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Implementing Prohibition of Hate Speech Under Article 28(2) of Indonesian Electronic Information and Transaction Law

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ABSTRACT
Several reports have alleged that Indonesian democracy is declining due to unjustified suppression of freedom of expression. One of that suppression is done by conviction based on hate speech under Article 28(2) of Law Number 11 of 2008 as amended by Law Number 19 of 2016 on Electronic Information and Transaction ("Electronic Law"). Such allegation becomes interesting considering that Indonesia recognizes the freedom of speech within its legal framework, including through the 1945 Constitution and International Covenant on Civil and Political Rights ("ICCPR"). This paper endeavors to examine whether Article 28(2) of Electronic Law is contrary to the 1945 Constitution and whether improvement can be made to address existing concerns. The method used will be juridical normative, where the examination will be done towards primary sources of law (e.g., Electronic Law, Law Number 12 of 2005 on the Ratification of ICCPR) and secondary sources of law (e.g., judicial decisions and doctrines). It is concluded that the formulation of Article 28(2) of Electronic Law is not in contrary to the 1945 Constitution; instead, its implementation raises issues due to a lack of objective criteria to interpret the article. It is proposed to adopt Rabat Action Plan into Indonesian legal instrument and implement non-legal measures to combat hate speech.

Keywords: *Electronic Law, Hate Speech, Offensive Speech, Rabat Action Plan.*

1. INTRODUCTION

Indonesia is one of the biggest democracies in Asia, with a population of 270 million consisting of diverse backgrounds[1]. However, according to Economist Index Unit ("EIU") Report on Democracy Index in 2020, Indonesia ranks 64 out of 167 in the world with a 6.30 index score, classifying it as flawed democracy[1]. The lowering of the index in 2020 (i.e., from 6.48 to 6.30) is the second most significant decrease, followed by its 2017 index decrease (i.e., from 6.97 and 6.39). In determining the EIU Index, civil liberties are among the five criteria considered[1]. The significant decrease in 2020 due to reliance on Covid-19 pandemic as justification for Indonesian government suppress dissents [1] on Covid-19 efforts while in 2017 due to alleged abuse of law attacking minority such as conviction of Chinese-minority Jakarta mayor who claimed abuse of religion in politics[2].

In addition to EIU Report, the Southeast Asia Freedom of Expression Network (SAFEnet) Report in 2020 highlights numerous cases targeting activists, journalists, and academics for their speech[3]. One of the most common bases for such cases is Article 28(2) of Electronic law, which prohibits individuals from intentionally and without right disseminate information purposed to cause hatred or animosity between individuals or groups based on ethnic (*suku*), religion (*agama*), race (*ras*) and other group identities (*antar-golongan*). The crime prohibited in Article 28(2) of Electronic Law is commonly referred to as hate speech (*ujaran kebencian*).

The concerns on those reports become peculiar considering that the Indonesian legal framework recognizes freedom of speech. The 1945 Constitution explicitly recognizes freedom of expression through Article 28(E)(2) and (3). Moreover, it affirms this recognition in Law Number 38 of 1999 on Human Rights, where it further elaborates that the freedom of

expression in the 1945 Constitution is also applicable to every individual and in whatever form of expression.

The commitment of Indonesia in recognizing freedom of expression is also shown by its ratification towards ICCPR, which Indonesia is a state party. Indonesia also made the contents of ICCPR as law through Law Number 12 of 2005 on the Ratification of ICCPR.

Aside from recognizing freedom of expression, the 1945 Constitution and ICCPR also provide certain limitations in the exercise of such freedom.

In Article 28(J)(2) of the 1945 Constitution, by way of strict construction reading, there are three requirements to limit human rights, namely that the limitation must be (i) prescribed by law, (ii) purposed to guarantee the recognition of and the respect of the rights and freedoms of others, and (iii) fulfill fair demand under the considerations of morality, religious values, security, and public order in a democratic society. The Constitutional Court, which has the authority to determine whether a violation of the constitution has occurred, decided several cases that added further requirements to limit human rights enshrined in the 1945 Constitution. It has been identified[4] that in its previous decision, the Constitutional Court has required limitations prescribed by law to (i) be based on a sufficient justification, (ii) not have the nuance of political sanction for certain groups, and (iii) not be excessive.

Those limitation requirements are similar to limitation requirements provided by the ICCPR, explicitly relating to freedom of expression. In Article 19 (3) of the ICCPR, it is provided that the limitation must be (i) prescribed by law, (ii) necessary, and (iii) for respect of the rights and reputation of others or the protection of national security or public order, public health, or morals. The Human Rights Committee has also interpreted the limitation of necessity, as the treaty body of ICCPR, to mean for the limit not to be excessive or, in other words, proportionate[5].

Considering Indonesia's recognition of freedom of expression, does this mean that Article 28(2) of Electronic Law is in violation of the 1945 Constitution and ICCPR as ratified through Law 12 of 2005 on Ratification of ICCPR? Is there a better alternative to prohibit speech in Article 28(2) of Electronic law while still respecting freedom of expression?

Part I will examine whether Article 28(2) of Electronic Law complies with the freedom of expression as recognized by the 1945 Constitution and ICCPR. Then, in Part II, the authors will endeavor to provide a solution to the current concerns of the alleged suppression of freedom of speech in Indonesia.

It is concluded that while Article 28(2) of Electronic Law formulation is justifiable under the 1945 Constitution, its implementation by courts has caused legitimate concerns. The concerns of the implementation are due to the lack of guidelines and objective criteria to determine punishable offensive or hateful speech. Therefore, the author relies on international law and proposes adopting the Rabat Action Plan containing assessment criteria to the Indonesian legal framework to interpret punishable hateful and offensive speech better.

Some research has been conducted to identify the issue. For example, in assessing the Indonesian regulatory regime, an assessment has been conducted by Giovanni Christy[6]. It was found that in handling digital hate speech, Indonesian laws and regulations are appropriate, and the issue rather lies in the education of society. While this research supports the finding that education is paramount in combatting hate speech, it will argue that Indonesian regulation has not appropriately address hate speech due to a lack of guiding instrument.

In other research[7], Devita Putri has elaborated that hate speech regulation in Indonesia is problematic due to its broad scope of application, and Rabat Action Plan can become an instrument to avoid multiple interpretations of Article 28(2) of Electronic Law. This research supports such findings; however, this research will further define the addressed problem by examining recent court trends in interpreting Article 28(2) of Electronic Law and further realize the use of the Rabat Action Plan by examining its importance and applicability in international law and method of implementation within Indonesian legal framework.

2. METHODOLOGY

The methodology used will be juridical normative. Two types of legal sources will be utilized. The first is Indonesian primary legal sources (i.e., binding instruments), such as the 1945 Constitution and other statutory instruments (e.g., Law, Government Regulation, Presidential Regulation, and others). To further understand the primary source of law, the secondary legal sources (i.e., non-binding legal instruments) such as court decisions and doctrines will be taken into account.

It must be noted that while Indonesia is bound by international law, within the framework of Indonesian Constitutional Law, the highest law remains to be the 1945 Constitution[8]. Indonesia adopts a system that separates international law and national law[9].

International law will become part of international once it is adopted as a national instrument. In the case of relevant treaty in this research which is ICCPR, it has been adopted in a national instrument (e.g., Law Number 12 of 2005 on Ratification of ICCPR). Howeve, since Indonesian judiciary does not accept provisions in international law instruments as a basis for a case relating to public law[10], interpretation of ICCPR by the Indonesian court is inexistent. It must be noted that this does not change the fact normatively, once adopted ICCPR has a legally binding nature as a primary source of law in Indonesia, making it enforceable in the Indonesian court of law. Along with ICCPR, other sources of international generally recognized under Article 38(1) of International Court of Justice Statute[11] will be utilized.

3. DISCUSSIONS

3.1 Article 28(2) of Electronic Law and Freedom of Expression under 1945 Constitution

Under Indonesian legal framework, the highest law of the land is Indonesian 1945 Constitution. No law shall contravene the Indonesian 1945 Constitution provision. To determine the legality of Article 28(2) of Electronic Law, an examination must then be conducted pursuant to the Indonesian 1945 Constitution. To this regard, past decision of Indonesian Constitutional Court, as the authoritative interpreter of the 1945 Constitution, may shed a light on the legality of Article 28(2) of Electronic Law.

3.1.1 Revisiting Indonesian Constitutional Court Decision Number 76/PUU-XV/2017

In 2017, a coalition of lawyers brought a petition to the Constitutional Court to judicially review and annul Article 28(2) of Electronic Law against various provisions in the 1945 Constitution, including Article 28(D) of the 1945 Constitution about freedom of expression[12]. The petition was unsuccessful.

While the Constitutional Court recognized that freedom of speech is enshrined in the 1945 Constitution, it focuses on the limitations for the exercise of such right. In examining whether Article 28(2) of Electronic Law is a justified limitation, the Constitutional Court only applied a strict reading of Article 28(J) of the 1945 Constitution and disregarded its previous decisions. The Constitutional Court states that "every expression must be delivered with moral and legal duty in regards to its truth," and Article 28(2) of Electronic Law ensures such duty to be fulfilled. Thus, it affirms that the enactment of Article 28(2) of Electronic Law is an acceptable limitation to freedom of expression based on moral justification, a type of justification recognized in the 1945 Constitution.

Another reasoning for the court's rejection is that the Constitutional Court believes Article 28(2) of Electronic Law is necessary to achieve social peace and ensure legal protection of groups considering Indonesia's diverse background. The Constitutional Court then affirms that the drafter was justified in enacting such provision and appropriately incorporated the phrase “other group identities” to protect as many groups as possible. However, The Constitutional Court seemed to limit the phrase “other group identities” by rejecting the petitioner’s argument where such a non-exhaustive term can also be interpreted to protect a group of corruptors and criminals. The Constitutional Court held that criminal law, in which Article 28(2) of Electronic Law is a part of, does not seek to protect "wicked actions," and such interpretation is unacceptable. The Constitutional Court then proceeded to elaborate that, on the contrary, it would be dangerous to annul or limit the group protection scope of Article 28(2) of Electronic Law since it would make create a legal vacuum.

The Constitutional Court seemed to understand that there are concerns for government abuse via Article 28(2) of Electronic Law. However, the Constitutional Court then pointed out that such concern is rooted in the implementation of Article 28(2) of Electronic Law, not its formulation. The Constitutional Court concluded that the formulation of Article 28(2) of Electronic Law is not incompatible with freedom of speech enshrined in Article 28(D) of the 1945 Constitution.

The author highlights the point made by the Constitutional Court. Article 28(2) of Electronic Law does provide group protection to a wide range of groups, including vulnerable groups such as people with disability, sexual minorities, or women. However, it does risk the danger of providing group protection to those who are deservedly prone to criticism, such as government officials, public figures, or political party members. Such risk, however is only a reality once the law is implemented in a case, an issue that is not within the authority of the Constitutional Court.

It must be noted that The Constitutional Court only has the authority to determine whether the impugned provision is contrary to the 1945 Constitution, and it does not have the authority to review the implementation of the law[13]. The implementation of the law is done by District Courts as the lowest courts,

and the decision will be reviewed by way of appeal to the High Court, and if such appeal fails, cassation to the Supreme Court becomes the final method of review.

Pursuant to the points brought up by the Constitutional Court, an examination on the implementation of Article 28(2) of Electronic Law will be done.

3.1.2 The Implementation of Article 28(2) of Electronic Law: Reviewing Supreme Court Decisions

The author will review the decisions by the Supreme Court involving Article 28(2) of Electronic Law to ensure the final and binding nature of the decision. In addition, the decision reviewed will be decisions issued in 2017 (i.e., the year the Indonesian EIU Index decreased significantly due to suppression of freedom of expression) until the date of the research.

In collecting the decisions, the author relies on the Supreme Court's online archive[14]. It must be noted that the Supreme Court online archive is not well-updated. Furthermore, requests for cases through offline means will involve significant administrative procedures and most likely be delayed during the covid-19 pandemic. Regardless, the cases identified may provide a description of the general practice of courts in interpreting Article 28(2) of Electronic Law.

There are 10 (ten) cases[15] on Article 28(2) of Electronic Law brought to the Supreme Court issued between 2017 and the date of this research that can be found in the Supreme Court online archive.

One of the striking findings is that all of the decisions collected are convictions. One decision was previously a not guilty verdict but then overturned by the Supreme Court.

In Supreme Court Decision 1940 K/PID.SUS/2018, the case involved a defendant who is a religious figure and an academician who expressed allegations towards members of a political party in Indonesia. The defendant alleged the members of the party to be communists because they are voted by the descendants of the now-disbanded Indonesian Communist Party. In the District Court and the High Court, the defendant was not found to have violated Article 28(2) of Electronic Law. The courts' considerations are; first, the defendant is deemed an academic with years of expertise in communism and communist development in Indonesia. Second, the court accepted the defendant's testimony, saying that his statement is supported by an interview of a public figure that stated that descendants of the disbanded Indonesian Communist Party elected the alleged political party. Third, considering the linguistic expert testimony proposed by the defense, the court accepted the argument that the defendant's expression constitute as a warning rather than purposed to cause hatred.

The Supreme Court then overruled such a decision. The Supreme Court held that the lower court did not appropriately implement the law. Despite the expertise of the defendant in communism in Indonesia and the source of his claim, the Supreme Court shortsightedly focuses on the unfavorable consequence of the expression by the defendant. The Supreme Court considers that allegations of being related to communists are deeply offensive considering Indonesian history with communism and its stigma. The posts will cause animosity and hatred to the member of the political party alleged to have communist involvement. Due to that ability to cause hatred, the Supreme Court found that the conduct fulfills the element of the crime under Article 28(2) of Electronic Law.

The black-letter approach of the Supreme Court is the approach of all the decisions reviewed in this writing. The court simply perceives the content to cause hatred or animosity or negative perception and relies on linguistic experts to determine the nature of the language used as offensive. Once it is established that the content can cause hatred and is offensive, it is then concluded that the action violated Article 28(2) of Electronic Law. The ability to cause hatred and the offensive nature of the speech becomes the determining factor for the act to be punishable by law.

This approach may result in several concerns. First, hatred and offensive nature are subjective, meaning that any party can respond to any content with hatred and become offended. Second, the problem is exacerbated by the lack of objective criteria and systematic methods to assess hatred and offensiveness.

In addition, since Article 28(2) of Electronic Law protects groups, if enough group members feel offended, it would then justify punishment. However, this would easily be abused by simply gathering individuals with the same identity (e.g., supporters of a political candidate[16]–[18]) and claim that the speech has offended them as part of a group). This situation is worsened because, as established above, the groups protected by Article 28(2) of Electronic Law are non-exhaustive and limited very implicitly and narrowly by the Constitutional Court.

The second issue, while offensive speech may cause negative consequence ranging from discomfort to threat of individual or group safety, speeches that are considered offensive has been promoted and perceived to foster democracy. For example, offensive materials such as satirical social commentary[19], critical journalism[20], and provocative promotion for public health issues[21] has been deemed to be essential speech necessary in a democratic society.

Despite such problems, the approach itself is appropriate under Indonesian law, not because it has a firm basis, but precisely because there is a lack of clarity. That lack of clarity has forced the courts to subjectively assess the case since no objective criteria can be relied upon.

It must be noted that recently, the Minister of Communication and Information, The General Attorney, and Head of the Indonesian Police Force have issued a Joint Decision Letter on Guideline for the Implementation of Certain Provisions in Indonesian Electronic Law[22]. While the issuance of such an instrument is appreciated, it does little to clarify Article 28(2) of Electronic Law.

In the Joint Decision Letter, it is stated that in fulfilling the objective element of Article 28(2) of Electronic Law, the “motive to incite must be proven," and it is indicated by “content that encourage, influence, mobilize, incite, cause conflict triggering hatred and/or hostility." Another part of the Joint Decision states that “delivering dissenting or unfavorable opinion shall not be prohibited unless it can be proven that it is done to encourage, influence, mobilize, incite, cause conflict triggering hatred and/or hostility.”

The Joint Decision Letter does not address the issue of the subjectivity of hatred and offensive. On the contrary, it justifies the court approach that once hatred is identified (and usually it is automatically identified once the speech is determined as offensive), it can be punished by Article 28(2) of Electronic Law. Therefore, a further guide should be introduced to understand what type of hatred and offensiveness should be subject to Article 28(2) of Electronic Law.

Considering that two of the highest courts in Indonesia, the Supreme Court and the Constitutional Court has not provided a solution to the issue, the author will resort to a regime of law that is binding in Indonesia, yet often disregarded: International Law.

3.2 Addressing Concerns on the Implementation of Article 28(2) of Electronic Law and International Law

3.2.1 International Laws and Hate Speech

Treaties being the primary source of international law provides a starting point to provisions relating to speech causing hatred. Two treaties explicitly refer to that type of speech, namely the International Convention on the Elimination of Racial Discrimination (“CERD") and ICCPR. Indonesia is a state party to both CERD (through Law Number 29 of 1999 on the Ratification of CERD) and ICCPR.

In Article 4 of CERD, states are required to adopt measures to punish “dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as act of violence or incitement to such acts against any race or group of persons of another color or ethnic origin." In ICCPR, an explicit mandate is enshrined in Article 20 require states to prohibit "advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence." A more general reference of hate speech can be found in the conjunctive reading of Article 19 on freedom of expression and Article 26 on non-discrimination, where state parties must adopt measures to protect individuals from “discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," including discrimination incited by speech. In ensuring no discrimination is incited through speech, the state must limit freedom of expression. In limiting freedom of expression, states must establish limitations prescribed by law and necessary and done to respect the rights or reputation of others or the protection of national security, public order, or public health and morals.

There are three main differences between prohibited speech in CERD and ICCPR[23]. First, CERD does not require the intention of incitement to be established and the content promoting racial superiority to determine conduct as punishable by law. Second, CERD bans certain statements not constituting as incitement. Third, CERD bans positive statements of superiority (e.g., the positive nature of culture compared to others).

It is observed that, generally, CERD focuses on the nature of the expression made while ICCPR focuses on whether the action may incite specific actions threatening the realization of the rights of others. However, despite such differences, there is no negation of obligation. Thus, a state is required to

adopt a more protective measure since by adhering to ICCPR, a state will most likely be in compliance with CERD while the contrary may not be true. To this end, prioritization of compliance will be given to ICCPR to ensure a better scope of protection.

The provision of the ICCPR provides a general obligation to prohibit speech inciting specific actions; however, it does not provide detailed guidance on technical determination on how to identify the prohibited actions. Cognizance of such issue, the Office of the High Commissioner for Human Rights ("OHCHR"), as the initiator of ICCPR, has involved internationally recognized experts to propose a tool kit to determine prohibited expression under ICCPR better. From such effort, the Rabat Plan of Action is formulated.

3.2.2 The Rabat Action Plan: A More Objective Determination for Hate Speech

Rabat Plan Action represents a progressive interpretation of international law and standards, accepted state practice, and general principles of law[24]. Under Article 38(1) of the International Court of Justice Statute, which contains the generally acknowledged sources of international law, teachings of the most highly qualified publicist can be utilized as a subsidiary means to "determine conventional or customary rule or of a general principle of law."[25][26] To such an end, a reasonable basis to propose adopting the Rabat Action Plan is established.

For its content, Rabat Action Plan firstly proposes the typology of speech based on severity which consists of speech that must be prohibited, speech that can be prohibited, and hateful speech that is lawful[27]. Speech that must be prohibited refers to the explicit obligation towards all states, such as the prohibition of incitement to genocide which is customary international law[28], while the remaining speech must be further determined within specific parameters. In the Rabat Action Plan, it is acknowledged that there is a lack of resources for the judiciary in various states to determine speech that can be considered a punishable offense. To that end, Rabat Action Plan contains a six-part threshold to assist the judiciary. The six-part threshold consists of the context of expression, speaker, intent, the content of expression, and extent of speech, and the likelihood of imminence.

A concise summary of each context can be found in the Annual Report of the United Nations High Commissioner for Human Rights[24] as the following:

(a) Context: Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility, or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;

(b) Speaker: The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed;

(c) Intent: Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offense under Article 20 of the Covenant, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience;

(d) Content and Form: The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;

(e) The extent of the speech act: Extent includes such elements as the reach of the speech act, its public nature, its magnitude, and the size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example, by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work)

is circulated in a restricted environment or widely accessible to the general public;

(f) The likelihood, including imminence: Incitement, by definition, is an inchoate crime. Thus, the action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.

Implementing the six-part threshold may aid the judiciary, address the concern of subjectivity, and filter offensiveness that may infringe the right of others. The criteria do not dictate what constitutes hate speech *per se* but instead allow a more objective and systematic analysis of the prohibited speech under Article 28(2) of Electronic Law.

To ensure its implementation, Rabat Action Plan should be incorporated in the Joint Decision Letter. While, in theory, ICCPR is applicable in Indonesia, and Rabat Action Plan can be a persuasive basis for interpretation of binding law ICCPR, international law may not be a basis to bring a case in Indonesian court [10]. Therefore, while promoting the applicability of international law instruments can be done by educating members of the judiciary, a regulatory measure should also be done further to ensure the applicability of the Rabat Action Plan.

There may be concerns that if Rabat Action Plan is to be adopted, there may be speech that is offensive but not punishable by law. To address such concern, an examination will be made on the urgency to abandon criminal law to punish all offensive speech and provide non-legal alternatives.

3.2.3 Combating Hateful Speech: Pushing Non-Legal Measure

Law as a tool for social engineering can shape public behavior[29]–[31]. In relation to criminal law, criminal law can instill fear while also prescribing ideal behavior in society, such as through threats of punishment via criminal law. Criminal law is believed to should only be used for severe violation of ethics, considering that criminal law has heavier and harsher sanctions compared to other laws[32], [33]. Such use of coercive power must follow a set of rules themselves, especially in a democratic society, so that it would not be a tool to subjugate the masses in an authoritarian regime.

Education offers an alternative as it is a powerful tool to address social issues. The government can establish a program to educate internet users on the civil use of the Internet. This education can be done through including curricula in schools or periodical socialization by the relevant ministries. Campaigns can also be launched to develop an awareness of the ethical use of the Internet. Singapore may provide exciting insight with the establishment of its Media Literacy Council with its various programs, including producing, distributing, and reviewing specific modules on digital literacy (e.g., preventing cyber-bullying, awareness of digital footprint, and others) used in schools[34]. Indonesia has recently launched a national digital literacy program to be broadcasted in various places. While much effort is highly appreciated, a sustainable and comprehensive program should be endorsed to ensure a long-lasting effect of digital literacy.

Another method to be considered is to regulate and empower media companies to filter their content. Indonesia has required electronic service providers to regulate their content; however, there are no monitoring efforts to ensure its implementation. By putting in place mechanisms to hold social media companies accountable for their content regulation (such as by periodical reports on content regulation efforts), the government can share its burden in preventing hate speech with digital service providers while maintaining a supervisory power.

Government has significant power to put the above-proposed measures. However, one of the most relevant and applicable methods to combat hate speech is countering speech. If a hateful speech is identified, an individual may counter such speech by informing regarding the evil nature of such speech. This action supports education efforts by the government, and it also acts as a social sanction that may deter individuals from expressing hate speech.

4. CONCLUSION

Normatively, the formulation of Article 28(2) of Electronic Law is not in violation of the 1945 Constitution as held by the Constitutional Court. However, it was correctly pointed out that concerns on the declining democracy are in the implementation of such an article. Inexistence of guidelines for the judiciary to interpret Article 28(2) of Electronic Law has encouraged judges to take a subjectively and shallow approach causing a high rate of conviction. Such a method can risk abuse of law based on

subjective response and silence offensive yet productive and protected expressions.

International laws provide an excellent starting point to clarify the implementation of Article 28(2) of Electronic Law. ICCPR provides protection towards freedom of expression, and via Rabat Action Plan, a more detailed method in determining criminally punishable hateful or offensive speech can be proposed. While international law is applicable within Indonesian legal framework, in reality, international must be adopted into Indonesian legal instruments so the judiciary will notice its applicability. Joint Decision Letter by the government can take reference from Rabat Action Plan. By applying Rabat Action Plan, there may be speeches that are considered hateful or offensive that are not punishable. However, it is not necessarily a regression since criminal law as a powerful tool for governance should not be used in every instance, and alternative methods such as education and counter-speech are possible. It is hoped that by having more clarity on hate speech, society will be able to have public debates without fear of persecution while also cognizance towards the existing legal duty to exercise freedom of expression.

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