

Formulation of Criminal Provisions in the Information and Electronic Transaction Law in Overcoming Acts of Disseminating Information Which Result in Humiliation or Hatred

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ABSTRACT

National and state life should follow religious norms, moral norms, decency norms, and legal norms. In social life, especially where interaction between humans and expressing opinions is the right of everyone that cannot be limited by anyone. However, in its development, the rights of speech and expression also need to be limited in order to protect the rights of others to their honor and to protect public order from incitement. Indonesia as a state of law participates in protecting the right to honor by limiting speech that may cause people to lose their honor and also maintain public order. However, in a positive law, the legislators are still unable to formulate concrete criminal provisions against criminal acts of insult and hate speech, especially in Law Number 11 of 2008 concerning Information and Electronic Transactions as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions. With this, the legal objectives of certainty, justice, and legal benefits are not fully implemented. Therefore, the writing of this paper will focus on guidelines for handling and criminal provisions for criminal acts of insult and hate speech in Indonesia.

Keywords: *Insults, hate speech.*

1. INTRODUCTION

The Unitary State of the Republic of Indonesia has so many different tribes, languages, cultures and religions, it is very important for each of its people to uphold unity in diversity by respecting the beliefs and dignity of others. However, it is not uncommon for disintegration between groups and camps to occur due to the utterances of some irresponsible persons.

Indonesia is a constitutional state as stated in Article 1 paragraph (3) of the 1945 Constitution and freedom of expression and opinion has been regulated since the constitution of this country was formed. As stated in Article 28E paragraph (2) of the 1945 Constitution "Everyone has the right to freedom to believe in beliefs, express thoughts and attitudes according to his conscience", continued in Article 28E paragraph (3) of the 1945 Constitution "Everyone has the right to freedom of association, assembly, and express opinions", and Article 28 F of the 1945 Constitution "Everyone has the right to communicate and obtain information to develop his

personal and social environment, and has the right to seek, obtain, possess, store, process, and convey information by using all kinds of channels available. available." These articles are the actualization of the procurement of human rights in Indonesia. The same right to express thoughts freely at the same time is further regulated in Article 5 of Law Number 9 of 1998 concerning Freedom to Express Opinions in Public. A year after Law No. 9/1998 was enacted, the government ratified Law No. 39/1999 on Human Rights which protects everyone's right to communicate and obtain information using any media. Article 19 of the Universal Declaration of Human Rights supports the protection of freedom of expression which reads "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference, and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The problem of criminal acts of humiliation or defamation, and acts that cause hatred (hate speech) have often occurred in recent years. This incident is more frequent because of the availability of information media (social media) which is growing and easily accessible. As a

result of these technological developments, gradually, information technology has changed the behavior of people from global human civilization.

Social media users can upload their opinions in the form of videos, images, writings, or sounds freely from anywhere and anytime as long as there is an internet network. Often people use this opportunity to express their emotions by spreading fake news, bringing down other people, to spreading information that causes hatred or hostility towards a person or group of people.

Insults and hate speech themselves are prohibited acts that can be criminalized. The forms of classification of insults and hate speech are included in the Criminal Code (KUHP) such as insults, defamation, blasphemy, unpleasant acts, provocation, incitement, and spreading false news. Insults and hate speech often produce negative impacts on victims and/or society such as shame, social sanctions such as ridicule from the public, damage to one's reputation, threats to life, and riots, to social disintegration.

In Indonesia, there are several rules that regulate insults and hate speech such as the Criminal Code (KUHP), Circular Letter of the Chief of Police No: SE / 06 / X / 2015 and SE / 02 / 11 / 2021 (SE Kapolri), Law No. Law Number 11 of 2008 concerning Information and Electronic Transactions (UU ITE), Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions, Law Number 40 of 2008 concerning Elimination of Racial Discrimination and Ethnicity, and Joint Decree of the Minister of Communication and Information Technology of the Republic of Indonesia, the Attorney General of the Republic of Indonesia, and the Head of the State Police of the Republic of Indonesia Number 229 of 2021, Number 154 of 2021, Number KB/2/VI/2021 concerning Guidelines for the Implementation of Certain Articles in the Law Law Number 11 of 2008 concerning Information and Electronic Transactions as Amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 20 08 concerning Information and Electronic Transactions (SKB).

The formulation of norms governing insults and hate speech is rooted in the Criminal Code. However, nowadays, these acts of insults and hate speech are regulated more specifically in their implementation in the world of information media in the ITE Law as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions. From the ITE Law, researchers are interested in examining more deeply Article 27 paragraph (3) and Article 28 paragraph (2), each of which reads, "Everyone intentionally and without rights distributes and/or transmits and/or makes information accessible Electronic and/or Electronic Documents containing insults and/or defamation" and "Everyone intentionally and without rights disseminates information aimed at causing hatred or hostility to certain individuals and/or groups of people

based on ethnicity, religion, race and intergroup (SARA)" which is considered too broad in interpretation so that it takes many victims who are criminalized for their opinions and criticisms.

Criminal acts of humiliation and expressions of hatred through information technology are increasing and are mostly handled by the Indonesian police. Often complaints against this matter are based on Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law. In 2017 there were 1,451 reports, while in 2018 there were 338 reports. In 2020 alone, there have been 324 cases.) The number of criminal cases of insults and hate speech is because the ITE Law and its revisions do not provide clear formulations regarding the subjective and objective elements of insults and hate speech.

Based on the division of the offense, criminal acts of insult and hate speech are formal offenses, because according to their understanding, formal offenses are acts against the law that can be criminalized because an act has fulfilled the elements outlined in the formulation of the article without having to pay attention to the consequences of the act. Thus, there is no concrete measure of the consequences (formulation with material offenses) from this hate speech act that can cause doubt or ambiguity in applying the formal law. In addition, the lack of clarity in the formulation of the definition of definition and also the consequences that exist in the regulations governing criminal acts of insult and hate speech, especially in the ITE Law, will result in bias in practice in society and law enforcement so that legal uncertainty arises.

In the theory of criminal law policy, it is stated that the formulation stage of a statutory regulation is the most strategic stage in the overall policy to be able to implement and operationalize criminal sanctions and sentencing. This stage begins with formulating rules regarding prohibited and required actions, so that they become guidelines in determining the policy line for the next stage, namely the stage of implementing the crime by the judiciary, and the stage of implementing the crime by the criminal implementing apparatus.) Simply put, in a legal norm that can be interpreted broadly there must be guidelines in order to realize a clear application of the law.

Human rights stipulate that freedom of expression in public is an absolute thing that should not be limited, but in its implementation it must still pay attention to the rights of others. That these things have also been regulated in the 1945 Constitution, but the fulfillment of unclear limits in the ITE Law has resulted in the implementation of the enforcement of hate speech crimes to be problematic because there are no guidelines for the implementation of hate speech itself.

Based on the explanation above, an effort is needed to tackle criminal acts of insult and hate speech to find out the right criminal law policy in overcoming insults and hate

speech in the world of information technology and how to formulate policies. Thus, the formulation of the crime can be clear, firm, and there is no legal ambiguity in practice and causes social friction in society.

1.1. Related Work

Based on the description above, the title of the research entitled: "Formulation of Criminal Provisions in the Information and Electronic Transaction Law in Overcoming Acts of Disseminating Information Which Result in Humiliation or Hatred"

1.1.1. Problems of Handling Guidelines and Provisions Against Insults and Hate Speech

The 1945 Constitution clearly guarantees freedom of expression for everyone in Article 28E paragraph (2) which reads "everyone has the right to freedom to believe in beliefs, to express thoughts and attitudes, according to his conscience" which is then emphasized in paragraph (3) as follows: people have the right to freedom of association, assembly and expression". In general, the above provisions do not limit freedom of expression at all, in fact the 1945 Constitution actually fully supports freedom of speech/liberty of expression (freedom of opinion and expression). However, in its development, Indonesia through the codification of criminal law has provided limitations on freedom of opinion and expression.

As stated in the explanation of Law Number 39 of 1999 concerning Human Rights, humans are endowed with reason and conscience from God Almighty so that humans have the freedom to decide their own behavior or actions. So to compensate for this freedom, humans are given the ability to account for all their actions. In line with the view above, Pancasila contains the thought that humans were created by God by bearing several aspects, namely individuality and sociality aspects. So with that, everyone's freedom is limited by the human rights of others. In another sense, everyone is obliged to recognize and respect the human rights of others. Thus, in Article 23 paragraph (2) of Law Number 39 of 1999 concerning Human Rights states "everyone is free to have, issue and disseminate opinions according to his conscience, orally or in writing through print media and electronic print media with due regard to religious values, decency, order, public interest, and the integrity of the nation". This provision is the legality of limiting the rights of human expression in the life of the state.

Positive law in Indonesia not only provides freedom of expression even though it is limited, but it also protects one's right to honor and reputation through constitutional

protection. As stated in Article 28G paragraph (1) of the 1945 Constitution, "everyone has the right to personal protection, family, honor, dignity, and property under his control. Law Number 39 of 1999 concerning Human Rights also confirms this in Article 29 paragraph (1) which reads "Everyone has the right to protection of his personal, family, honor, dignity, and property rights". It is the burden and responsibility of the state (state responsibility) to maintain and guarantee these rights.

The statement above shows that there is a relationship between the right to freedom of opinion and expression with the right to honor. Both must be guaranteed and protected by the state. In the context of this obligation, the state can carry out derogation or reduction of both rights. However, the state cannot arbitrarily act and carry out activities to destroy recognized rights and freedoms or to limit them more than those stipulated in the above provisions. Simply put, although these rights can be limited, the restrictions must be based on statements through law in order to protect public order, public health and morals, social and public safety, to protect one's reputation and the rights of others. Some tangible and concrete forms of protection for honor are through the Criminal Code, Law Number 40 of 2008 concerning the Elimination of Racial and Ethnic Discrimination, to the ITE Law. These rules criminalize any attack or act that robs or damages the integrity of everyone and threatens public order and security such as defamation, insult, blasphemy and slander, and hate speech. However, as has been the case for many years, the provisions in Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law which are supposed to protect people's honor are instead aimed at criminalizing an utterance that should not be criticized due to the unclear formulation of the provision. The author makes this research by raising the issue of the unclear formulation in Article 27 paragraph (3) and Article 28 paragraph (2) of Law 11 of 2008 concerning Information and Electronic Transactions as amended by Law Number 19 of 2016 concerning Amendments to the Law Number 11 of 2008 concerning Information and Electronic Transactions which reads "Every person who knowingly and without rights distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that has insulting and/or defamatory content" and "Every person intentionally and without rights disseminates information aimed at causing feelings of hatred or hostility towards certain individuals and/or community groups based on ethnicity, religion, race, and inter-group (SARA)". The room that discusses the content of an insult or hate speech is still very wide so it is vulnerable for someone to be considered to have stated a word or writing that has an element of insult or hate speech. In this chapter the author will discuss each of the problems contained in the two articles of the ITE Law which regulates insults and hate speech.

1.1.2. Affirmation of the Definition of Defamation Offenses and Hate Speech in Indonesia in the Future

As according to the theory of criminal law policy put forward by Marc Ancel which states that penal policy is "a science as well as an art that has a practical purpose in formulating laws, implementing laws and implementing court decisions". So criminal law policy is not just a procedure or technique for the formation of laws and regulations in a juridical-normative and systemic-dogmatic way, but also a juridical, sociological, historical or other social science approach, including criminology.

Policy efforts to make good criminal regulations are essentially inseparable from the purpose of crime prevention. Thus, criminal law policy is closely related to crime prevention policies through criminal law so that efforts are needed to realize good regulations in accordance with current and future situations and conditions as well as state policies through legislators to formulate regulations desired by the community to achieve what you aspire to. Simply put, a rule that is considered not to meet the ideals of the community must be reformulated through criminal law policies in order to achieve the ideals desired by the state and society. So with that, the ITE Law still needs to be revised and reformulated intensively through juridical, sociological, historical or criminological approaches and considers 3 legal objectives, namely justice, certainty, and expediency.

UU ITE Seen From Legal Purpose

Gustav Radbruch argues that there must be harmonization between the three legal objectives, namely justice, certainty, and legal benefits whose orientation leads to the creation of harmonization in the implementation of the law. So with that, it is not possible to link the ITE Law only in terms of legal certainty, so the author here will also discuss in terms of justice and legal benefits.

With regard to the theory of legal objectives put forward by Gustav Radbruch, it can be seen that the ITE Law and several judges' decisions using indictments under Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law are considered to have missed the three aspects of the legal objectives.

Justice is an aspect that has a very broad meaning. According to Plato through his legal philosophical theory which states that justice must be rooted in virtue, so that wisdom is needed to know the basis of morality. Justice also includes normative and constitutive properties for the existence and continuity of law. so that justice must be the basis and root of the creation of a dignified positive law. Without an element of justice in the application of the law through the formation of a statutory regulation, the law will become a means for those who have great authority to control minorities.

The ITE Law has a lot of ambiguity in its writing, so that in its improper application it ends up taking quite a lot of victims due to being handed an unfair sentence. For example, in Article 27 paragraph (3) of the ITE Law, acts that are classified as a form of insult and defamation referred to in this article are not contained in a clear and detailed manner so that the application of this article is considered inappropriate and seems "at will".

Indonesia is a legal country that adheres to a civil law system, so legal certainty is the main thing needed because written law is an important source of law in civil law countries. Legal certainty is in line with the implementation of a life order whose implementation is clear, orderly, consistent and consistent so that it is not swayed by subjective conditions in society. Meanwhile, this is quite the opposite in the ITE Law. Legal certainty is not only essential for judges in examining and convicting a criminal act, or for law enforcement officers such as the police in determining suspects, but also for people who are bound and obliged to obey the applicable regulations, so that there is no doubt for the public in interpreting a norm in legislation.

Judging from the usefulness of the law proposed by Jeremy Bentham that the law must be able to provide the greatest benefit to as many people as possible (the greatest happiness for the greatest number). If viewed from this side, the benefit of the law is very closely related causally to happiness. Broadly speaking, in principle, the purpose of law is only to create benefits for the community.

When viewed from the theory of criminal law policy and the three aspects of legal objectives, the ITE Law is still unable to provide justice, certainty, or legal benefits. this is evident from the many protests and attempts to examine the ITE Law in the Constitutional Court due to the "rubber" article which often takes its toll. The legislators should have a deeper review of the concept of formation and writing in the ITE Law so that it has a more concrete definition so that there is no gap to misuse the articles in the ITE Law. As explained above that the SE Kapolri, ST Polri and SKB cannot solve the problem of multiple interpretations in Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law, efforts to improve and affirm the boundaries of these articles should be carried out in the Law. - Laws that have a high position in the hierarchy of laws and regulations so that the public and law enforcement officers can be guided by the Law.

1.2. Our Contribution

The purpose of this research is to address issues that have been outlined in the background and the formulation of the problem analyzing and knowing the mechanisms and forms of community participation in the preparation of environmental impact analysis (AMDAL) and to analyzing

and knowing the comparison of the arrangements for community participation in the preparation of the AMDAL based on Law Number 32 of 2009 concerning Environmental Protection and Management and Law Number 11 of 2020 concerning Job Creation through Regulation of the State Minister for the Environment of the Republic of Indonesia Number 17 of 2012 concerning Guidelines for Community Involvement in the Process of Environmental Impact Analysis and Environmental Permits and Government Regulation Number 22 of 2021 concerning Implementation of Environmental Protection and Management and in the Perspective of Legal Certainty.

1.3. Paper Structure

The structure of this paper uses research methods to collect data, manage data, and conclude from the data according to the problem to be studied by the author. This legal research studies certain legal phenomena, either one or more symptoms. This legal research is carried out with a series of scientific activities based on certain methods, systematics, and thoughts. The research method used by the author in the study is as follows: Types of Research. The type of research in this legal research is normative research. The definition of normative research or doctrinal law is research that provides a systematic explanation of the rules governing certain categories of law, as well as an analysis of the relationship between regulations that describes areas of difficulty and can predict future developments. And also Legal Sources and Materials In this writing, the author uses legal materials obtained from the results of a study of the law or literature review or library materials related to a problem or material from research which is often called legal material.

2. BACKGROUND

2.1. Elaboration of the Crime of Humiliation and Hate Speech and its Handling in Indonesia

Legally, the term hate speech crime has never been used to classify acts of defamation or humiliation, when viewed in the Criminal Code, defamation is included in the category of crimes against public order in Chapter V of the Second Book, while insults are included in the category of crimes against public order. Chapter XVI Second Book. If viewed from the side of the target or object of delicti, which is the intent or purpose of the article, namely to protect honor, the term criminal act of insulting honor becomes more appropriate. From the beginning, the intent and purpose of the legislator was to protect honor (eer) and good name

(geode naam). Even R. Soesilo himself explicitly stated that hate speech is an offense regulated in Articles 154 to 157 of the Criminal Code whose purpose is to maintain peace and public order among the population so that there is no incitement to disrupt and divide society.

Experts still have their own opinions about the meaning and definition of honor and good name, but agree that honor and good name are the rights of everyone.)

Regarding the handling of cases of alleged violations of Law no. 11 of 2008 concerning Information and Electronic Transactions as amended by Law no. 19 of 2016, on February 19, 2021, the National Police Chief issued Circular No. SE/2/11/2021 concerning Ethical Cultural Awareness to Realize a Clean, Healthy, and Productive Indonesian Digital Space. This SE was issued in response to President Joko Widodo's request that the Police be more selective and wise in handling cases of alleged violations of hate speech.

In the Circular, the Chief of Police made several points:

Keeping up with the development of the use of digital space that continues to develop.

Understanding the ethical culture that occurs in the digital space by taking an inventory of various problems and impacts that occur in society.

Monitoring, educating, giving warnings, and preventing the public from potential cybercrimes.

In receiving reports from the public, investigators must be able to clearly distinguish between criticism, input, hoaxes and defamation that can be punished.

Since receiving the report, the investigator must communicate with the parties, especially the victim (not represented) and facilitate by giving the widest possible space to the disputing parties to mediate.

Investigators conduct comprehensive studies and case titles on cases handled by involving Bada elements and make collegial collective decisions based on available facts and data.

Investigators have the principle of criminal law being the last resort in law enforcement (ultimum remedium) and promoting restorative justice in resolving cases.

Against parties and/or victims who will take peaceful steps to become part of the investigator's priority for restorative justice.

Against victims who still want their case to be brought to court, but the suspect has realized and apologized, then no detention will be carried out. Before the file is submitted to the Public Prosecutor to be given space for mediation again. Investigators should coordinate with the Public Prosecutor's Office in its implementation, including providing advice on the implementation of mediation at the prosecution level.

In order to carry out gradual supervision of every step of the investigation taken. Then give rewards and punishments for the assessment of the leadership on an ongoing basis.

According to the Circular Letter of the National Police Chief No: SE/X/06/2015 what is meant by hate speech and what is included in hate speech are insults, defamation, blasphemy, unpleasant actions, provoking, inciting, and spreading false news in public. as well as through social media.

2.2. Classification of Offenses in Criminal Acts of Humiliation and Hate Speech

According to the division of delicacies, acts of insult and utterance are included in formal delicacies according to R. Soesilo and delicacies of complaints according to Article 45 paragraph (5) of Law Number 19 of 2016. That is, delicacies are considered to have been committed and can be punished if the actions are prohibited and threatened with sanctions. or punishment by legislation has been completed without regard to the impact or consequences resulting from the action. In addition, acts of contempt are included in the delicacy of complaints, which means that any crime committed can only be prosecuted in court when the complaint is received from those who have the right to complain. Delik complaints are also divided into 2 (two), namely delik absolute complaints and delik relative complaints. According to Pompe, the delicacy of an absolute complaint is the delicacy that, in essence, the existence of a complaint is a condition for the perpetrator to be prosecuted, such as criminal acts of contempt, defamation, moral crimes, and crimes of disclosure. While relative delinquency is a crime committed which is not a complaint crime, but due to certain things it can be classified as a complaint delinquency. Delik this relative complaint is a condition to be able to prosecute the perpetrator when between the perpetrator and the victim or the victim has a special relationship. An example is theft in the family. If seen from the two divisions of delicacy of complaints, then the act of defamation or insult goes into the delicacy of absolute complaints.)

Referring to the above statement, the act of insult and hate speech becomes an act that cannot be separated from the subjective perception of a person or a group of people whether the victim or law enforcement officers, where the crime of insult and hate speech can be easily punished without seeing the real consequences of the action. This can lead to confusion if there are no special guidelines or special rules that can facilitate the implementation guidelines of applicable laws and regulations, while if really seen from the purpose (*mens rea*) of the perpetrators who want to bring down the dignity of a person, it is worth noting also that the intent of the perpetrator should be that there is a real consequence to the victim where the stigma of society towards the victim becomes bad and the victim is expected to receive social sanctions from society. However, an assessment of the consequences cannot be fully

implemented if the crime of hate speech is categorized as a formal crime.

Historically, hate speech acts have not always been included in the category of formal offenses, initially hate speech acts were classified as material offenses, which means that the consequences of the act must be proven first so that they can eventually be punished. Simultaneously with R. Soesilo's statement in his comments on the offenses of spreading hatred contained in Article 154 to Article 157 of the Criminal Code which states that "This article was taken by the Dutch government from Article 124a of the British Indian Code Penal in 1915. At first the formulation was material, it means that it must be proven first that the spread of hatred and so on has really aroused such feelings among the people. So in the past what was prohibited was the result of the statement, but such a formula is very difficult to apply because it is difficult to prove the effect of the statement, then it is changed into a formal formulation".) as the main rule (*genus offense*) against all acts of spreading hatred, Articles 154 to 157 become the upstream of all successor rules (*species offenses*) related to the spread of hatred. Therefore, it can be concluded that the criminal provisions for the act of disseminating electronic information containing elements of defamation and/or insult as regulated in Article 27 paragraph (3) of the ITE Law are acts that are included in a formal offense.

3. CONCLUSION

In this section, the author will briefly explain the answers to the problems contained in Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law which the author raises as a problem in the formulation of this writing problem. Provisions regarding insults and hate speech contained in Law Number 11 of 2008 concerning Electronic Information and Transactions as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions still valid today is not in accordance with the theory of legal objectives and criminal law policies as stated in Chapter II of this research. The provisions governing criminal acts of insult and hate speech still do not have clear and concrete rules, the interpretation of the elements in the provisions is still too broad to be able to obtain definite laws, objective law enforcement and not selective. The ITE Law should also be better formulated to provide guidance not only to the public, but to the police, prosecutors, and courts that apply the law and also to the organizers or implementers of court decisions.

With the issuance of a Joint Decree of the Minister of Communication and Informatics of the Republic of Indonesia, the Attorney General of the Republic of Indonesia, and the Head of the State Police of the Republic

of Indonesia concerning Guidelines for the Implementation of Certain Articles in Law Number 11 of 2008 concerning Information and Electronic Transactions as Amended by Law Number 19 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions (SKB) provides little hope that law enforcement in Indonesia, especially against criminal acts of insult and hate speech, will experience good changes. However, the guidelines in the SKB cannot be applied in general, considering the position of the SKB which is quite far from the Law to be able to explain the contents of a Law. In addition, in the explanation of Article 28 paragraph (2) of the ITE Law, it is still not possible to determine the main problems contained in the element of "SARA" which there is still no specific understanding regarding who is actually meant in the context of "intergroup". In the future, legislators should prepare revisions to the ITE Law which are more directed to the improvement of articles with multiple interpretations, so that they can serve as guidelines for the wider community and law enforcement.

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