Legal Regulation of Hate Speech Offences with a Restorative Justice Approach

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Abstract. The primary objective of this study is to examine the legal framework governing hate speech, with particular emphasis on its conformity to the existing legal definition. Hate speech include verbal utterances, actions, written materials, or public displays that are considered impermissible due to their capacity to incite social disharmony, physical aggressiveness, and prejudiced convictions among both the individuals engaging in and being subjected to such behaviour. The implementation of hate speech legislation is inherently intertwined with both the legal framework and the prevailing legal norms within a given society. The primary aim of this study is to construct legislative frameworks pertaining to hate speech offences and delineate various law enforcement processes. The present study is categorised as qualitative normative research, more especially situated within the doctrinal framework. This study employs many methodological approaches, including conceptual analysis, historical investigation, legal examination, comparative analysis, and case study analysis. The results of the research show that Article 28 paragraph two states that "anyone who intentionally and without right incites, invites, or influences others to distribute and/or transmit information aimed at stirring up hatred or hostility towards individuals and/or certain groups based on ethnicity, religion, nationality, race, or gender through Electronic Information, Electronic Information, and/or Electronic Documents shall be punished." Based on this formulation, the prohibited act differs from the essence of Article 28 paragraph two, where the prohibited act is actually "causing others to distribute and/or transmit information" as a consequential element (material offense). The expansion of the meaning of intergroup in the Constitutional Court Decision Number 76/PUU-XV/2017 concerning the substantive review of Article 28 paragraph two and Article 45 paragraph two is considered contradictory to the 1945 Constitution. The term intergroup not only includes ethnicity, religion, and race but also encompasses other entities not represented by ethnicity, religion, and race, which are then categorized as intergroups. Through systematic interpretation, the term "group" in Article 156 of the Criminal Code can be used to determine the criteria for the concept of "intergroup" in Article 28 paragraph two. However, the qualification of what entities fall into the category of groups or intergroups is not further explained. Based on this formulation, it can be said that this article covers acts outside the electronic realm since the prohibited act is "causing others to distribute and/or transmit information," whereas it should be contextual-

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ized with the Information and Electronic Transactions Act (ITE) where the prohibited act should be "speech" or "proselytization" through electronic means. Furthermore, clarification is needed regarding "community groups," where community groups refer to other inherent and unchangeable identities, not intended to insult individuals, legal entities, state institutions, public authorities, or positions.

Keywords: Legal Regulation, Hate Speech, Restorative Justice.

1 Background of the Problem

The phenomena of technical breakthroughs is accompanied by both adverse consequences and potential avenues for engaging in cyber criminal activities. Vodymyr Golubev is a notable individual. This phenomenon is commonly identified as a novel manifestation of anti-social behaviour. Alternative terms for it encompass cybercrime, cyberspace, virtual space offence, an emerging facet of technologically-driven criminality, a novel aspect of transnational criminality, and a contemporary manifestation of cyber misconduct. White collar crime refers to non-violent offences committed by individuals in professional or business settings, typically including deceit, fraud, or other illegal activities for financial gain.

The extensive openness of information and communication within a temporal space, known as cyberspace, can have negative effects and result in legal issues.[2] The types of threats posed by the sophistication of cyber technology include cyber warfare, terrorism, pornography, illegal trade, and other forms of threats.[3] Cybercrime is increasing, and its modes of operation are becoming increasingly diverse.[4] Crimes that were previously conventional and direct, such as threats, theft, defamation, pornography, gambling, fraud, and terrorist activities.

One of the most prevalent cybercrimes in the virtual world is hate speech. The aforementioned behaviour gives rise to the incitement of conflict and disruptions, as well as the cultivation of partial perspectives or preconceived notions towards particular collectives. It is commonly regarded as a form of intimidation that frequently causes distress among individuals and communities due to factors such as their ethnic background, religious beliefs, racial identity, and socioeconomic standing (referred to as SARA). With the increasing number of internet users (netizens), the intentional dissemination of posts containing images, photos, videos, audio, and words that cause insult, defamation, blasphemy, and so on has become more common. Many people feel harmed as a result of the prevailing hate speech, which is currently on the rise, is increasingly being pursued through legal channels.

The scholarly article entitled "Rabat Plan of Action" published in 2012, authored by the Office of the High Commissioner for Human Rights (OHCHR), provides a framework for distinguishing between speech protected by the right to freedom of expression and hate speech, particularly in the context of social media platforms. The Office of the United Nations High Commissioner for Human Rights (OHCHR) presents a framework consisting of three distinct classifications for hate speech. These

classifications encompass expressions that warrant criminal prosecution, expressions that may be subject to administrative penalties or civil litigation, and expressions that cannot be legally sanctioned but can be addressed through alternative means, such as the implementation of government policies.

Expressions that warrant criminal prosecution encompass acts of inciting genocide, inciting violence, and inciting hatred based on specific international provisions. The user's text contains no information that should be rewritten academically. According to Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) "any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence should be prohibited by law." Furthermore, it should be noted that Article four of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) establishes specific provisions stating that "every State Party shall prohibit all forms of propaganda that promote racial hatred and discrimination in any form, with the aim of justifying or encouraging racial hatred."

Germany implemented law enforcement on social media platforms on January 1, 2018, with a law known as NetzDG (Network Enforcement Law). The introduction of this legislation specifically addresses the handling of negative content, such as hate speech. One of its provisions requires social media service/platform companies to remove negative content within 24 hours. There are even fines imposed on social media companies found to have allowed the dissemination of hate speech.[8] Australia itself has had guidelines regarding hate speech since 2001, under the Racial and Religious Tolerance Act 2001 Act Number 47/2001 of the State of Victoria, Australia.

As described earlier, the practices of countries regarding hate speech regulations highlight the importance of recognizing hate speech as a serious threat that can undermine national unity and cohesion. Referring to Article 28E (3) of the 1945 Constitution of Indonesia, which states: "Every person has the right to freedom of association, assembly, and expression."

Article 28F of the 1945 Constitution is formulated as follows: "Everyone has the right to communicate and obtain information to develop their personal and social environment, and has the right to seek, obtain, possess, store, process and convey information using all available channels."

The safeguarding of the freedom of expression on social media is considered a fundamental human right, protected by constitutional laws. However, it is also necessary to look at Article 28J paragraph two of the 1945 Constitution, because the article states that: "In exercising his/her rights and freedoms, every person shall be subject to restrictions stipulated by Law with the sole purpose of ensuring recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with moral considerations, religious values, security, and public order in a democratic society."

The aforementioned argument elucidates that individuals possess the entitlement to engage in communication and access information in order to foster their personal and societal milieu. Nevertheless, an other article elucidates that there exist boundaries

within which individuals uphold the freedom of others, particularly with regard to the dignity and reputation of each individual. In order to prevent the infringement of individuals' rights in the realm of communication and expression, it is imperative that all individuals, whether by direct means or media platforms, refrain from engaging in such violations.

The Criminal Code (KUHP) has several articles known as hate speech articles (Haatzaai Artikelen), namely Article 154 on "whoever in public expresses feelings of hostility, hatred or contempt against the Government of Indonesia," Article 155 on the broadcasting of the criminal offense of Article 154, and Article 156 on "whoever in public expresses feelings of hostility, hatred or contempt against one or several groups of Indonesian people". These articles expressly prohibit statements that, among other things, include statements of feelings of hatred against the Government of Indonesia (Article 154 and Article 155) or one/some class of the Indonesian people (Article 156).

Article 154 and Article 155 of the Criminal Code have subsequently been decided as contrary to the 1945 Constitution of the Republic of Indonesia and therefore do not have binding legal force by the Constitutional Court Decision Number 6/PUU-V/2007. The basis of consideration of the Constitutional Court in its decision, namely: "That the provisions of Articles 154 and 155 of the Criminal Code, on the one hand, do not guarantee legal certainty, thus contradicting Article 28D Paragraph one of the 1945 Constitution, on the other hand, as a consequence, also disproportionately hinders the freedom to express thoughts and attitudes as well as freedom of expression, thus contradicting Articles 28 and 28E Paragraph two and Paragraph three of the 1945 Constitution."

The Constitutional Court considered that firstly Articles 154 and 155 of the Criminal Code do not guarantee legal certainty (contrary to Article 28D paragraph one of the 1945 Constitution), secondly they disproportionately hinder the freedom to express thoughts and attitudes as well as the freedom to express opinions (contrary to Articles 28 and 28E Paragraphs two and three of the 1945 Constitution). The Court has employed these factors to determine that Article 154 and Article 155 of the Criminal Code are in conflict with the provisions of the 1945 Constitution, thereby rendering them devoid of legally binding effect.

And related to hate speech specifically on social media, it has been regulated in regulations on information and electronic transactions, namely Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions (ITE Law). [17] Several articles in the ITE law are still controversial and considered unfair in their application in society, especially Article 28 paragraph two related to hatred, ethnicity, religion, race and intergroup (SARA). Article 28 paragraph two reads: "Every person intentionally and without the right to disseminate information aimed at creating a sense of hatred or hostility of individuals and/or certain community groups based on ethnicity, religion, race, and intergroup (SARA)."

The criminal provisions in Articles 27-29 of Law of the Republic of Indonesia Number 19 of 2016 Concerning the Amendment to Law Number 11 of 2008 Concern-

ing Electronic Information and Transactions (hereinafter referred to as the ITE Law), Article 28 paragraph two on the criminal offense of spreading hatred is in the 3rd position as an article that is often used after Article 27 paragraph three and 27 paragraph one of the ITE Law. Article 28 paragraph two jo. Article 45A paragraph two of the ITE Law specifically regulates the prohibition of expression in the form of dissemination of information related to Ethnicity, Religion, Race, and Intergroup (SARA).

The International Covenant on Civil and Political Rights (ICPR) mandates in Article 20 paragraph two that "the protection of hate speech on the basis of nationality, race or religion be carried out with due regard to permissible human rights restrictions, one of which is the restriction on freedom of expression and opinion." However, Article 28 paragraph two of the ITE Law does not fulfil the principles of human rights restrictions which must: "1. be regulated by law, 2. be in accordance with the purpose of the restriction in Article 19 paragraph 3 of KIHSP, and 3. the restriction must be necessary and proportional." [18] It is imperative to develop legislation that is universally comprehensible and capable of effectively governing individuals' conduct. The Sirakrusa Principles state that what is "necessary" must have a justification for the restriction that addresses a social need and achieves a legitimate aim, and is proportionate. [19]

The ruling rendered by the Constitutional Court has provided a comprehensive elucidation of the concept of hate speech. The term "intergroup" has been elaborated to embrace not just elements such as ethnicity, religion, and race, but also includes any entities that do not come within the scope of these aforementioned categories. The problem highlighted in the previous statement pertains to the absence of clear delineation on the definition of "all entities" and the precise individuals or organisations encompassed within this designation.

An example of a hate speech case that befell a homeland musician in 2017, Dhani Ahmad Prasetyo alias Ahmad Dhani uploaded to Twitter by saying "The one who blasphemed the religion of Ahok, who was tried by KH Ma'ruf Amin ADP". then sent a writing also through Watshapp uploading the sentence "Anyone who supports the blasphemer is a bastard who needs to be spit in his face-ADP". then sent another writing through Watshapp saying "The First Precept of Godhead, the blasphemer becomes the governor ... are you sane?"

Both the appellate panel of judges and the first level panel of judges have collectively agreed that the defendant has been legally and definitively established as being responsible for the commision of a criminal act. Finally, the panel of judges decided that the Defendant Dhani Ahmad Prasetyo alias Ahmad Dhani, had been proven legally and convincingly guilty of committing the criminal offence of "Intentionally and without rights, ordering to do so, disseminating information aimed at creating a sense of hatred and hostility of individuals and/or certain community groups based on ethnicity, religion, race, and intergroup (SARA)". As referred to in Article 28 paragraph two. Sentencing the Defendant Dhani Ahmad Prasetyo alias Ahmad Dhani, therefore with imprisonment for a year.

Likewise, the case that went viral was I Gede Aryastina Alias Jerinx, which originated from the posting of the IG account @jrxsid on 13 June 2020 which contained a post of the words "because I am proud to be a lackey of WHO, then threw more words @jrxsid: "disband IDI!.[22] Then on 15 June 2020 the IG account @jrxsid again posted the words "In 2018 there were 21 Indonesian doctors who died. This is only monitored by the media. Unfortunately there is a rotten conspiracy to dramatise the situation as if the Doctor died only this year so that the public is excessively afraid of CV19. Where do I know this? Please copy all the links in the photo, post them on your FB/IG, then see WHAT Happened! Still saying CV19 is not a conspiracy? Wake The Fuck Up Indonesia!."

Consideration of the Panel of Judges I Gede Aryastina Alias Jerinx was charged as regulated and threatened with punishment in Article 28 paragraph two Jo. Article 45A paragraph two of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions Jo. Article 64 paragraph one of the Criminal Code. Finally, in the court's decision, I Gede Aryastina alias Jerinx was proven legally and convincingly guilty of committing the crime of "intentionally and without the right to disseminate information aimed at creating a sense of hatred or hostility of certain groups of people based on intergroup" as charged in the First Alternative Indictment of the Public Prosecutor. The judge then sentenced the Defendant to ten months imprisonment, and a fine in the amount of Rp.10,000,000,- (ten million rupiah) with the provision that if the fine is not paid, it will be replaced by a month imprisonment.

The settlement or decision of the above case related to hate speech is different from that experienced by Hilmiadi alias Ucok, [25] in 2021 Ucok uploaded a video of about 13 seconds in the TikTok application which commented on Palestine using swear words. Even inciting a massacre of Palestinians, the West Nusa Tenggara Regional Police conducted a case title and decided to resolve the Hilmiadi alias Ucok hate speech case through restorative justice.

The second case that was resolved through restorative justice was Daniel with the initials DBS, [26] insulted and harassed the Prophet Muhammad through his Facebook account, namely Daniel Exering, then was charged with the article on the criminal act of hate speech that caused hatred based on SARA, to handle the case the police used Article 45A paragraph two Jo Article 28 paragraph two ITE, so he was named as a suspect. However, the settlement of the case was resolved in restorative justice by the Makassar Police Investigator.

The third case that was resolved through restorative justice occurred in Sibolga City, North Sumatra. This case began when RD (the perpetrator) uploaded a status that harmed EP (the victim) and contained hate speech and defamation. RD in the status called EP a "psychopath". The allegation strengthened, because RD took a screenshot of the status from EP's Facebook page and uploaded it on his Facebook page and included the hate speech status. After reporting the matter, the Sibolga Police Satreskrim responded quickly and sought mediation. Head of Criminal Investigation Unit of Sibolga Police, AKP Agus Aditama, said that mediation efforts in hate speech cases should be prioritised. Legal handling is carried out in the usual way,

when if mediation efforts are unsuccessful. The results of the mediation obtained an amicable agreement with evidence of a stamped peace letter, this is proof that the problems of both parties have been resolved.

The cases described above can be observed to have one thing in common, namely the motive or background of hatred and prejudice or biased attitudes that are maintained through the process of stereotyping against groups that are considered different. What is meant by stereotyping is the perpetuation of negative views towards different groups or people from different groups based solely on incomplete knowledge, and full of suspicion and prejudice. However, from the same offence, the law enforcement process is found to be different, some are resolved by restorative justice and some are resolved by general criminal law.

In its implementation, the Hate Speech Article in the ITE Law equates legal entities with ethnicity, religion, and race, which clearly undermines the standards that Article 28 paragraph two of the ITE Law and Article 156 of the Criminal Code intend to address. Following the revision of the Defamation Article in the ITE Law, notable changes were observed in terms of the severity of penalties imposed. Additionally, the scope of protection provided by the Intergroup element was broadened to encompass individuals who face insults based on their profession, position, political affiliation, and other relevant factors. The Hate Speech Article and the Defamation Article in the ITE Law became interchangeable, even though the objectives of these two Articles are very different from each other. The Hate Speech Article aims to protect minority groups from incitement to hate so that they have the potential to experience discrimination or hate crime.

The purpose of this study is to analyse the legal framework governing hate speech offences, particularly in relation to the Criminal Procedure Code (KUHAPidana) and Law of the Republic of Indonesia Number 19 of 2016, which pertains to amendments made to Law Number 11 of 2008 concerning Electronic Information and Transactions. Furthermore, the primary objective of this study is to investigate the possible efficacy of restorative justice as a viable alternative within the Indonesian legal framework for addressing instances of hate speech. Accordingly, this study was conducted to examine hate speech charges from the perspective of restorative justice, with a specific emphasis on the legal structure surrounding these offences.

2 Research Method

The research methodology employed in composing scientific papers for this magazine is classified as qualitative normative research, specifically focusing on doctrinal analysis. Qualitative normative research, intended to formulate carefully the fundamental issues at hand using a measurable analysis knife. To produce quality research, a legal approach is needed according to the intended research designation. The research employs many methodological techniques, including the conceptual approach, historical approach, statutory approach, comparative approach, and case approach. The five proposed methodologies are hypothesised to offer potential solutions to address the research questions addressed in this study.

3 Result and Discussion

The delineation of hate speech, according per Black's Law Dictionary, is as follows: According to the definition provided by Dictiniory, hate speech refers to verbal expressions that convey a strong aversion or animosity towards a specific group, such as a particular ethnicity, race, or culture. This type of speech is particularly concerning when it is employed by both individuals and groups, as it has the potential to incite violence through provocative language.

Hate speech, as defined within the legal context, encompasses verbal expressions, actions, written materials, or public presentations that are forbidden due to their potential to incite societal conflict, violence, and prejudice. Such comments not only have the capacity to elicit harmful responses from both the individuals making these utterances and the recipients of these actions, but also fall under the purview of legal restrictions. [30] Hate speech based on SARA when referring to the definition of intergroup in accordance with the Constitutional Court Decision Number 76/PUUXV/2017 is: “One of the categories that recognises the existence of social differentiation, in addition to the categories of ethnicity, race, and religion. The categories of "ethnicity" and "race" refer to conditions or given factors that cannot be changed by the human being who bears the tribe or race in question, and become an inherent identity for life. Religion is not a given factor like ethnicity and race but rather a human choice, but because of its sacred nature and anthropologically contains values that are difficult to change, it tends to become the lifelong identity of someone who adheres to it.” “The category "tribe" houses entities such as Javanese, Acehnese, Jambi, Minang, Kubu, Sundanese, Sasak, Bugis, Sumbawa, Bali, Ternate, Waigeo, Dani, and so on. The "race" category houses the Mongoloid, Malay, Melanesoid racial entities, and so on. The "religion" category is a forum for entities adhering to Islam, Christianity, Catholicism, Hinduism, Buddhism, and Confucianism. Beyond these three categories, the Court is of the opinion that there are many other categories that have not all been accommodated by the law, for example domicile, profession / livelihood, groups who are members of certain organisations and so on.” “The term "intergroup", according to the Court, is not a clear and unambiguous term. The meaning of the term cannot be immediately known, unlike the terms "tribe", "religion" and "race", which together with the term "intergroup" are placed in parallel and even gave rise to a popular abbreviation in society, namely SARA. Although it is not clear and unequivocal, it does not mean that "intergroup" does not exist.”

“Furthermore, it is important for the Court to explain that the term "intergroup" appears to be a harmful or bad thing, one of which is because of its application which is feared to be arbitrary. Universally, when a law or regulation is applied arbitrarily, it is definitely bad and harmful. However, this is a matter of legal application, for which there are legal remedies available, so it is not an issue of the norm's constitutionality. The constitutional problem arises when the term "intergroup" is removed, namely the existence of a legal vacuum that leads to legal uncertainty.”

“That the term "antargolongan" is formed from a combination of the word "antar" and the word "golongan", which the word "golongan" in the Big Indonesian Diction-

ary means the same as group (Hasan Alwi et al, 2001: 368). When a group is interpreted as a collection (of people) who share certain attributes or characteristics, the term golongan/group will include/include ethnicity, religion, and race. Whereas in the phrase SARA, the legal position of the term "tribe", the term "religion", the term "race", and the term "intergroup" is placed as equal, which means that each does not include each other or one does not become a sub- ordinate of the other."

"Through this Court's decision, it is affirmed that the term "intergroup" does not only include ethnicity, religion, and race, but includes more than that, namely all entities that are not represented or contained by the terms ethnicity, religion, and race."

3.1 Legal Arrangement of Hate Speech Offences

Hate speech, as defined within the legal context, encompasses verbal expressions, actions, written materials, or public presentations that are illegal due to their potential to incite societal conflict, violence, and prejudice. Such comments have the capacity to elicit hostile behaviour from both the individuals making these statements and those who are subjected to their consequences. The legal framework for the regulation of hatred in Indonesia is established through many laws and regulations. Among them are Article 156 of the Criminal Code (KUHP), Article 20 paragraph two of Law Number 12 of 2005 on the Ratification of the International Covenant on Civil and Political Rights, Article 16 in conjunction with Article one paragraph three of Law Number 40 of 2008 on the Elimination of Racial and Ethnic Discrimination, Article 28 in conjunction with 45 paragraph two of Law Number 19 of 2016 on the Amendment to Law Number 11 of 2008 on Electronic Information and Transactions, and there are also other related regulations. The understanding of hatred in Article 156 of the Criminal Code states that "the act is committed by speech containing certain words or sentences. Because it is expressed by speech, it is called verbal expression of feelings. The content of the statement of feelings is expressed in three types, namely:

a. Statement,
b. Regarding,
c. Hostility,
d. Hatred, and
e. Defamation of a class of the Indonesian population."

The moral ideals, ethics, and social norms that influence the perception of an expression as expressing enmity, hatred, or disdain towards specific groups within the Indonesian community are significant factors in determining public opinion. These considerations are rooted in the collective moral consciousness and societal standards that shape the Indonesian country.

The understanding of hatred in Article 28 paragraph two of the ITE Law lacks elaboration. This phenomenon has given rise to numerous interpretations and diverse perspectives from various stakeholders over the intended animosity and the provisions outlined in the text. One perspective posits that the act in question constitutes a formal criminal crime. The fulfilment of the criminal crime is contingent upon the execution of the act. The rationale behind this observation is that the wording of the article does

not explicitly forbid the act of causing specific outcomes. The usage of the term "intended to" within the context of the article suggests that the purpose of providing information is to provoke sentiments of animosity. Based on the aforementioned elucidation, it is important to furnish substantiation that the act of sharing information is carried out with the deliberate aim of instigating animosity. One approach to addressing this issue is rationalising the structure of the action based on its inherent characteristics and contextual factors. This can potentially lead to the emergence of animosity between various groups, as desired and seen by the individual responsible.

The interpretation of the provisions of Article 28 paragraph two of the ITE Law remains subject to numerous interpretations, as indicated by the provided explanation. However, it is worth noting that the stipulations outlined in the aforementioned article have been effectively utilised in the resolution of numerous situations that contravene its rules. These cases encompass individuals such as Sandy Hartono, Alexander Aan, Muhamad Rokhisun, and I Gede Aryas-tina, also known as Jerinx. The four cases exhibit distinct historical contexts and have undergone conclusive adjudication. In the context of the judicial setting, the utilisation of articles necessitates the application of legal interpretation by law enforcement officials, particularly judges, in order to ascertain if a conduct has contravened the provisions outlined in the article. The act of interpreting. According to Professor D. Simons, a fundamental prerequisite for the interpretation of a statutory regulation is that it must be construed in accordance with the regulation itself. When attempting to understand a given text, it is imperative to adhere strictly to the prescribed regulations and refrain from seeking additional external resources.

Indeed, despite the formulation of a statutory regulation employing precise language and terminology, there remains a potential for interpretation, thereby giving rise to uncertainties. Based on the three cases, it can be concluded that the actions that can be categorised as violating the provisions of Article 28 paragraph two of the ITE Law are:

"a. The existence of parties who feel aggrieved by the actions of a person or group of people related to SARA elements,
b. The act contains images of people who are sanctified in a religion that are contrary to the original image,
c. Making writings that demonise the contents of the holy book of a religion that is different from the teachings of that religion or,
d. Disseminating matters of a personal nature that contradict or violate the norms of decency and morality,
e. The acts committed contain elements of SARA and are carried out on social media."

Websites that employ or incorporate Hate Speech are sometimes referred to as hate sites. This website predominantly employs internet forums and news sources to underscore a specific perspective. Numerous nations globally have implemented legislation to govern the expression of hate speech. In the case of Indonesia, specific regulations exist in the form of articles that pertain to the regulation of hate speech targeting individuals, groups, or institutions.

Dissemination, how to deliver images or objects as referred to in this article can be done in various ways such as broadcasting or showing images or objects through electronic media (television/radio), print media (newspapers, tabloids, magazines), or other media including the internet.

The presence of the criminal offence of defamation (smaad) is evident in Article 310 of the Criminal Code, whereas Article 311 encompasses the criminal offence of slander (laster), refraining from employing the term insult. Then there is Article 315 which contains a criminal offence called simple insult (eenvoudig beleediging), and which is formulated as any intentional insult (elke opzettelihke beleediging) which is not defamatory. It appears that defamation is a subset of insult. It appears that defamation is a subset of insult.

These articles are also related to the rapid growth of information technology, which means that broadcasting or presenting images or objects as referred to in the above articles can be done in various ways, such as broadcasting or showing images or objects through electronic media (television/radio), print media (newspapers, tabloids, magazines), or other media including the internet.

There are also other arrangements in laws outside the Criminal Code [46] such as Law Number 11 of 2008 as amended by Law Number 19 of 2016 on Electronic Information and Transactions, Law Number 40 of 2008 on the Elimination of Discrimination and Race, articles that are directly related to the criminal offence of spreading hate speech are Article 27 paragraph three Article 28 paragraph one and two, Article 45 paragraph one and paragraph two, Article 52 paragraph four. Article 27 (1) "Every person intentionally and without right distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that contain insults and/or defamation."

Article 28 paragraph one "Every person intentionally and without right to spread false and misleading news that results in consumer harm in Electronic Transactions". Paragraph two "Every person intentionally and without right to disseminate information aimed at creating a sense of hatred or hostility of individuals and/or certain community groups based on ethnicity, religion, race and intergroup (SARA)."

Article 45 paragraph four "Every person who intentionally and without right distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that contain insults and/or defamation as referred to in Article 27 paragraph (3) shall be punished with a maximum imprisonment of 4 (four) years and/or a maximum fine of Rp750,000,000.00 (seven hundred fifty million rupiah)." [48]

Article 45 paragraph four "Every person who intentionally and without right distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that contain insults and/or defamation as referred to in Article 27 paragraph (3) shall be punished with a maximum imprisonment of 4 (four) years and/or a maximum fine of Rp750,000,000.00 (seven hundred fifty million rupiah)."

Article 45A paragraph one "Any Person who intentionally and without right disseminates false and misleading news resulting in consumer harm in Electronic Transactions as referred to in Article 28 paragraph (1) shall be punished with a maximum

imprisonment of 6 (six) years and/or a maximum fine of Rp1,000,000,000.00 (one billion rupiah)". (2) "Any person who intentionally and without right disseminates information aimed at creating a sense of hatred or hostility of individuals and/or certain community groups based on ethnicity, religion, race, and inter-group (SARA) as referred to in Article 28 paragraph (2) shall be punished with a maximum imprisonment of 6 (six) years and/or a maximum fine of Rp1,000,000,000.00 (one billion rupiah)."

Based on the aforementioned articles, it is evident that the ITE Law does not explicitly address or differentiate the categorisation of the offence as a crime or an offence. This has legal implications as the Criminal Code (WvS) continues to recognise and differentiate between the categorisation of offences as crimes or offences. Consequently, the ITE Law must still adhere to the overarching provisions outlined in the Criminal Code.

The expansion of the meaning of intergroup in the Constitutional Court Decision number: 76/PUU-XV/2017 concerning the judicial review of Article 28 paragraph two and Article 45 paragraph two which are considered contrary to the 1945 Constitution. The concept of intergroup encompasses not just ethnicity, religion, and race, but also extends to other entities that do not fall within these categories. These non-ethnic, non-religious, and non-racial entities are classified as intergroup. However, it is not further explained what qualifications are included in the category of groups or groups of all entities. As the following variable explanation:

Article 28 paragraph 2 of the ITE Law	Author's Notes/Corrections
"Every person who intentionally and without the right to incite, invite, or influence so as to move others to distribute and/or transmit information aimed at creating a sense of hatred or hostility towards individuals and/or certain community groups based on ethnicity, religion, nationality, race, or gender carried out through the means of Electronic Information, Electronic Information, and/or Electronic Documents."	In this formulation, the prohibited acts are different from the nature of Article 28 paragraph (2) which before the revision was : "Every person intentionally and without the right to disseminate information aimed at creating a sense of hatred or hostility of individuals and / or certain community groups based on ethnicity, religion, race and intergroup (SARA), which is prohibited instead of the act of "moving others to distribute and / or transmit information" as an element of effect (ma-

	terial offence).” It can be said that this article becomes an act not in “the electronic realm, because the prohibited act becomes "moving others to distribute and / or transmit information" when in context with the ITE Law, the prohibited act should be "speech" or "syiar" through electronic means.”

From the table above, the author can explain that this article becomes an act not in the electronic realm, because the prohibited act becomes "moving others to distribute and / or transmit information" when it should be contextualised with the ITE Law, the prohibited act should be "speech" or "syiar" through electronic means. According to John Stuart Mill in On Liberty (1859), explains that scientific discussion and argumentation should be given freedom and encouraged to the limits of logical reasoning, not emotional or moral limits. An argument should not be stopped just because it is offensive or controversial as long as it may contain truth. Similarly, according to Kent Greenswalt, hate speech constitutes an affront and derogatory expression targeting racial, religious, ethnic, or sexual identities, which can have significant implications for the principles and implementation of democratic governance. According to John K Roth, hate speech can be classified as a criminal conduct involving the use of abusive language targeting persons based on their race, ethnicity, religion, sexual orientation, or other group affiliations.

3.2 The Absence of the Element of Incitement to Hate in the Formulation of Article 28 paragraph 2 of the ITE Law

The main problem in the formulation of the criminal offence of hate speech / hate speech in Article 28 paragraph two of the ITE Law is the absence of the element of incitement as one of the most important elements in defining the spread of hatred. The element of "incitement" is important in the provision on the spread of hatred, because in its own formation this provision is actually intended to avoid forms of incitement that are disruptive and divisive. The phrase "disseminating information intended to cause hatred or hostility" in Article 28 paragraph two can be interpreted subjectively and is a very broad formulation.

The phrase "inciting" itself, according to R. Soesilo, is interpreted as the act of encouraging, inviting, arousing, or fuelling people to do something. Thus, the act of spreading to cause hatred alone cannot fulfil this measure.[51] This is also confirmed in the Rabat Plan of Action which states that to be able to declare an expression as a

criminal offence, one of the elements that must be met is the element related to intent.[52] Intent in Article 20 of the IPHSP requires incitement. Distribution or mere dissemination of content cannot be categorised as a punishable acT.

Hate speech articles should be regulated so strictly to protect discrimination and violence against ethnic, religious and racial minorities. However, with the ITE Law's very broad formulation, the element of "incitement to hatred" is not the touchstone or assessment of whether electronic information is considered a form of statement that can "cause hatred or hostility." Article 28 paragraph two of the ITE Law assesses whether the subject feels hatred and there is a connection with SARA. In several cases, H. Sahidudin, S.Ag (Decision Number 61/Pid.Sus/2018/PN Ktb) was judged by the hatred of the religious activity organising team, then in the case of Decision Number 7/Pid.Sus/2019/PN Wng was judged by the content that cornered a party. Criminalisation on the basis of expression like this is very dangerous to use to prove the fulfilment of a criminal element.

3.3 Interpretive Definition of Intergroup

The ITE Law lacks a comprehensive and unambiguous definition of the term "Intergroup," resulting in a lack of clarity regarding the specific groups that are protected by the provisions of the article. On 23 June 2021 SKB Guidelines for the Implementation of the ITE Law.[53] was passed, in which the phrase "Intergroup" in the ITE Law was interpreted in accordance with the ruling of the Constitutional Court Number 76/PUUXV/2017. However, the content of this decision is very problematic in interpreting the phrase "Intergroup", where this decision does not provide firm boundaries for this element. The categorisation of intergroup dynamics ought to be predicated around the immutable aspects of community or citizen identity, rather than mutable factors such as occupations, affiliations, or other easily modifiable attributes. Inherent and immutable aspects of identity, such as race, country of origin, religion, place of origin, descent, nationality, or constitutional-legal status, as well as other stable and enduring identities.

The absence of a definition of SARA in the formulation leads to various interpretations. Basically, Article 28 paragraph two is rooted in Articles 156, 156a, and 157 of the Criminal Code, but there are differences in the meaning of SARA with Article 28 paragraph two.[54] The broad interpretation of "Intergroup" is inseparable from the Constitutional Court Decision Number 76/PUU-XV/2017 which interpreted it to "not only include ethnicity, religion and race, but include more than that, namely all entities that are not represented or contained by the terms ethnicity, religion and race". Thus, in several cases such as the case of Dr Martanto bin Alm Sumadi Raharjo (Decision Number 7/Pid.Sus/2019/PN Wng) and the case of Ahlidin Raharjo (Decision Number 77/Pid.Sus/2018/PN Bnr), "Intergroup" in these two cases included professional/governmental/political institutions.

Authority of Power of Attorney

In practice, it is also found that there is an imbalance of relations or "power relations" that appears in cases of spreading hatred, namely that the complainant comes from people who hold power / state institutions / political parties and the reported is the small people. Normally, Article 28 paragraph two of the ITE Law cannot be used against the Government or state institutions, but reporting by the Government or state institutions is still widely found. This imbalance in power relations has led to allegations of criminalisation or unfounded or malicious prosecution. Article 28 paragraph two is used more as a tool to support authoritarian power, as well as being used for social engineering purposes. It is time for the orientation and instrumentation of criminal law as a tool of power to be changed towards supporting the operation of a democratic political system that respects human rights.

5. Apllication of Restorative Justice in the Settlement of Hate Speech Cases

The freedom of opinion and speech is a fundamental attribute of a democratic nation, constituting an inherent right of every individual. Moreover, it is a constitutionally protected right bestowed by the State. This right is manifested in Article 28E Paragraphs two and three of the 1945 Constitution, which states that “the state guarantees the right of every person to express thoughts and attitudes in accordance with their conscience and the right to express opinions.” This right also reflects the implementation of a democratic state. However, the implementation of the right to opinion and expression is still limited by the human rights of others so as not to injure other personal rights. This is intended to create harmony for the state in providing protection to each of its citizens.

Problems in the application of laws related to hate speech are related to legislation that is considered a "rubber" article by several expert views, due to the thin differentiation between opinions or arguments and hate speech to the public. One of the experts who thinks so is Airlangga University Political Communication Expert Hendri Subiakto, who conveyed in the judicial review trial of Law Number 11 of 2008 concerning Electronic Information and Transactions as amended by Law Number 19 of 2016 concerning Electronic Information and Transactions (ITE Law).

In the practice of law enforcement related to hate speech, the offence is qualified as a complaint offence. This complaint offence is the basis of law enforcers to conduct follow-up related to criminal offences (daad strafrecht) that have occurred. Thus, in making complaints to the authorities or in this case the Indonesian National Police as one of the law enforcers who handle complaints related to hate speech. If reviewed further, the complaint related to hate speech is a form of subjectivity from the complainant, who in this case is considered a victim.

Victims as parties who are considered to have suffered losses generally choose the litigation route before communicating with non-litigation settlements outside the court. This shows that there is still a Culture Law that is Crime Control Model with the intention and purpose of wanting to provide retribution for actions that have harmed him. Here we can examine that there is a setback in handling criminal law,

because in the context of modern criminal law the approach taken is the Due Process Model which aims to restore existence without ending in punishment.

This concept can be implemented in the crime of hate speech to minimise excessive punishment in each case. The concept of modern law enforcement with a Due Process Model approach that prioritises restoring the original state (restorative) can be achieved by organising an out-of-court peace process, by bringing together the two parties to make peace or what we commonly know as the mediation method and in the context of criminal justice is commonly referred to as penal mediation. [58] With the aim of providing healing to the victim and giving space for the perpetrator to apologise to the victim.

Trisno Raharjo, citing Martin Wright, posits that mediation entails a structured procedure wherein both victims and offenders convene and engage in dialogue, facilitated by a third party, whether directly involved or not. This process serves to facilitate the articulation of victims' needs and emotions, while enabling offenders to acknowledge and assume accountability for their transgressions.

The application of penal mediation itself was first recognised in positive law in Indonesia since the issuance of National Police Chief Letter No. Pol: B/3022/XII/2009/SDEOPS dated 14 December 2009 on Case Handling through Alternative Dispute Resolution (ADR), although it is partial in nature. This letter emphasises that the settlement of criminal cases using ADR must be agreed upon by the parties to the case, but if there is no agreement, the case will be resolved in accordance with applicable legal procedures in a professional and proportional manner. [60]

The purpose of the issuance of the National Police Chief's Letter regarding the handling of criminal cases using the ADR approach is to provide a space or forum for resolving new criminal cases with out-of-court settlements. This actually brings law enforcement in Indonesia closer, especially in handling criminal cases related to hate speech, resolved by means of penal mediation to create a sense of justice and a modern restorative justice process.

From an etymological perspective, the term "Restorative Justice" in the Indonesian context can be seen as a form of justice including diverse principles and teachings, or as a conceptual framework aimed at establishing a more equitable and harmonious system of punishment. The existing system of punishment exhibits a notable lack of emphasis on both victims and perpetrators, as evidenced by the disparity in attention given to their respective interests. In the context of Restorative Justice, it is imperative to establish a clear purpose for punishment, as this serves as the foundation for developing an effective process to attain the desired objective.

The notion of Restorative Justice pertains to the interests of the perpetrator and their responsibility to reintegrate into society as a responsible citizen, with consideration for the victim, their family, and the broader community. This idea, in essence, pertains to the resolution of criminal activities (offences) by means that lie beyond the purview of the court process or, at the very least, do not adhere entirely to criminal justice protocols. If we collide it in the context of penal mediation related to hate speech crimes. So, in essence, the case can be resolved by bringing together both parties between the victim and the perpetrator by providing communication space

between the two. This is because there is the potential to be resolved in a family manner by fulfilling the rights and obligations of each. For example, the victim asks the perpetrator to apologise in a press conference and the victim will forgive because his reputation has been resolved by the official press conference, so there is no need for a criminal process that leads only to retaliation when the problem can be resolved properly with the agreement of both parties.

6. Application of Restorative Justice in Indonesian Laws

Restorative justice is basically not a new law, nor is it a newly invented law, because solving legal problems by applying restorative justice processes has been done since ancient times. This process changes normatively in different ways in each country that applies it. It is the same with the changes in the application of criminal law.[63] If you look closely, criminal law in the Old Testament emphasises that victims must be paid with restitution. Similarly, when it comes to property, restitution must be paid according to the code of Hammurabi.

The record of the development of criminal law shows that revenge is a major component of the criminal justice system. The most obvious is the death penalty for murder. The criminal justice system is essentially the state's effort to enforce the law, assessing the actions of a person who is deemed to have committed an act prohibited by law and then imposing punishment in the form of corporal punishment or fines. In other words, the response of the judiciary to acts classified as crimes is more to prevent, deter, punish and include retribution for public safety for criminal acts committed by someone.

The idea of 'stopping' the enforcement of criminal law in this harsh and perceived form of retaliation was put forward by many thinkers almost like a choir, and one of those ideas and thoughts was restorative justice, where every crime should have a remedy by avoiding punishment. Albert Eglash in several articles in 1958 began to voice his ideas about restorative justice which he associated with restitution. From the author's research, there are three types of criminal justice approaches, firstly retributive justice, based on punishment, secondly distributive justice, focusing on punishing offenders and ignoring victims, and thirdly restorative justice, focusing on restoring the harm caused by crime. Although Albert Eglash is recognised as one of the pioneers who started the idea of restorative justice, it is Howard Zher who is considered one of the early thinkers of restorative justice, as he was the one who was able to provide a precise articulation of restorative justice. This can be seen from his book which is quite widely used as a source. In Zehr's view, the conventional justice system has failed to deal with crime because it still maintains an opinion of 'retributive' justice that views crime as behaviour that violates criminal law. In fact, he says that the criminal justice process often does not feel like justice. This view discourages offenders from understanding the impact of their crimes on victims.

Therefore, he argues for the need to shift from a 'retributive' lens to a 'restorative' lens, which re-conceptualises crime as a violation of human rights. In Zehr's view,

there are three steps that must be taken with regard to restorative justice, first is to fulfil the immediate needs, the needs of the victim, then must seek to identify the larger needs and obligations.

Until now, there are no criminal law provisions in Indonesia as a legal basis for implementing restorative justice. Although the Police have started since 2018, when Circular Letter Number: SE/8/VII/2018 was issued and then followed by the Regulation of the Attorney General's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. Decree of the Director General of the General Justice Agency of the Supreme Court Number 1691/DJU/SK/PS.00/12/2020. Guidelines for the Implementation of Restorative justice in the General Court Environment, followed by National Police Chief Regulation Number 8 of 2021. The realisation of the implementation of restorative justice, according to the statement of the National Police Chief, there were 11811 cases resolved through restorative justice mechanisms in 2021, while the Attorney General's Office as of 27 October 2021 had terminated 314 cases through restorative justice mechanisms. Although quite a number of cases have been resolved through restorative justice by the Police or by the Prosecutor's Office, the cases or cases that can be resolved through restorative justice are very limited.

The limitation of cases that can be resolved through the restorative justice process, for example, in the attachment of the Director General of the General Justice Agency of the Supreme Court is a minor criminal offence punishable by a maximum imprisonment of 3 (three) years or a fine of Rp.2,500,000, - (two million five hundred thousand rupiah). Whereas in the Prosecutor's Regulation, the limitation is a fine or imprisonment of no more than 5 (five) years and a loss of no more than Rp.2,500,000 (two million five hundred thousand rupiah). What is more advanced in the requirements for resolving cases through the restorative justice process is based on National Police Chief Regulation Number 8 of 2021. In situations where it is imperative to avoid generating dissatisfaction and/or rejection within the community, to prevent social strife, to avert the potential division of the nation, to refrain from engaging in radicalism and separatist, and to avoid repeating criminal offences as determined by a court of law.

With the regulations made by the Supreme Court, the Attorney General's Office and the Indonesian National Police as mentioned above, this is the main problem in implementing restorative justice, as if each law enforcement agency has its own authority according to the level of the case settlement process in making rules. What needs attention is the limitation of the value of cases that can be resolved through the restorative justice process. There should be no restriction on the value or threat of punishment, as long as the parties, namely the victim and the perpetrator, are willing to resolve their legal problems with restorative justice processes.

In instances of grave offences, such as murder, it is noteworthy to examine Islamic law as an illustrative example. Specifically, when the victim's family chooses to provide forgiveness, regardless of the presence or absence of monetary compensation, it becomes imperative to incorporate such cases within the purview of restorative justice mechanisms. Similarly, in cases involving criminal offences that result in financial

losses to the state, it is deemed suitable to address them through the application of restorative justice principles. As part of this approach, those found guilty of such criminal activities may be assigned supplementary responsibilities, such as engaging in social work. In order to ensure consistency in the application of punitive measures in accordance with the principles of restorative justice, it is worth considering the example set by France. Notably, France has incorporated restorative justice practises into its Criminal Procedure Code, thereby integrating judicial proceedings within this framework.

Firstly, restorative justice continues to evolve and law enforcement agencies focus more on programmes, rather than meetings between victims, perpetrators and other parties. Secondly, institutional issues, because although institutionalisation can lead to the "growth" of restorative justice laws and programmes, it does not necessarily translate into the development and implementation of better practices. Thirdly, the issue of moving from formal to informal forms, where the "growth" of restorative justice results in the emergence of new programmes or practices as a substitute for other formal or informal sanctions, and can lead to perceived interference with the existing criminal justice system. Fourth, is the issue of relevance, restorative justice focuses more on class offences that the "ghettoisation of restorative justice", so it is questionable whether it can move beyond "alternative sentencing" for smaller offences.

4 Conclusion

The expansion of the meaning of intergroup in the Constitutional Court Decision number 76/PUU-XV/2017 regarding the judicial review of Article 28 paragraph two and Article 45 paragraph two which are viewed as contrary to the 1945 Constitution. The term intergroup does not only include ethnicity, religion, and race but includes more than that, namely all entities that are not represented by ethnicity, religion, and race which are then categorised as intergroup. However, it is not further explained what qualifications are included in the category of groups or groups of all entities.

Article 28 paragraph two “Every person who intentionally and without the right to incite, invite, or influence so as to move others to distribute and/or transmit information aimed at creating a sense of hatred or hostility towards individuals and/or certain community groups based on ethnicity, religion, nationality, race, or gender carried out through the means of Electronic Information, Electronic Information, and/or Electronic Documents.” With this formulation, the prohibited act is different from the true nature of Article 28 paragraph two, which prohibits the act of "moving others to distribute and/or transmit information" as an element of effect (material offence).

With this formulation, it can be said that this article becomes an act not in the electronic realm, because the prohibited act becomes "moving others to distribute and / or transmit information" when in context with the ITE Law, the prohibited act should be "speech" or "syiar" through electronic means.

An explanation of "community groups" should be included, where community groups are other identities that are inherent and difficult to change, not aimed at in-

sulting individuals, or legal entities, state institutions, public authorities, positions. The resolution of legal problems through the restorative justice process can be ensured to reduce the use of correctional institutions and state detention centres that have exceeded their capacity.

4.1 Recommendation

1. In the application of the settlement of hate speech cases at the police and prosecutor's office level, it must be authorised by the court so that restorative justice can obtain legal certainty.
2. An explanation of "community groups" should also be included, where community groups are other identities that are inherent and difficult to change, not aimed at insulting individuals, or legal entities, state institutions, public authorities, and positions.
3. The absence of other elements that constitute the substance of hate speech, as a result everything that is considered unpleasant is considered hate speech and criminal law theory does not justify this kind of formulation, because it deprives people of their freedom, rights, and independence. So the content of Article 28 paragraph 2 must be very detailed.
4. The article on hate speech formally still exists in the Criminal Code but law enforcers police, prosecutors, and judges do not apply the article because it is considered contrary to the principles of democracy and an independent State, but strangely the ITE Law through article 28 paragraph 2 instead revives what has been killed by law enforcers with a very severe threat of 6 (six) years and a fine of 1 (one) billion.
5. In order for there to be similarity in the implementation of punishment based on the restorative justice process, one that should be emulated is France, which has included legal proceedings through restorative justice in the Criminal Procedure Code.

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