

Non-Decriminalization of Political Offenses in Indonesia: A Study on Article 154 of the Criminal Code (KUHP)

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Abstract

Article 154 of the Indonesian Criminal Code (*Kitab Undang-undang Hukum Pidana*; KUHP) is classified as a political offense because it is directed against the state, aims at public harm (public wrong), and involves non-violent expression of enmity or contempt (oral, written, or visual). The Dutch Government, however, viewed Article 154 KUHP as undemocratic and contrary to free expression and opinion, arguing it was only justifiable in colonial Indonesia for their interests. This created a divergence between the legislative interests of a colonized nation and a democratic one regarding 'expression' or 'opinion'. The Netherlands has equivalent provisions in Articles 137a to 137e of their Criminal Code, focusing on public insult against authorities or specific groups. While the Dutch code formulates these as formal insult offenses, Indonesia's Article 154 KUHP is broader, covering both formal and material insult. Notably, Articles 137a and 137b of the Dutch Criminal Code were revoked in 1978 for conflicting with Dutch freedom of expression, while Article 154 KUHP remains enforced in Indonesia because its elements are considered identical to Political Offenses.

Keywords

Kitab Undang-undang
Hukum Pidana; KUHP;
Non-Decriminalization;
Political Offenses; Article
154



I. Introduction

The Indonesian Criminal Code (*Kitab Undang-undang Hukum Pidana*; KUHP) currently in effect in Indonesia originates from the *Wetboek van Strafrecht voor Nederlanch Indie* (WvSNI), whose legal force is based on Indonesian Law Number 1 of 1946 in conjunction with Indonesian Law Number 73 of 1958. Meanwhile, the *Wetboek van Strafrecht voor Nederlanch Indie* (WvSNI) itself is the counterpart of the *Wetboek van Strafrecht* (WvS) which applies in the Netherlands, although differences exist in some matters.

To this day, the KUHP is still written in its original language, namely Dutch, and only its name has changed from *Wetboek van Strafrecht voor Nederlanch Indie* (WvSNI) to *Wetboek van Strafrecht* (WvS), which can then be called *Kitab Undang-undang Hukum Pidana*. This is stated in Article VI of Indonesian Law Number 1 of 1946, as follows:

- 1) The name of the Criminal Law Code "*Wetboek van Strafrecht voor Nederlanch Indie*" is changed to "*Wetboek van Strafrecht*".
- 2) This code can be named: "*Kitab Oendang-Oendang Hukum Pidana*"

As for the several translation versions of the KUHP originating from the aforementioned *Wetboek van Strafrecht* (WvS), many have now been found, disseminated, and published to the general public. However, these translation versions are not official but are private translations from the translators. Therefore, it is highly possible for conflicts to arise between one translation version and another. For example, between the translation

version by Moelyatno on one hand and the translation version by R Soesilo on the other hand regarding the word *eenig goed* in criminal offenses concerning property (*vermogensdelicten*), such as, among others: the crime of theft (*diefstal*), the crime of extortion and threats (*afpersing en afdreiging*), the crime of embezzlement (*verduistering*), the crime of fraud (*oplichting*), the crime of receiving stolen goods (*heling*), and so on. Moelyatno translates the word *eenig goed* as “barang sesuatu”, while R Soesilo translates the word *eenig goed* as “sesuatu barang”, both of which have different meanings.

The language condition of the KUHP currently in effect in Indonesia, as stated above, certainly makes it inadequate. Sudarto [1983] even said that the currently applicable KUHP is no longer suitable for the conditions of an independent Indonesia, viewed from practical, political, and sociological aspects. Viewed from the practical aspect, it means that the KUHP currently in effect in Indonesia should be written in a language that can be understood and comprehended by the Indonesian people. Therefore, a legal code that still uses a foreign language (Dutch as its original language) is not national law in the true sense.

Viewed from the political aspect, Indonesia as an independent country should form and have its own KUHP as National Law. Whereas the current KUHP originates from the *Wetboek van Strafrecht voor Nederlanch Indie (WvSNI)* which is still in effect based on Indonesian Law Number 1 of 1946 in conjunction with Indonesian Law Number 73 of 1958. This shows that politically, Indonesia does not yet have a KUHP as National Law in the true sense. Although Indonesia has now formed and possesses its own KUHP as National Law stipulated by Indonesian Law Number 1 of 2023, it has not yet been enacted. It will only be enacted 3 (three) years after its stipulation, which is January 2026.

Meanwhile, viewed from the sociological aspect, it means that the KUHP as National Law in the true sense should reflect the social and cultural values that live and develop within Indonesian society as an independent nation. However, in the KUHP that is still currently in effect, the opposite is often found. First, there are several social and cultural values that grow and develop in native Indonesian society that are not accommodated in the currently effective KUHP as a criminal offense, for example: *perzinahan* in the sense of Fornication [Adji, 1984]. The act of *Zinah* stipulated and regulated in the KUHP as a criminal offense is only in the sense of Adultery or *Overspel* as stated in Article 284 of the KUHP, as follows:

Article [1] Punishable by imprisonment for a maximum of nine months):

1. a. A married man who commits an overspel, even though it is known that Article 27 BW (Civil Code) applies to him;
- b. A married woman who commits overspel;
2. a. A man who participates in committing the act, even though it is known that the co-offender is married);
- b. An unmarried woman who participates in committing the act, w even though it is known that the co-offender is married and Article 27 BW (Civil Code) applies to her.

Meanwhile, in the Second sociological aspect, there are several criminal offenses regulated in the KUHP that are still in effect today but are not in accordance with and even conflict with the social, cultural, and political values of Indonesian society as an independent nation, such as the existence of Article 154 of the KUHP as *haatzaai-artikel* (hate-sowing articles), which is no longer in line with the situation and conditions of an independent Indonesia or with the democratic atmosphere that this nation and state is trying to create. As affirmed by Oemar Seno Adji [1984] as follows: Those articles (Article 154, ed.) as an undemocratic regulation, I base this even more so on a “*wetshistoris*” (legal-

historical) interpretation, which also illustrates what motivated the government in the past to create the "*haatzaai-artikelen*".

Besides Oemar Seno Adji, many other parties objected to the existence of Article 154 of the KUHP, such as the Dutch Minister of Justice and Wiryono Prodjodikoro [Adji, 1984]. They felt objections because Article 154 of the KUHP contains at least 2 (two) weaknesses. **First**, the formulation of the article is seen as too broad. The words "*permusuhan, kebencian atau merendahkan*" (enmity, hatred or contempt) contained in the formulation of the article can give rise to very broad interpretations, as stated by the Dutch Minister of Justice: "*De woorden vijandschap, haat of minachting laten bevondien een heel ruime interpretative toe*" (free translation: the words enmity, hatred and contempt above allow for a very broad interpretation). Meanwhile, the word *bevondien* indicates the consequence that: "*Het daarin vervat verbad betreft niet slechts de vorm van bepaalde uittalingen, doch tast daarvens vergaand de materiele vrijheid van meeningsuiting aan*" (Article 154 of the KUHP, contains a prohibition not only on the form of certain statements, but it also ultimately attacks the material freedom of expression).

Second, the placement of the article is not in its proper place. Article 154 of the KUHP should not be placed in Book II of the KUHP, Chapter V regarding Crimes Against Public Order, but rather placed in Book II of the KUHP, Chapter VII regarding insult (*Beleediging*). This indicates that the words "enmity, hatred and contempt" are broader than the meaning of the word insult. In other words, the meaning of the words in the formulation of Article 154 of the KUHP constitutes material insult, while the meaning of the words in the formulation of Article 310 of the KUHP/Article 265 of the *Nederlandsch Strafwetboek* (N.Sw) constitutes formal insult. Whereas, in fact, only formal insult is recognized as a criminal offense. Therefore, there is a concern that Article 154 will attack the material freedom for citizens to express opinions towards their government. The Dutch Minister of Justice at that time firmly rejected the enactment of Article 154 in the Netherlands, stating [Adji, 1984]: "*De ondergeteekende zoudeze bepalingen, welke op zichzelf te verklaren zijn door de behoefte van een koloniale samenleving, zeker niet voor het Rijk in Europa willen overnemen.*" (Free translation: The undersigned – the Dutch Minister of Justice, certainly will not take over the provisions of Article 154 of the KUHP, for the Kingdom in Europe, which are to be explained by the needs of a colonial society).

However, to this day Article 154 of the KUHP is still maintained (has not been revoked). Even in the Criminal Code (newest KUHP) under Indonesian Law No. 1 of 2023 concerning the Criminal Code, which has been passed by the DPR but not yet enacted, Article 154 is still maintained, although in a different form of language and a different article, as found in:

CHAPTER V

CRIMINAL OFFENSES AGAINST PUBLIC ORDER

(Paragraph 2)

Insults against the Government or State Institutions

(Article 240)

- (1) Any person who publicly, orally or in writing, insults the government or state institutions, will be punished by imprisonment for a maximum of 1 (one) year and 6 (six) months or a fine of at most category II
- (2) In the event the criminal offense as referred to in article (1) results in riots in the community, will be punished by imprisonment for a maximum of 3 (three) years or a fine of at most category IV
- (3) The criminal offense as referred to in article (1) can only be prosecuted based on a complaint from the insulted party

(4) The complaint as referred to in article (3) will be made in writing by the leadership of the government or state institution

With the continued maintenance of Article 154 of the KUHP (Indonesian Law Number 1 of 1946) in conjunction with Article 240 of the KUHP (Indonesian Law Number 1 of 2023), it is clear there is not yet freedom of opinion that contains legal certainty in the State of Indonesia. It can be interpreted that, in the substance of both articles, in the old KUHP as well as the new one, it is not yet sterile for expressing aspirations of freedom of opinion. This is due to the broad interpretation of both articles as one of the elements of Criminal Offenses in the Political Field. From the explanation above, it will further raise questions: what is the historical development of Article 154 of the KUHP being stipulated as one of the criminal offenses in the political field in Indonesia? The next question is, what are the core elements of the Offense (*Bestadelen*) in Article 154 of the Criminal Code (KUHP)?

II. Research Methods

Research on the Non-Decriminalization of Political Offenses in Indonesia (A Study on Article 154 of the KUHP) is a type of normative legal research, which examines legislation. Normative legal research is also called library research because what is studied is library material or secondary material [Soekanto & Mamuji, 2019]. There are three approaches used in this research: (1) the Statute Approach, which is an approach carried out by examining all laws and regulations related to the legal issue to be researched [Marzuki, 2011]; (2) The Legal History Approach discusses the history of the formation of the KUHP in Indonesia; dan (3) the Conceptual Approach, which is an approach that departs from the views and doctrines developing within the science of law. Thus, by studying these views and doctrines, the researcher will find ideas that give birth to legal understandings, legal concepts, and legal principles relevant to the issue at hand [Marzuki, 2011].

The Legal Material Sources used are: Primary Legal Materials in the form of the KUHP, Indonesian Law Number 1 of 1946 in conjunction with Indonesian Law No. 73 of 1958, and several treaties that have a relationship, either directly or indirectly, with crimes in the political field, and Secondary Legal Materials which are explanations of the Primary Legal Materials, such as the 1999-2000 draft KUHP and the KUHP (Indonesian Law No 1 of 2023), as well as Tertiary Legal Materials which provide further information about Primary Legal Materials and Secondary Legal Materials, such as the Kamus Umum Bahasa Indonesia, *Handwoordenboek der Nederlandse Taal* compiled by Koenen-Edepols Heeroma, Advanced learner's Dictionary-Oxford, and Black's law Dictionary [Soekanto, 1986]. The technique for collecting legal materials is carried out by means of library study and qualitative analysis of legal materials.

III. Results and Discussion

3.1 The History of the Formation of Article 154 of the KUHP Stipulated As One of the Criminal Offenses in the Political Field in Indonesia

Article 154 of the KUHP is one of the articles regulated in Book I Title V concerning Crimes against Public Order (*Misdrijven tegen de openbare orde*). Article 154 of the KUHP contains provisions concerning enmity, hatred, and contempt towards the Indonesian government, which is widely known as the *Haatzaai Artikel* (Hate-Sowing Articles).

In the *Wetboek van Strafrecht* applicable in the Netherlands, this article is not found. Even if it is seen to exist, it only resembles Article 154, namely stating in the form of insult (*uitlating in beledigenden vorm*) as regulated in Article 137a Swb. Where Article 137a Swb was revoked by Law dated March 25, 1978, *Staatsblad* 155. This is because the article was deemed to conflict with the right to freely express opinions.

Article 154 of the KUHP can be classified as a political offense, this is because: (1) the act committed is directed against the state as a government institution (crimes directed to state), (2) the harm caused by the act is aimed at public harm, thus constituting a public wrong, and (3) there is no violence because it only involves expressing feelings of enmity, hatred, and contempt orally, in writing, or through images (non-violence).

The history of the formation of Article 154 of the KUHP cannot be separated from the history of the formation of the KUHP itself; in other words, the two cannot be separated because they are a single unit. The page of history for criminal law in Indonesia (Dutch East Indies or *Nederlandsch-Indie*, ed.) began with the issuance of the *Koninklijk Besluit* (Royal Decree) dated May 16, 1846, which was announced in *Staatsblad* 1847 No. 23, specifically Article 8 which ordered the Governor-General of the Dutch East Indies to create a draft KUHP. The full content of Article 8 verse (1) is as follows [Tresna, 1959]: "Gebernur-Djenderal Hindia-Belanda diperintahkan untuk menyuruh membikin renjana Kitab Hukum Pidana untuk Hindia-Belanda dan mengirimkan selekas-lekasnya ke Negeri Belanda guna dipertimbangkan dan dikuatkan" (The Governor-General of the Dutch East Indies is ordered to have made a Criminal Code draft for the Dutch East Indies and send it as soon as possible to the Netherlands for it to be considered and confirmed).

Based on the suggestions from Mr. Wichers, the Governor-General of the Dutch East Indies formed a committee tasked with drafting the KUHP, adhering to the creation of unification in criminal law. Besides that, the KUHP, of course, was guided by the criminal law applicable in the Netherlands with necessary changes considering the needs within the colonial society [Tresna, 1959].

The Government in the Netherlands, in principle, approved the aforementioned intention and even desired, for the sake of unification, that it should not too closely resemble the KUHP applicable in the Netherlands itself [Tresna, 1959]. Besides that, the government wanted, for the time being, the formation of a KUHP for the European group and those equated with them first, which would later also be enacted for the Native (*Bumi Putera*) group and those equated with them.

The committee formed by the Governor-General could not work as expected, leading to an interpellation in parliament. The committee was not offended by the interpellation and even proposed to hand over the tasks to legal scholars in the Netherlands who had more opportunities and resources to complete them. Therefore, a committee was formed and chaired by Mr. MH Godefoi, Mr. LWC Keuchennius, and Mr. S Keyzer (whose work was later continued by another committee, namely: Mr. Jhr. DAJ Junius van Hemert, Mr. MTGL Francois, Mr. S Keyzer, and AA de Pinto).

Finally, the result of the committee's work was stipulated by *Koninklijk Besluit* dated February 10, 1866, which was announced in Indonesia in *Staatsblad* 1866 No. 55. The result of the committee's work was a KUHP for the European group which took effect on January 1, 1867. According to Mr. CC van Helsdingen Jr, it must be acknowledged that this KUHP was a derivative of the French *code pénal*, except, of course, with changes deemed necessary [Tresna, 1959]. Based on the suggestions of MR. TH der Kinderen to compile a complete KUHP for the Native (*Bumi Putera*) group and not merely a reference to the KUHP for the European (Dutch) group, which was viewed very favorably, the government assigned this task to Mr. TH der Kinderen himself to carry it out. Then Mr.

TH der Kinderen was able to complete the task in 1870 and submitted his draft to the government, which was well received with a few minor changes and stipulated by *ordonantie* (ordinance) dated May 6, 1872 (Stb. No.85), taking effect on January 1, 1873.

Meanwhile, at another time, Article 75 verse (1) of the *Regerings-Reglement* (RR) 1854 ordered, based on the principle of concordance, the KUHP to be enacted for the Dutch East Indies in 1881-1886, which replaced the *Code Penal*. The Decree of the Governor-General dated November 30, 1883, which was completed in 1886, was not well received, therefore it was necessary to form a committee.

By *Koninklijk Besluit* dated March 28, 1887 No. 15, a committee led by Mr. De Pauly, former President of the Hooggerechtshof in the Dutch East Indies, was formed with the task of drafting a new bill. On June 24, 1891, the draft was submitted to the Dutch government and stipulated by *Koninklijk Besluit* dated April 12, 1898 No. 30. After changes were made, it was then announced in Indonesia in *Staatsblad* 1898 No. 175 but was not yet enacted because it was still awaiting the completion of the KUHP for the Native (*Bumi Putra*) group.

As time went on, it turned out that the current of unification ideals had an increasingly strong influence. The government in the Netherlands was no exception. The Dutch government desired a KUHP that aspired to unification. In such an atmosphere, in 1909, the Minister of Colonies Idenburg urged the Dutch government to form a special committee originating from the State committee tasked with making changes to the Civil Code and Criminal Code in the Dutch East Indies.

In 1913, a special committee was formed and submitted a draft to the Minister of Colonies. Based on the *Koninklijk Besluit* (Royal Decree) dated October 15, 1915, the draft was stipulated as the *Wetboek van Strafrecht voor Nederlandsch-Indie* (Criminal Code for the Dutch East Indies), which was announced by *Staatsblad* 1915 No. 732. Then by *Koninklijk Besluit* dated May 4, 1917 No. 46 (*Staatsblad* No. 497), a *Verordening* (Ordinance) was stipulated to regulate the enactment of the new Criminal Code, which took effect on January 1, 1918.

During the discussions in the special committee, several controversial issues arose, including: the polemic regarding the existence of Article 154 of the KUHP. According to several literary sources, the existence of Article 154 of the KUHP was inspired by the British Indian Penal Code, which was later adopted into the *Wetboek van Strafrecht voor Nederlandsch-Indie* (Criminal Code for the Dutch East Indies). It should be noted that the provision contained in the British Indian Penal Code itself had been affirmed as invalid by the Supreme Court of India and the High Court of East Punjab because it was deemed “unconstitutional” [Adji, 1984].

In the exhausting debates in the special committee, the Dutch Minister of Justice clearly explained the existence of the provisions of Article 154 of the KUHP. According to the Dutch Minister of Justice, the Article is formulated in the form of a formal and at the same time material insult as stated as follows [Adji, 1984]: “*Het daarin verval verbod met slechts de vorm van bepaalde uitlatingen, doch tast daarens vergaand de materieel vrijheid van meeningsuiting aan*” (The article -Article 154 KUHP, ed.- contains a prohibition not only on the form of certain statements, but it also ultimately attacks the material freedom of expression). Furthermore, the Dutch Minister of Justice affirmed, among other things [Lamintang, 1987]: “*De woorden vijandscap, haat of minachting laten bevondien een heel ruime interpretative toe*” (Free translation: the words enmity, hatred and contempt above allow for a very broad interpretation).

Because the meaning of the words enmity, hatred and contempt was so broad, the Dutch Minister of Justice firmly rejected the enactment of Article 154 of the KUHP in the

Netherlands, stating [Adji, 1984]: “*De ondergeteekende zou deze bepalingen, welke op zichzelf te verklaren zijn door de behoefte van een koloniale samenleving, zeker niet voor het Rijk in Europa willen overnemen*” (Free translation: The undersigned -the Dutch Minister of Justice, ed.- certainly will not take over these provisions -Article 154 KUHP, ed.- for the Kingdom in Europe, which are to be explained by the needs of a colonial society).

It is also clearly stated in that statement that the opposite is true for colonized or colonial countries, such as the Dutch East Indies (Indonesia). Thus Article 154 of the KUHP continued to be enforced to protect colonial needs and interests, even though it contradicted freedom of expression and opinion. Oemar Seno Adji [1984] expressed his opinion, as follows: It is understandable that such a criminal act was deemed undemocratic by the Dutch Government, contrary to the ideas of “free expression” and “opinion” and – according to them – could only be tolerated in Indonesia in the past due to colonial needs and interests. An attitude, which they frankly admitted, and which resulted in legislative interests, in a colonized country and a country that views itself as democratic, running “divergently” (*uiteenlopend*), even being contradictory in nature, when it concerns ‘expression’ or ‘opinion’.

As an equivalent to Article 154 of the KUHP above, Articles 137a to 137e were formed in the KUHP applicable in the Netherlands, which contain forms of public insult against public authorities or public institutions (*openbare gezag of openbare instelling*) and certain population groups based on their race, religion, or life beliefs (*Belediging van bevolkingsgroep*). Of course, Articles 137a to 137e of the KUHP applicable in the Netherlands were formed very differently from Article 154 of the KUHP. This difference is seen in the formulation and scope; in other words, Articles 137a to 137e of the Dutch KUHP are formulated as formal insult offenses, while Article 154 of the KUHP is formulated as both formal and material insult offenses, and is even broader than both. Based on the law in *Staatsblad* No. 155 dated March 25, 1978, Articles 137a and 137b of the KUHP applicable in the Netherlands were revoked and declared no longer valid because they were not in accordance with the freedom of expression, opinion, and association developing in the Netherlands, while Article 154 of the KUHP is still enforced in Indonesia to this day [Adji, 1984]. This is because in Indonesia, the Criminal Offense in Article 154 of the KUHP is identical to Political Offenses.

3.2 The Core Elements of the Offense (*Bestadelen*) in Article 154 of the Criminal Code (KUHP)

Initially, the formulation of Article 154 of the KUHP found in the *Wetboek van Strafrecht voor Nederlandsch-Indie*, was stated as follows: “*Hij die in het openbaar uiting geeft aan gevoelens van vijandschap, haat of minachting tegen de Regeering van Nederland of van Nederlandsch-Indie, wordt gestraft met gevangenisstraf van ten hoogste zeven jaren of geldboete van ten hoogste drie honderd gulden*” (Free Translation: Whoever publicly expresses feelings of enmity, hatred or contempt towards the Government of the Netherlands or of the Dutch East Indies, shall be punished with imprisonment for a maximum of seven years or a fine of at most three hundred guilders).

Based on Article 3 in conjunction with Article 8 point 33 of Indonesian Law Number 1 of 1946 concerning Criminal Law Regulations, the words *Nederland of van Nederlandsch-Indie* must be read as *Indonesie*. Article 3 of Indonesian Law Number 1 of 1946 fully affirms: If in any criminal law regulation the words “*Nederland-Indie*” or “*Nederlandsch-Indisch (e) (en)*” are written, then those words must be read as “*Indonesie*” or “*Indonesisch (e) (en)*”). Meanwhile, Article 8 further affirms, among other things: The

Criminal Code is changed as follows: 33. in Article 154 and Article 155 the sentence fragment “*Nederland of van Nederlandsch-Indie*” must be read as “*Indonesie*”.

With the provisions contained in Article 3 in conjunction with Article 8 point 33 of Indonesian Law No. 1 of 1946 above, the formulation of Article 154 of the KUHP found in the *Wetboek van strafrecht voor Nederlandsch-Indie* underwent a slight adjustment. After being adjusted according to Indonesian Law No. 1 of 1946 concerning Criminal Law Regulations, the formulation of Article 154 of the KUHP became as follows: “*Hij die in het openbaar uiting geeft aan gevoelens van vijandschap, haat of minachting tegen de Regeering van Indonesie, wordt gestraft met gevangenisstraf van ten hoogste zeven jaren of geldboete van ten hoogste drie honderd gulden*” (Free Translation: Whoever publicly expresses feelings of enmity, hatred or contempt towards the Government of Indonesia, shall be punished with imprisonment for a maximum of seven years or a fine of at most three hundred guilders).

Several translations of the KUHP made by various parties have translated the formulation of Article 154 of the KUHP differently. Examples that can be given here include, among others: (1) the KUHP translation by Moelyatno, (2) the KUHP translation by R. Sugandhi, (3) the KUHP translation by R. Soesilo, (4) the KUHP translation by the Translator Team of the National Law Development Agency of the RI Department of Justice, and (5) the KUHP translation by PAF. Lamintang.

According to the KUHP translation by Moelyatno [1996], Article 154 is translated as follows: Whoever in public expresses feelings of enmity, hatred, or contempt towards the Government of Indonesia, is threatened with imprisonment for a maximum of seven years or a fine of at most three hundred rupiah.

According to the KUHP translation by R. Sugandhi [1981], Article 154 is translated as follows: Whoever expresses in public feelings of enmity, hatred, or betrayal towards the Government of the Republic of Indonesia, shall be punished with imprisonment for a maximum of seven years or a fine of at most four thousand five hundred rupiah.

According to the KUHP translation by R. Soesilo [1981], Article 154 is translated as follows: Whoever in public expresses feelings of enmity, hatred, or contempt towards the Head of Government of the State of Indonesia, is punished by imprisonment for a maximum of seven years or a fine of at most Rp 4.500,-.

Likewise, the Translator Team of the National Law Development Agency (BPHN) of the RI Department of Justice (Tim Penerjemah Badan Pembinaan Hukum Nasional (BPHN) Departemen Kehakiman) [1988] translated Article 154 of the KUHP as follows: Whoever in public expresses feelings of enmity, hatred, or betrayal towards the Government of Indonesia, is threatened with imprisonment for a maximum of seven years or a fine of at most four thousand five hundred rupiah.

Besides the translations above, PAF. Lamintang [1989] also translated Article 154 of the KUHP as follows: Whoever in public expresses feelings of enmity, hatred, or contempt towards the Government of Indonesia, shall be punished with imprisonment for a maximum of seven years or with a fine of at most four thousand five hundred rupiah.

Article 154 of the KUHP consists of several core elements of the offense or *bestandelen*, which according to the Supreme Court decision No. 346/Kr/1980 dated January 25, 1984 are also called essential parts [Soema di Pradja, 1989]. In general, the core elements of the offense (*bestandelen*) of Article 154 of the KUHP can be broken down as follows:

1. (Whoever: *hij*);
2. (In public: *in het openbaar*);
3. (Expresses feelings: *uiting geven aan gvoelen van*);

- a. (Enmity: *vijandschap*);
- b. (Hatred: *haat*);
- c. (Contempt: *minachting*);
4. (Towards the Government of Indonesia: *tegen de Regering van Indonesie*).

The first core element of the offense of Article 154 of the KUHP is whoever or *Hij* in Dutch [Lamintang, 1987]. This core element of the offense refers to the perpetrator of the criminal act (*dader*) who is a natural person (*natuurlijke persoon*). As regulated in Article 55 in conjunction with Article 56 of the KUHP, perpetrators of criminal acts include:

1. *Pleger*: Persons who materially commit the criminal offense;
2. *Doenpleger*: Persons who order others to commit the criminal offense;
3. *Mededader*: Persons who participate in committing the criminal offense;
4. *Uitlokker*: Persons who persuade others to commit the criminal offense;
5. *Medeplichtiger*: Persons who assist others in committing the criminal offense.

The second core element of the offense of Article 154 of the KUHP is in public or *in het openbaar* in Dutch. Within the KUHP, there are several words that resemble the word *in het openbaar*, such as, among others: (1) *openbaar* found in Article 281 of the KUHP and (2) *openlijk* found in Article 170 of the KUHP. Of course, the word *in het openbaar* on one hand and the words *openbaar* or *openlijk* on the other hand have different meanings.

Almost all KUHP translators agree that the word *in het openbaar* means in public or before the public, while the words *openbaar* or *openlijk* mean openly or overtly [Moeljatno, 1984]. The striking difference between the two is that the first refers to place, while the second refers to circumstance.

As mentioned above, *in het openbaar* or in public or before the public refers to place. However, this does not mean that the place referred to here is merely public places, such as terminals, stations, airports, ports, town squares, and others. But according to the *Hoge Raad* (HR) Decision [Moeljatno, 1984] dated May 22, 1939, N.J. 1939 No. 861, the most important thing is that the place can be easily accessed by the Community or public; in other words, through that place, all acts of the perpetrator of the criminal offense can be heard and/or seen by the general public, even if they have to pay for it [Lamintang, 1987].

The third core element of the offense is expressing feelings of enmity, hatred, and contempt or in Dutch “*uiting geven aan gevoelens van vijandschap, haat of minachting*” [van Haeringen, 1950]. The word *uiting* comes from the word *uiten*, which means *zijn gevoelens te kennen geven* (to make one's feelings known) [Koenen, Endepols, Heeroma, 1948]. The word *zijn gevoelens* can mean *een innerlijke gevoel van iets hebben*, which means “his feeling” or more completely “the deepest feeling possessed by a person” [Koenen, Endepols, Heeroma, 1948], while the word *te kennen geven* has various meanings, namely: *mededelen* or “to notify/communicate,” *doen blijken* or “to show,” and *doen verstaan* or “to explain” [van Haeringen, 1950]. Thus, the word *uiting geven* in the formulation of Article 154 of the KUHP, which has a meaning or significance identical to the word *zijngevoelens te kennen geven*, can mean, namely: “to notify,” “to show,” and “to explain” one's deepest feelings.

This also shows that the words *uiting geven aan gevoelens van vijandschap, haat of minachting* can mean “to notify, to show, and/or to explain feelings of enmity, hatred, or contempt” [Moeljatno, 1984]. Therefore, the word “*menyatakan*” (to state/express), which is the translation of the word *uiting geven* as part of the third core element of the offense in Article 154 of the KUHP, is not only limited to acts of verbal utterance, but can also be carried out through actions [Lamintang, 1987].

The verbal actions and/or deeds must contain enmity, hatred, or contempt. Meanwhile, the words enmity (*vijandschap*), hatred (*haat*), or contempt (*minachting*) themselves are theoretically clear in meaning, but practically they will cause problems [Moeljatno, 1984]. The word *vijandschap* comes from the word *vijand*, which means “*haat en dit tracht te uiten in dader of woorden*” [Koenen, Endepols, Heeroma, 1948], or “hatred and attempts to express this hatred in deeds or words,” while the word *haat* means “*gevoel van diepe afkeer (met de bedoeling leed te doen), ook met betrekking op zaken en begrippen*” [Koenen, Endepols, Heeroma, 1948], or “a feeling of deep dislike (with an intention to cause annoyance/harm), also relating to various things and concepts/ideas.”

Furthermore, the word *minachting* means “*met trots neerzien op, kien, gering achten*” [Koenen, Endepols, Heeroma, 1948], or “to proudly/arrogantly look down upon, consider insignificant, unimportant.” Thus, in line with the sequence of expressing feelings of enmity, hatred, and contempt, the first is the most severe, because the government is considered an enemy. The second is less severe, because from the words or actions used, it must be apparent that the perpetrator hates the government and is not just a conclusion drawn from the content of the statement. Finally, the third is somewhat less severe again, because it is merely a statement of contempt [Moeljatno, 1984].

The fourth core element of the offense is the Government of Indonesia or in Dutch *de Regering van Indonesie*. The Government of Indonesia refers to the central government and does not include the regional government [Moeljatno, 1984]. Meanwhile, statements of enmity, hatred, and contempt directed at the regional government may be threatened with Article 207 of the KUHP, the content of which states: “Whoever intentionally insults a ruler or public body existing in Indonesia publicly, orally or in writing, is threatened with imprisonment for a maximum of one year and six months or a fine of at most four thousand five hundred rupiah.”

Furthermore, according to JHA Logemann [Lamintang, 1987], the Government of Indonesia here includes: the President, the Vice President, and the Ministers collectively as a *samengesteld organ* (composite body). Of course, the statements of enmity, hatred, and contempt must be directed at the President, Vice President, and Ministers not as private individuals but related to their attitudes and actions in running the state government according to the 1945 Constitution.

Although the formulation of the offense in Article 154 of the KUHP does not explicitly mention “intentionally” (*Opzettelijk*) [Moeljatno, 1984], the act of expressing enmity, hatred, and contempt towards the Government of Indonesia must be done intentionally [Lamintang, 1987]. As is known, *opzettelijk* or intention includes: (1) *willen* (to will/intend) and (2) *weten* (to know). This means that for a perpetrator of a criminal offense to be deemed to have fulfilled the element of *opzet* (intent), concerning the objective elements that constitute actions, the person in question must intend (*willen*) to carry out those actions. Meanwhile, concerning the objective elements that constitute circumstances, the person in question need only know (*weten*) about those circumstances.

Therefore, in order for a perpetrator of a criminal offense to be deemed to have fulfilled all the elements of the criminal offense formulated in Article 154 of the KUHP, the perpetrator in question must be proven:

- a. That the perpetrator of the criminal offense has “intended” (*willen*) to express feelings of enmity, hatred, or contempt towards the Government of Indonesia;
- b. That the perpetrator of the criminal offense “knew” (*weten*) the statement of their feeling was made in public;
- c. That the perpetrator of the criminal offense “knew” (*weten*) the statement made in public constituted a feeling of enmity, hatred, or contempt; and

- d. That the perpetrator of the criminal offense "knew" (*weten*) that the feeling of enmity, hatred, or contempt was directed at the Government of Indonesia.

If the intent (*opzet*) or deliberateness regarding any one element of the criminal offense formulated in Article 154 of the KUHP cannot be proven, then the perpetrator of the criminal offense must be ruled acquitted of all legal prosecution (*ontslag van alle rechtsvervolging*) [Lamintang, 1987].

IV. Conclusion

The history of the formation of Article 154 of the KUHP being stipulated as a Political Offense in Indonesia is inseparable from the history of the formation of the KUHP itself, meaning the two are one unit. The historical documentation for criminal law in Indonesia (Dutch East Indies or *Nederlandsch-Indie*, ed.) began with the issuance of the *Koninklijk Besluit* dated May 16, 1846, announced in *Staatsblad* 1847 No. 23, specifically Article 8, which ordered the Governor-General of the Dutch East Indies to create a KUHP draft. The full content of Article 8 Article (1) is as follows: The Governor-General of the Dutch East Indies is ordered to have a draft Criminal Code for the Dutch East Indies made and to send it as soon as possible to the Netherlands to be considered and confirmed. The Governor-General of the Dutch East Indies formed a committee tasked with drafting the KUHP based on the creation of unification in criminal law. Furthermore, the KUHP was guided by the criminal law applicable in the Netherlands with necessary changes considering the needs of the colonial society. After a long and exhausting struggle, the result of the committee's work was finally stipulated by *Koninklijk Besluit* dated February 10, 1866, announced in Indonesia in *Staatsblad* 1866 No. 55. The result was a KUHP for the European group which took effect on January 1, 1867. Based on the suggestions of Mr. TH der Kinderen to compile a complete Criminal Code for the Native (*Bumi Putra*) group and not merely a reference to the Criminal Code for the European (Dutch) group, the government assigned this task to Mr. TH der Kinderen himself. Mr. TH der Kinderen completed the task in 1870, and his draft was accepted with minor changes and stipulated by *ordonantie* (ordinance) dated May 6, 1872 (Stb. No. 85), taking effect on January 1, 1873. In 1913, a special committee was formed and submitted a draft to the Minister of Colonies. Based on *Koninklijk Besluit* dated October 15, 1915, the draft was stipulated as the *Wetboek van Strafrecht voor Nederlandsch-Indie* (Criminal Code for the Dutch East Indies), announced by *Staatsblad* 1915 No. 732. Subsequently, by *Koninklijk Besluit* dated May 4, 1917 No. 46 (*Staatsblad* No. 497), a *Verordening* (Ordinance) was stipulated to regulate the enactment of the new Criminal Code, which took effect on January 1, 1918. During the discussions in that special committee, several controversial issues arose, including: the polemic regarding the existence of Article 154 of the KUHP. According to several literary sources, Article 154 of the KUHP was inspired by the British Indian Penal Code, which was later adopted into the *Wetboek van Strafrecht voor Nederlandsch-Indie*. It should be known that the provision in the British Indian Penal Code itself had been declared invalid by the Supreme Court of India and the High Court of East Punjab because it was deemed "unconstitutional". Due to the extremely broad meaning of the words enmity, hatred, and contempt, the Dutch Minister of Justice firmly rejected the enactment of Article 154 of the KUHP in the Netherlands. It was clearly stated in that declaration that, conversely, it did apply to colonized or colonial countries, such as the Dutch East Indies (Indonesia). Thus, Article 154 of the KUHP was maintained to safeguard colonial needs and interests, even though it conflicted with the freedom of expression and opinion. Oemar Seno Adji stated his opinion as follows: It is understandable that such a criminal act

was deemed undemocratic by the Dutch Government, contrary to the ideas of “free expression” and “opinion” and – according to them – could only be tolerated in Indonesia in the past due to colonial needs and interests. An attitude, which they frankly admitted, and which resulted in legislative interests, in a colonized country and a country that views itself as democratic, running “divergently” (*uiteenlopend*), even being contradictory in nature, when it concerns ‘expression’ or ‘opinion’. As an equivalent to Article 154 of the KUHP, Articles 137a to 137e were formed in the KUHP applicable in the Netherlands, which contain forms of public insult against public authorities or public institutions (*openbare gezag of openbare instelling*) and certain population groups based on their race, religion, or life beliefs (*Belediging van bevolkingsgroep*). Articles 137a to 137e of the Dutch KUHP are formulated as formal insult offenses, whereas Article 154 of the KUHP is formulated as both formal and material insult offenses, and is even broader than both. Based on the law in *Staatsblad* No. 155 dated March 25, 1978, Articles 137a and 137b of the KUHP applicable in the Netherlands were revoked and declared no longer valid because they were not in accordance with the freedom of expression, opinion, and association developing in the Netherlands, while Article 154 of the KUHP is still enforced in Indonesia to this day. This is because in Indonesia, the Criminal Offense in Article 154 of the KUHP is classified as a Political Offense. This is because: (1) the act committed is directed against the state as a government institution (crimes directed to state), (2) the harm caused by the act is aimed at public harm, thus constituting a public wrong, and (3) there is no violence because it only involves expressing feelings of enmity, hatred, and contempt orally, in writing, or through images (non-violence).

The Core Elements of the Offense (*Bestadelen*) in Article 154 of the KUHP consist of at least 4 elements of the offense, including: **1)** Whoever or *Hij* in Dutch. This refers to the perpetrator (*dader*) who is a natural person (*natuurlijke persoon*), namely: The person who materially commits the criminal offense (*pleger*); The person who orders others to commit the criminal offense (*doenpleger*); The person who participates in committing the criminal offense (*mededader*); The person who persuades others to commit the criminal offense (*uitlokker*); and The person who assists others in committing the criminal offense (*medeplichtiger*). **2)** In public or *in het openbaar* in Dutch. According to the *Hoge Raad* (HR) Decision dated May 22, 1939, N.J. 1939 No. 861, in public means the place can be easily accessed by the Community or public; in other words, through that place, all acts of the perpetrator of the criminal offense can be heard and/or seen by the general public, even if they have to pay for it. **3)** Expressing feelings of enmity, hatred, and contempt or in Dutch *uiting geven aan gevoelens van vijandschap, haat of minachting*. This refers to "his feeling" or more completely "the deepest feeling possessed by a person," where the feeling referred to is not only expressed orally/in writing but also includes feelings accompanied by concrete actions. **4)** The Government of Indonesia or in Dutch *de Regering van Indonesie*. The Government of Indonesia here refers to the central government and does not include the regional government. The Government of Indonesia here includes: the President, the Vice President, and the Ministers collectively as a *samengesteld organ* (composite body). Statements of enmity, hatred, and contempt must be directed at the President, Vice President, and Ministers not as private individuals but related to their attitudes and actions in running the state government according to the 1945 Constitution.

References

- Adji, Oemar Seno. [1984]. *Hukum Acara Pidana Dalam Prospekti*. Jakarta: Erlangga.
- Koenen, Endepols, Heeroma. [1948]. *Handwoordenboek der Nederlandse Taal*. Batavia: JB Wolters Groningen.
- Lamintang, PAF. (Translator). [1989]. *Kitab Undang-Undang Hukum Pidana (KUHP)*. Bandung: CV. Sinar Baru.
- Lamintang, PAF. [1987]. *Delik-Delik khusus: Kejahatan-Kejahatan terhadap Kepentingan Hukum Negara*. Bandung: CV. Sinar Baru.
- Marzuki, Piter Mahmud. [2011]. *Penelitian Hukum*. Jakarta: Kencana Prenada Media Group.
- Moeljatno (Translator). [1996]. *KUHP: Kitab Undang-undang Hukum Pidana*. Jakarta: Bina Aksara.
- Moeljatno. [1984]. *Kejahatan-Kejahatan Terhadap Ketertiban Umum (Openbare Orde)*. Jakarta: Bina Aksara.
- Soekanto, Soerjono, & Mamuji. [2019]. “Penelitian Hukum” (Legal Research). Jakarta: Sinar Grafika.
- Soekanto, Soerjono. [1986] *Metode Penelitian Hukum*. Jakarta: PT RajaGrafindo Persada.
- Soema di Pradja, Achmad S. [1989]. *Hukum Pidana Dalam Yurisprudensi*. “Diklat, Fakultas Hukum Universitas Padjadjaran Bandung.”
- Soesilo, R. (Translator). [1981]. *Kitab Undang-Undang Hukum Pidana (KUHP) serta Komenta-komentarnya lengkap pasal demi pasal*. Bogor: Politeia.
- Sudarto. [1983]. *Hukum Pidana Dan Perkembangan Masyarakat: Kajian Terhadap Pembaharuan Hukum Pidana*. Bandung: Sinar Baru.
- Sugandhi, R. (Translator). [1981]. *Kitab Undang-Undang Hukum Pidana dengan Penjelasannya*. Surabaya: Usaha Nasional.
- Tim Penerjemah Badan Pembinaan Hukum Nasional (BPHN) Departemen Kehakiman. [1988]. *Kitab Undang-Undang Hukum Pidana (KUHP)*. Jakarta: Pustaka Sinar Harapan.
- Tresna, R. [1959]. *Asas-Asas Hukum Pidana (disertai pembahasan beberapa perbuatan pidana jang penting)*. Djakarta: PT Tiara Limited.
- van Haeringen, CB. [1950]. *Kramer’s Nederlands Woordenboek*. Jakarta: GB van Goor Zonen’s Uitgeversmaatschappij NV. ‘sGravenhage.