

The Aspect of Criminal Liability in Law Enforcement for the Prohibition on Hate Speech on Social Media

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Abstract-The issue of hate speech may never have been predicted by scientists and social media creators because social media is in principle only intended to facilitate communication between people in various parts of the world. Since Indonesia is a state of law, we must always position the law as the commander, all social disputes should be resolved with a legal approach. Before the existence of Law No. 11 of 2008 on Information and Electronic Transactions, acts of public hate speech were carried out on the basis of the articles in Chapter V of the Criminal Code that regulates Crimes Against Public Order. Criminal Code and Article 28 of Law Number 11 of 2008 concerning Information and Electronic Transactions is because the three articles are considered contrary to Article 28E paragraph (3) concerning freedom of expression because of the broad article formulation and crashing principles legal certainty so that it is feared can limit democracy. This paper discusses the issue of criminal liability for hate speech. The results of the study show that Article 157 of the Criminal Code and Article 28 of Law Number 11 of 2008 concerning Information and Electronic Transactions, they have some problems in the formulation, the most important aspect is the criminal liability aspect of these articles. This aspect of criminal responsibility becomes a hot area of debate over articles that contain a prohibition on the spread of hate speech because the matters regulated in the article have a too loose definition.

Keywords-Criminal Liability, Law Enforcement, Hate Speech

I. INTRODUCTION

One of the main debate issues in criminal law for the last five years and continue to be a hot topic in Indonesia is the problem of hate speech on social media. Even President Joko Widodo also took a stand against the rampant spread of hate speech. On December 19, 2016, at the State Palace, Jakarta, President Joko Widodo declared himself ready to counter hate speech, to avoid vilifying each other, to avoid useless demagoguery, to avoid provoking each other, and to avoid slander because they are detrimental to Muslims in Indonesia [1].

The spread of hate speech on social media is often associated with a radicalism that leads to attitudes and acts of intolerance. The most extreme is the act of terrorism that can have fatal consequences, like the fall of many casualties that is often caused by hate speech on social media. If radicalism and intolerance are considered as diseases, then the hate speech through social media is considered as the initial symptom which will be very

dangerous if left unchecked. On 8 June 2016 in Surabaya, the 88th National Police Headquarters Special Detachment arrested three suspected terrorists. The interesting thing is that the three suspected terrorists claimed to be inspired by ISIS groups who propagate through social media. The Head of Public Relations of the National Police Headquarters, Inspector General of Police Boy Rafli Amar, said that the three suspects admitted that they often saw ISIS spread its teachings through social media and videos. He explained that the video of the ISIS spokesperson, Abu Muhammad Al-Adnani, about their movements which often circulated on YouTube, was the trigger for the three to take radical action and plan to attack public areas. On October 20, 2016, Tangerang Metro Resort Police Chief, Effenendi was attacked by terrorists with weapons. The attacker was Sultan Aziansyah, who according to the Head of the National Counterterrorism Agency (BNPT) Suhardi Alius was inspired by ISIS' hate speech content on social media. According to EU Justice Commissioner Vera Jourová, recent terror attacks have reminded us to take immediate action in dealing with hate speech [2].

II. FINDINGS AND DISCUSSION

Sociology observer from Nahdatul Ulama University, Luluk Nur Hamidah, said that provocative statements containing hatred on the basis of ethnicity, religion, race, and class were the biggest triggering factors for radicalism. According to Luluk, hate speech from intolerant groups is no longer in the realm of individuals with individuals. However, this has had a huge impact on society [3]. Luluk's opinion was reinforced by Iqbal Ahnaf who said that Social media also played a role in the process of radicalization. "If all this time we think social media can open up the horizon, it can also narrow one's thinking," said Iqbal. This happens when someone restricts his/her social media in groups that contain radical discourse. The onslaught of information from these radical websites also gave rise to new sources of knowledge and authority. Radical figures have emerged as references and role models for many people. Sources of religious knowledge that used to be the hold of many scholars are now beginning to be abandoned. The spread of radical teachings is also increasing, and along with that, the utterance of hatred. This hate speech is used by radical groups as a means of mobilization and building sympathy.

Iqbal gave an example in the case of Lesbian, Gay, Bisexual, and Transsexual (LGBT) that is in rife lately. Many parties who oppose LGBT are then exploited by certain groups by using anti-LGBT discourse to attract sympathy and popularize themselves. Similar cases also occur in cases involving minority groups that are deemed heretical like Syiah and Ahmadiyah. This expression of hatred on social media is able to mobilize people to commit violence in the name of religion [4]. In line with Luluk and Iqbal, Ahmad Ansori also correlated hate speech with radicalism. According to Ahmad, there is actually a mechanism that can be used to overcome the problem of religious extremism through hate speech but our law has not specifically dealt with the problem [5]. Although it is not an act, we encounter hate speech everywhere. We often find it in many communal quran readings, great *tablighs*, social media and even on TVs. This hate speech, if it continues, will be able to provoke the community and lead to violence [6].

The method of delivering social media messages that connects individuals directly in a very fast time without any filtering mechanism or message filter accelerates the spread of messages that can be categorized as massive hate speech. It must be acknowledged, that the advancement of social media technology has added a new style in criminal acts in the form of speech delivery. Previously, we only knew of the mainstream media which had editorial devices that technically functioned as filters and were legally responsible for the message to be conveyed, but now the situation was completely different. On social media, there are no editorial devices, no editing and no legal liability of the press company. All messages can be directly sent and read directly by others in mere minutes. With a forwarding mechanism, a message of hate speech can also be spread in a chain that involving many people.

Amal Nur Ngazis, Agus Tri Haryanto, and Agus Rahmat said that social media and the internet have not only been a place to convey user expression lately. Now, its function and utilization are increasingly widespread, not limited to heartfelt writings or sharing experiences, social media and the internet are starting to be filled with hate speech content. By utilizing the advantages and ease of writing, internet users are increasingly engrossed in posting ideas, thoughts, or content that spreads hatred. The issue of hate content has come to the attention of the world's governments, civil society, and technology companies. All of them are aware of the bad risk of overflowing hate speech content on the online platform [7]. What people are experiencing right now is caused by the lack of understanding of how to use social media, take the positive side of it, and how to avoid its negative effects. Social media seems to bring people to worldwide area and almost without limits in communication. Interaction without face to face and quick message delivery are develop rapidly and become difficult to censor. This condition is then used by some parties for spreading hate speech to attack others for their own

interests. The emergence of social media is not only as an easy means to connect people but also makes it easier to spread hate speech.

The issue of hate speech may never have been predicted by scientists and social media creators because social media is in principle only intended to facilitate communication between people in various parts of the world. From the standpoint of sociology, social media has influenced the way humans socialize, make friends, and interact [8]. Adam Chazawi and Andi Ferdian said the development of information and communication technology had both positive and negative influences, like a double-edged sword. The use of information and communication technology, on one hand, contributes to the improvement of human welfare and civilization, but on the other hand, advances in ITE technology can be used to carry out acts that are against the law which attack various legal interests of people, society and the state. In line with that, the criminal law must enforce the protection, if not, the development and advancement of information technology which has influenced changes in the activities of life and human civilization, will bring a very bad impact [9].

Hate speech is called as a destroyer of the unity and integrity of the Indonesian people. Although our nation consists of various tribes, races, and religions, we have lived in harmony and peace for centuries in the corridor of Unity in Diversity. The harmony that we have always guarded is now in danger of falling apart because of the rampant hate speech. The noble culture of our nation, like tolerance, *tepo seliro* and mutual cooperation can also be completely eroded if we cannot stem the increase of hate speech in the community. We see that there have been many social conflicts in various regions that began with the hate speech on social media.

Since Indonesia is a state of law, we must always position the law as the commander, all social disputes should be resolved with a legal approach. The concept of the rule of law, in addition to being not a State of Power (*Machtstaat*) also implies recognition of the principle of supremacy of law and constitution, the principle of separation and limitation of power according to the constitutional system stipulated in the law, the existence of human rights security in the law, the existence of a free and impartial judicial principle that guarantees the equality of every citizen in the law, and guarantees justice for everyone including the abuse of authority by the ruling party. In understanding such a rule of law, essentially, the law determines everything in accordance with the principles of nomocracy and the doctrine of 'the rule of law, and not of Man'. In the framework of the 'rule of law', it is believed that there is recognition that the law has the highest position (supremacy of law), the existence of equality in law and government (equality before the law), and the implementation of the principle of legality in all its forms of real practice (due process of law) [10].

Currently, the step to stem the spread of hate speech on social media is to make, perfect and enforce legislation that regulates criminal sanctions for people who express hate speech through social media. Strict law enforcement is expected to have a deterrent effect on the perpetrators of the spread of hatred through social media and at the same time make other social media users be more careful and avoid acts of spreading hate speech.

Before the existence of Law No. 11 of 2008 on Information and Electronic Transactions, acts of public hate speech were carried out on the basis of the articles in Chapter V of the Criminal Code that regulates Crimes Against Public Order. There are two types of hate speech spread in the Criminal Code, they are hatred to the government which was regulated in Article 154 and Article 155 and hatred towards one or several groups of Indonesian people regulated in article 156 and Article 157. Specifically, Article 154 and Article 155 of the Criminal Code in 2007 have been declared invalid by the Constitutional Court through Decision in case Number 6/PUU-V/2007 because it is considered to be in conflict with the 1945 Constitution. Currently, in addition to Article 156 and Article 157 of the Criminal Code, regulations concerning the prohibition of spreading hate speech are regulated in Article 28 of Law Number 11 of 2008 concerning Information and Electronic Transactions. Both of these rules are also currently being submitted for judicial review at the Constitutional Court. The reason for proposing a material test of Article 156, Article 157 of the Criminal Code and Article 28 of Law Number 11 of 2008 concerning Information and Electronic Transactions is because the three articles are considered contrary to Article 28E paragraph (3) concerning freedom of expression because of the broad article formulation and crashing principles legal certainty so that it is feared can limit democracy.

III. CONCLUSION

Apart from the assumptions of Article 156, Article 157 of the Criminal Code and Article 28 of Law Number 11 of 2008 concerning Information and Electronic Transactions, they have some problems in the formulation, the most important aspect is the criminal liability aspect of these articles. This aspect of criminal responsibility becomes a hot area of debate over articles that contain a prohibition on the spread of hate speech because the matters regulated in the article have a too loose definition. The looseness of the definition actually starts from a very important element, on what is hatred. In the context of what quality of hatred should be prohibited and what kind of hatred is not prohibited because of the element of fairness. We know that like, love, are hate are human feelings experienced by everyone. Love or hate is a feeling that cannot be forced. It should be remembered that our country is a democracy that adheres to the principle of freedom of expression. The principle of freedom of expression is even expressly regulated in our constitution Article 28E paragraph (3) of the 1945

Constitution. The principle of freedom of expression expresses guarantees that citizens are free to express their opinions, including in the form of criticism. The blurring of the line between criticism and hatred can lead to the demise of democracy because one of the main elements of democracy is freedom of expression. It would be a problem if the criticism was classified as hatred. Criticism is a form of community participation in controlling the running of government. With criticism, those who run the government have a reminder alarm if their actions are deviating. Conversely, without criticism, irregularities in the implementation of government will continue to occur and ultimately lead to damage to the system that is difficult to repair again. In the context of the subject or target, the definition between groups is not clear either. Hatred of groups as what may and may not be spread. Are groups based on organization, are groups based on social strata, or groups based on political preferences. On January 23, 2017, the Jakarta Metropolitan Police investigated the frontman of the Islamic Defenders Front (FPI) Habib Rizieq Shihab because of his lecture on the rupiah which he called there was a picture of a sickle hammer which was a symbol of the Indonesian Communist Paratai (PKI) or communist teachings. Because of this, Habib Rizieq Shihab was charged with the article of spreading hate speech, the question arose whether spreading hatred towards the PKI and the Communist Teachings was a criminal offense? when the PKI is a banned organization and communism is also prohibited. If the spread of hatred towards PKI and communists could be categorized as a crime, it could be that the spread of hatred towards corruptors, environmental destroyers, criminals could also be convicted. The looser definition of the elements in the criminal act that prohibits the spread of hate speech makes it difficult to enforce laws related to the prohibition of the spread of hatred if it is only based on the fulfillment of elements of the offense. Even the criminal act of theft of 362 KUHP which has clearer definition of offense still face problems. The case of theft of 3 cacao by an old woman, Minah, is a concrete example. If it refers to fulfilling the element of the old woman's offense that was proven to take something, which is wholly or partly owned by another person, with the intention to be owned illegally, then it is categorized as a criminal act. But this case became public gossip because it was deemed not to fulfill a sense of justice.

Even worse can happen if the trial in a criminal act prohibits the spread of hate speech is only oriented to the fulfillment of the element of the offense. In the context of a criminal conviction, the court is tasked with considering between the criminal acts and the accountability of the perpetrators of criminal acts as the basis for criminal convictions. On one hand, criminal acts emphasize the legal interests of the people who want to be protected by legal norms. On the other hand, criminal mistakes and liabilities emphasize legal obligations based on certain circumstances in the making of a criminal act. The consideration of criminal acts and criminal liability aims

to place the “criminal conviction” as the fulfillment of the interests of society and individuals based on daad en daader strafrecht. If the orientation of law enforcement forbidding the hate speech on social media is only the fulfillment of elements of the offense, then the law may not be able to carry out one of its functions, namely to create order in society. Because technically there will be a lot of people imprisoned and in principle, there will be a reduction in the principle of freedom of expression in public.

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