere, providing citizens with a platform to communicate opinions, express criticism, and demonstrate solidarity concerning matters of public interest.

From a democratic perspective, expressions that are emotional, provocative, or sharply critical should not automatically be construed as threats to public order.[14] A clear distinction must be drawn between speech that merely conveys dissatisfaction with governmental actions and speech that intentionally incites others to commit unlawful acts. Maintaining this distinction is fundamental to preserving freedom of expression. Failure to do so risks expanding the scope of criminal liability beyond its legitimate limits, thereby producing a

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[10] Ratna Artha Windari & Si Ngurah Ardhya I Putu Agus Kusuma Jaya, "Juridical Implications of Constitutional Court Decision Number 78/PUU-XXI/2023 on Freedom of Expression in Indonesia," *Internasional Journal of Business, Law, and Education* 7, no. 1 (2026), https://doi.org/https://doi.org/10.56442/ijble.v7i1.1391.

[11] Aniceto Masferrer, "The Decline of Freedom of Expression and Social Vulnerability in Western Democracy," *International Journal for the Semiotics of Law* 36 (2023): 1443–75, https://doi.org/https://doi.org/10.1007/s11196-023-09990-1.

[12] Dmytro Terletskyi, "Constitutionalism and Democracy," *Ukrainian Journal of Constitutional Law (UJCL)* 4 (2025), https://doi.org/https://doi.org/10.30970/jcl.4.2025.4.

[13] John Stuart Mill, "On Liberty Batoche Books," (Kitchener, Batoche Books Limited, 2001).

[14] Nilman Ghofur, "Law, Media, and Democracy in the Digital Era: Freedom of Expression and ITE Regulation in Indonesia," *Al-Mazaahib* 12, no. 2 (2024), https://doi.org/https://doi.org/10.14421/al-mazaahib.v12i2.3703.

chilling effect on public participation and weakening one of the foundational pillars of a democratic society.[15]

2. Limitations on Freedom of Expression under the Indonesian Legal System

Although freedom of expression is recognized as a fundamental right, it is not absolute. Article 28J paragraph (2) of UUD NRI 1945 provides that, in exercising their rights and freedoms, every person shall be subject to such limitations as are prescribed by law solely for the purpose of guaranteeing the recognition and respect of the rights and freedoms of others and to satisfy the just demands of morality, religious values, security, and public order within a democratic society.[16]

Restrictions on freedom of expression are permissible only when they satisfy strict legal requirements. Gehan Gunatilleke explains that any legitimate restriction must comply with a three-part test: it must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society.[17] These requirements are cumulative; failure to satisfy any one of them renders the restriction incompatible with internationally recognized standards on freedom of expression. This framework closely reflects the limitations clause contained in Article 19(3) of the ICCPR.

Applying this three-part test to the present case, the first requirement appears to be satisfied, as Articles 160 and 161 of the KUHP constitute valid statutory provisions capable of serving as a legal basis for restricting freedom of expression. Likewise, the second requirement may be considered fulfilled because the offence of incitement is intended to protect legitimate public interests, namely the preservation of public order and the prevention of violence capable of disrupting social stability.

The third requirement, whether the restriction was necessary in a democratic society, however, warrants closer scrutiny. The critical question is whether the criminal prosecution of the defendant's social media posts was genuinely necessary to protect public order. The case record does not demonstrate that the defendant's Instagram Stories resulted in violence, public disorder, or the commission of any criminal offence. Nor is there evidence establishing a direct and imminent causal connection between the expression and any unlawful conduct. In these circumstances, it is open to question whether the imposition of criminal sanctions a necessary and proportionate response. Accordingly, a strong argument can be made that the application of criminal law in this case failed to satisfy the necessity requirement that governs permissible restrictions on freedom of expression within a democratic society.

3.2. Analysis of Article 160 of the KUHP from the Perspective of Freedom of Expression

In Decision Number 675/Pid.Sus/2025/PN Jkt. Sel., the Panel of Judges held that the constituent elements of Article 160 of the KUHP had not been proven beyond a reasonable doubt because no actual consequence resulted from the defendant's social media posts. This reasoning bears significant relevance to the protection of freedom of expression, as it is

[15] Muhamad Syauqillah Jaka Setiawan, Satya Arinanto, "Lived Experiences of Constraint: Digital Activism, State, Ambivalence, and Repression in Indonesian Digital Public Sphere," *Ettisal: Journal of Communication* 11, no. 1 (2026), https://doi.org/https://doi.org/10.21111/ettisal.v11i1.45.
[16] Susianto, Yusuf Eko Nahuddin, Riski Febria Nurita, "Freedom of Speech in the Context of Constitutional Law: Maintaining the Balance Between Freedom and Public Order," *International Journal of Sustainable Law* 2, no. 1 (2025), https://doi.org/https://doi.org/10.71131/jjbx9540.
[17] Gehan Gunatilleke, "Justifying Limitations on the Freedom of Expression," no. October 2020 (2021)

consistent with the Court's interpretation in Decision Number 7/PUU-VII/2009, which recharacterized Article 160 as a material offence (*materieel delict*). In that landmark decision, the Court affirmed that criminal liability for incitement cannot be established solely by proving the existence of speech or written statements containing an alleged call to action; rather, the prosecution must also demonstrate that the expression produced a tangible and concrete consequence.

The Court's interpretation constitutes an important safeguard for the constitutional right to freedom of expression guaranteed under Article 28E paragraph (3) of UUD NRI 1945. Within a democratic constitutional order, freedom of expression enables citizens to communicate opinions, criticize governmental actions, and participate in public affairs.[18] Consequently, any restriction upon this right must be applied cautiously and only on legally justifiable grounds consistent with guarantees.[19]

If Article 160 were instead interpreted as a formal offence (*formeel delict*), an individual could be convicted merely for making a statement considered provocative without requiring proof that the statement caused any concrete consequence. Such an interpretation would substantially broaden the scope of criminal liability for public expression and increase the potential for abusive enforcement of criminal law. It would also blur the distinction between lawful criticism and criminal conduct, thereby creating legal uncertainty and undermining the principle of legal certainty.

In the present case, the prosecution failed to establish that the defendant's Instagram Stories prompted any individual to commit acts of violence against the Indonesian National Police or to engage in any other criminal offence.[20] Likewise, no evidence was presented demonstrating a causal nexus between the impugned posts and any subsequent unlawful conduct by third parties. Accordingly, one of the essential elements of Article 160 the occurrence of an actual consequence resulting from the alleged incitement, was not satisfied.

The absence of such a causal connection is a decisive factor in determining whether expression may legitimately be restricted through criminal sanctions. Criminal law does not permit restrictions on freedom of expression to be based merely upon speculation, assumptions, or generalized concerns that certain speech may potentially disrupt public order in the future. Rather, the State bears the burden of demonstrating the existence of a real, concrete, and objectively verifiable threat before imposing criminal liability upon an individual for expressive conduct.[21]

The Panel of Judges' reasoning reflects the application of the principles of necessity and proportionality, both of which govern permissible restrictions on freedom of expression. The

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[18] Windiahsari Windiahsari, Bayangsari Wedhatami, Varun Chhachhar, "Freedom of Expression in the Digital Age: A Study of Social Media Censorship and Human Rights in Indonesia," *Contemporary Issues on Indonesian Human Rights Law and Policy* 1, no. 4 (2024), https://doi.org/https://doi.org/10.65815/k6w1dn46.

[19] Aminah Nur Kauthar Binti Zawawi Ainun Najib, Umar Umar, Abim Bhakti, Prika Fatikasari, "Regulation on Freedom of Expression on Social Media in Indonesia and Malaysia," *Journal of Indonesian Constitutional Law* 1, no. 1 (2024), https://doi.org/https://doi.org/10.71239/jicl.v1i1.20.

[20] I Gede Pasek et al., "Pengaturan Tentang Pembatasan Hak Kebebasan Berekspresi Pada Media Sosial Dalam Perspektif Hukum Nasional," 2024.

[21] Usi Zahara and Yoserwan Hamzah, "Penyidikan Tindak Pidana Penghasutan Dalam Unjuk Rasa Anarkis Oleh Satuan Reserse Kriminal Kepolisian Resor Kota Padang" 8, no. 1 (2024): 166–86.

principle of necessity requires that limitations on fundamental rights be imposed only where they are genuinely required to protect a legitimate public interest, while the principle of proportionality demands an appropriate balance between the objective pursued and the degree of interference with individual rights. Since the proceedings failed to establish any actual harm or threat to public order resulting from the defendant's expression, the imposition of criminal sanctions under Article 160 lacked an adequate legal and constitutional basis.

Furthermore, the Court's approach contributes to preventing the emergence of a chilling effect on freedom of expression.[22] If individuals could be prosecuted without proof that their speech produced any actual harm, citizens would likely become reluctant to express opinions on matters of public concern for fear of criminal prosecution.[23] Such self-censorship would inevitably diminish public participation in democratic discourse and weaken freedom of expression as an essential mechanism for ensuring governmental accountability.

The judgment demonstrates that criminal law cannot be invoked solely based on speculative assumptions regarding possible disturbances to public order. Instead, the State must establish the existence of a clear and present danger arising from the expression before restricting constitutionally protected speech.[24] This approach is consistent with the rule of law, which recognizes the protection of fundamental rights as a core element of constitutional governance.

Accordingly, the Panel of Judges' decision to acquit the defendant of the charge under Article 160 KUHP may be regarded as an affirmation of the Court's interpretation in Decision Number 7/PUU-VII/2009 and as an effort to maintain an appropriate balance between the protection of public order and the guarantee of freedom of expression.[25] The judgment reinforces the principle that criminal law should not be employed excessively to suppress public expression, but only where compelling evidence demonstrates that the expression has produced actual consequences threatening legally protected interests.[26] Such an approach reflects a defining characteristic of a democratic state governed by the rule of law, founded upon constitutional supremacy and the effective protection of human rights.

3.3. Analysis of Article 161 of the KUHP from the Perspective of Freedom of Expression

Unlike its findings under Article 160 of the KUHP, the Panel of Judges concluded that the constituent elements of Article 161 had been established. The Court reasoned that the defendant had disseminated written material containing incitement through social media,

[22] Octavia Rahma Mahdi and Patricia Rinwigati, "The Urgency to Use the Rabat Plan of Action in the Hate Speech Offense" 7, no. 2 (2024): 323–42, https://doi.org/10.20473/mi.v7i2.49903.
[23] Riza Imaduddin Abdali Ifziwarti Yunita and Fitri Lestari, "Kriminalisasi Ekspresi Sebagai Bentuk Pelanggaran Hak Asasi Manusia Dan Regresi Demokrasi," n.d., 1–49, https://yappika-actionaid.or.id/id/publikasi/detail/205/kriminalisasi-ekspresi-sebagai-bentuk-pelanggaran-hak-asasi-manusia-dan-regresi-demokrasi.
[24] Cokorde Istri Dian Laksmi Dewi, "Aspek Hukum Kebebasan Berpendapat Dan Berekspresi 1" 15, no. 1 (2021): 26–34.
[25] Ibnu Asqori Pohan, Ezra Maharani Batavia Lumban Gaol, Felicia Jesse Amanda, "SAFEnet and Civil Society Dynamics in Expanding Digital Public Space in Indonesia," *Jurnal Politik Walisongo* 7, no. 2 (2025), https://doi.org/https://doi.org/10.21580/jpw.v7i2.28133.
[26] Fitria Nursaidah, Emmilia Rusdiana, "Analisis Frasa 'Penguasa Umum' Dalam Pasal 160 KUHP Dikaitkan Dengan Prinsip Lex Certa (Studi Putusan PN Bondowoso No. 26/Pid.B/2025/PN Bdw)," *Ekspose: Jurnal Penelitian Hukum Dan Pendidikan* 24, no. 2 (2025), https://doi.org/https://doi.org/10.30863/ekspose.v24i2.10615.

thereby making it accessible to the general public.[27] This conclusion was based on the characterization of Article 161 as a formal offence (*formeel delict*), which does not require proof that the alleged incitement produced any actual or concrete consequence.

The Court's reasoning possesses a clear normative foundation. However, when examined through the lens of constitutional law, democratic theory, and international human rights standards, several aspects of the judgment warrant critical scrutiny.[28] The principal concern is that such an interpretation may facilitate the criminalization of expressive conduct that poses no genuine or demonstrable threat to public order.

In the present case, the defendant's Instagram Stories were published in the context of an emotional response to an incident of significant public concern.[29] The prosecution failed to establish that the posts mobilized members of the public to commit acts of violence or any other criminal offence. Consequently, the defendant's conviction appears to have rested primarily upon the perceived content of the expression itself rather than upon any objectively verifiable harm resulting from its dissemination.

Such an approach risks expanding the scope of criminal liability for protected expression. If emotionally charged, provocative, or strongly worded statements may be characterized as criminal incitement without requiring proof of actual harm or a sufficiently close causal connection to unlawful conduct, the distinction between constitutionally protected criticism and punishable speech becomes increasingly blurred.[30] The absence of a requirement to demonstrate concrete consequences also weakens the safeguards established by the Court in Decision Number 7/PUU-VII/2009, thereby creating the possibility that Article 161 may function as an alternative mechanism for imposing criminal liability where the material elements required under Article 160 cannot be established.

Restrictions on freedom of expression must satisfy the principles of legality, legitimate aim, necessity, and proportionality, as reflected in Article 19(3) of the ICCPR.[31] Moreover, where speech is alleged to constitute incitement, the assessment should be guided by the threshold articulated in the Rabat Plan of Action, which requires consideration of factors including context, the speaker's intent, the content and form of the expression, the extent of its dissemination, and the likelihood of resulting harm. Criminal sanctions should therefore be imposed only where expression creates a genuine and imminent risk of serious harm rather than based on speculative or abstract concerns.

Interpreting Article 161 as a purely formal offence, detached from any requirement to demonstrate actual or probable harm, may therefore be difficult to reconcile with these

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[27] Latipah Nasution, "Hak Kebebasan Berpendapat Dan Berekspresi Dalam Ruang Publik Di Era Digital" 4 (2020): 37–48.
[28] Peter J Verovšek, "The Roots of Liberal and Illiberal Democracy : Political Theory , Collective Memory and Conflicting Visions of Sovereignty in Europe Europe," *Journal of Contemporary European Studies* 33, no. 4 (2025): 1493–1508, https://doi.org/10.1080/14782804.2025.2563562.
[29] Muhammad Irfan Pratama and Abdul Rahman, "Kebebasan Berpendapat Dan Berekspresi Di Media Sosial Dalam Perspektif Hak Asasi Manusia" 3, no. 1 (2022): 1–16.
[30] Rizki Wahyuni and Yati Sharfina Desiandri, "Hak Asasi Manusia (HAM) Pada Kebebasan Berpendapat / Bereksperesi Dalam Negara Demokrasi Di Indonesia" 5, no. 3 (2024): 961–66.
[31] Michael O'Flaherty, "Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34," *Human Rights Law Review* 12, no. 4 (2012), https://doi.org/https://doi.org/10.1093/hrlr/ngs030.

international standards. Such an interpretation creates a significant risk of overcriminalization, enabling criminal punishment based solely upon the dissemination of controversial or emotionally charged opinions. In a democratic society, criminal law should remain a measure of last resort (*ultima ratio*), particularly where the expression concerns matters of public interest or political accountability.[32]

Furthermore, this expansive interpretation may generate a chilling effect on freedom of expression. Citizens may become reluctant to participate in public debate or criticize governmental institutions out of concern that emotionally expressed opinions could later be construed as criminal incitement. Such self-censorship would undermine democratic deliberation, weaken public participation in governance, and diminish freedom of expression as an essential mechanism for ensuring governmental accountability.

Accordingly, although the Court's application of Article 161 may be defensible under a literal reading of the statutory provision, its compatibility with guarantees of freedom of expression and international human rights standards remains open to serious question.[33] A more rights-oriented interpretation would require Article 161 to be construed consistently with the Court's jurisprudence on Article 160, thereby ensuring that criminal liability for disseminating alleged incitement is imposed only where the expression presents a demonstrable, imminent, and objectively verifiable threat to legally protected interests. Such an interpretation would better preserve the balance between protecting public order and safeguarding the constitutional values of democratic participation and freedom of expression.

4. Conclusions

Decision Number 675/Pid.Sus/2025/PN Jkt. Sel. illustrates the continuing tension between the State's interest in preserving public order and the guarantee of freedom of expression in Indonesia's democratic legal order. The Court's refusal to convict the defendant under Article 160 of the KUHP appropriately reflects the Court's interpretation in Decision Number 7/PUU-VII/2009 changing the legal status of Article 160 of KUHP regarding incitement from a formal offense to a material offense, which requires proof of actual consequences before criminal liability for incitement may arise. This approach reinforces the principles of legality, legal certainty, and the constitutional protection of expressive freedom.

However, the conviction under Article 161 raises constitutional and human rights concerns. By treating Article 161 as a purely formal offence without requiring evidence of actual or imminent harm, the judgment risks circumventing the constitutional safeguards established for Article 160. Such an interpretation broadens the scope of criminal liability for online expression, weakens the distinction between protected political speech and punishable incitement, and creates a chilling effect on democratic participation. It also sits uneasily with the requirements of legality, necessity, and proportionality under Article 19(3) of the ICCPR and the threshold established by the Rabat Plan of Action. Accordingly, Article 161 should be interpreted consistently with constitutional principles and international human rights

[32] Hoang Le Buu, "Freedom of Expression on Social Media : Perspectives from International Law and Vietnamese Law Freedom of Expression on Social Media under International Law Standards," n.d., 93–102, https://doi.org/10.59324/ejahss.2026.3(3).08.
[33] Muhammad Roqib et al., "Hak Atas Kebebasan Berekspresi Dan Berpendapat Di Indonesia Dengan Di Amerika Serikat," 2018, https://perspektif-hukum.hangtuah.ac.id/index.php/jurnal/article/view/76.

standards to ensure that criminal sanctions are imposed only where expression creates a demonstrable and imminent threat to legally protected interests.

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6. Reference

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