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LEGAL PERSPECTIVES CONCERNING HATE SPEECH IN INDONESIA

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ABSTRACT

In Indonesia there is concern on hate speech that causes conflict and seems to be on the rise and unchecked. There is general consensus that this must be resolved. The focus of this research is to investigate the legal mechanisms used by the Indonesian government to resolve the problem of hate speech. The Research Question is: What are the characteristics of hate speech and what legal mechanisms are there in Indonesia to contain it. Hate speech data, which was of public concern, and already decided upon in court, was obtained from online media. The legal considerations used by the court to decide on hate speech were identified to determine the legal mechanisms used by the government to resolve problems arising from hate speech. The findings reveal: 1) the indicators used by the government to differentiate freedom of expression from hate space. Hate speech has been found to be associated to contempt, defamation, unpleasant deeds, provocation, instigation and hoax. Hate speech is also carried out in the following contexts: through speeches, campaign activities, displayed on banners, on social media networks, public opinion delivery (demonstrations), religious lectures, print and electronic mass media, pamphlets. 2) The legal mechanism used by the Government is to carry out prevention / preventive (non-penal), and provide sanctions / repressive (penal). The court's decisions on what constituted hate speech matched with the regulations in force in Indonesia regarding human rights.

INTRODUCTION

Just prior to the 2019 Presidential Election in Indonesia, there were many incidences of hate speech which resulted in criminal penalties for the perpetrators. In the Tamim Pardede case where the accused was sentenced to 2 years in prison and fined 200 million rupiah for uploading a video which they courts claimed were insults directed at the President and the National Police Head. In the video Tamim stated that Tito (National Police Head) was a Jokowi henchman who was Communist. Other events are groups on Facebook -- referred to as *saracen* groups-- that uploaded content containing hate speech directed at certain groups. Some of these posts, were considered potentially

offensive to ethnic, religious, racial, and intergroup sentiments by the police (Ambarine, 2017). Ahmad Dani (Indonesian musician) was also declared a suspect and sentenced to one year in prison for inciting and spreading hate against Ahok supporters through three posts on his Twitter (3 Cuitan Ahmad Dani, 2019). Similiarity, DKI Jakarta Governor Basuki Tjahaja Purnama (Ahok) was sentenced to 2 years in prison after making a controversial statement about the election of leaders. He quoted al-Maidah: 51. Ahok was considered to have committed blasphemy towards religion which was considered an expression of hate. During a working visit to Pulau Seribu, in front of the community, Ahok said "... so don't trust people, this would mean you cannot vote for me, you have been lied to using Al-Maidah 51 ..." (Court Decision, 2016).

Sanctions against the hate speech perpetrators do bring about differences of opinion. One party believes that the application of the law with regards hate speech lies in a narrow interpretation which has a potential for abuse and could be used for certain interests (Adreanus, 2016). Other parties argue that the making of regulations that regulate and give aprovide sanctions against hate speech still needs to be implemented. Every utterance, statement or incitement intended to discriminate or commit violence against a particular person or group, because of racial, ethnic or religious background, or even sexual orientation, is an act that harms humanity and human rights. Therefore, these actions need to be prohibited by the state, as it is deemed criminal in national criminal law (Anam, 2015).

The hate speech issue is like a double-edged knife. Regulating and restricting will lead to arbitrariness and conflict with human rights. However, leaving it without regulation, is like opening the channel as wide as possible, without showing concern to aspects of statements containing hate speech, which actually leaves the community in a situation of mutual hate, mutual suspicion, intolerance, and discrimination. This leads to state of disharmony.

Because there are contradictions in the prohibition of hatespeech, countries in the world respond to it in a variety of ways. The majority of countries categorize hate speech as crime so the perpetrators, they say, must be punished. For example, Australia has a law on prohibiting behavior that triggers hatred and humiliation to others, namely the (Racial and Religious Tolerance Act 2001 Act No. 47/2001 Victoria-Australia State). Likewise the Netherlands also has a Criminal Code which prohibits actions that insult the religious feelings of others (Iqbal & Barda, 2019). Even the European Union Community and the German state have asked social media to monitor and block hateful conversations. They even have declared that they would punish media companies which ignores them (Hairi, 2019).

However, there are also countries that do not prohibit or criminalize hate speech, (Hairi, 2019) namely the United States, San Marino, and the Holy See - the central governing body of the entire Roman Catholic Church located within the Vatican City, an independent state-. They reason that freedom of speech is the basis for the progress of democracy. Freedom of opinion is the basic right of everyone. (Hwa Kang, 2018). This article will explain the attitude of the

Indonesian state towards hate speech and the legal settlement mechanisms towards hate speech crimes.

METHOD

This research is legal research that uses a normative-empirical legal study model (Kadir, 2004). It is a study that analyzes the behavior of people from the perspective of legal regulations in Indonesia, namely the 1945 Constitution, Human Rights Law No. 9 of 1999, Law No. 12 of 2005 concerning Ratification of the ICCPR and ITE Law No. 19 of 2016. Data resembling hate speech behavior from online media such as whatsapp, newspapers, and facebook that are of public concern was collected. This research will determine if the actions taken by the government in responding to cases of hate speech conform to the legal aspects. It will also determine if the steps taken were positive in solving the problems. The opinions of legal experts on media -selected (purposif) from academics/ non- academic officials- will also be sought to see their reactions on the steps taken by the government.

Data analysis was carried out through the stages of data reduction, data presentation, conclusion drawing, and data verification (Miles & Hubberman, 1994). Data reduction is used to select data that is suitable for research needs, namely about hate speech that is handled by law enforcement and sentenced by the court. Presentation of the data is done after the reduction and sorting stages are completed. The conclusion drawing phase is done by interpreting the data that has been analyzed at the data reduction and presentation stage.

LITERATURE REVIEW

In the last five years, the issue of hate speech has become the focus of the study of legal experts in various countries. A lot of countries, India and Irlandia (Ahnaf & Suhadi: 2014), European countries (Sihombing: 2012), America, Australia, Germany and Netherlands (Wulandari: 2017) see this problem as serious as there is emergence of multiple cases involving hate crime. Most countries agree, especially those who have ratified the ICCPR. These countries believe that hate speech must be prohibited because it violates human rights as stipulated in articles 6-27 of the ICCPR. However, each country varies in interpretation with regards identification and definition of hate speeches. Besides that, they also differ in the ways they respond to and resolve them.

There are lots of studies and articles that discuss hate speech and research suggests that it can at least be classified into 3 parts. First, research explains how hate speech is defined and what is the difference between hate speech, free speech and hate crime, as stated by Alkiviadou (2018), Gelber (2019) and Howard. According to Howard, freedom of expression is a person's moral right to express and express opinions to others. Hate speech is speech directed against individuals or groups, with unwanted negative stigma either implicitly or explicitly and seen as wanting to provoke others to be hostile.

Second, the literature discusses hate speech in several countries and the response given by those countries. Some of them are as written by Cohen (2015) about hate speech in the US, Yola (2017) about hate speech in Nigeria, Hwa Kang (2019) discusses hate speech and freedom of speech in Canada-US.

Compared to the US, the treatment of the Canadian constitution towards hate speeches is different. The United States shows the most liberal attitude in protecting freedom of expression. They believe hate speech is a part of freedom of expression that must be protected. Incitement is prohibited in the world of democracy, including the United States, but determining the form of hate speech must be weighed carefully because it can lead to hate crimes. Meanwhile, the Canadian constitution punishes the spread of hate speech propaganda.

Similarly, studies on hate speech in Turkey written by Deveci (2018) and by Alaburic (2018) in Europe state that hate speech is not allowed. Hate speech in Turkey is not over-responded to by the government. The strong Turkish nationalism has led to the understanding that hate speech only occurs when directed at the state and threatens nationalism not just to issues with bearings on individuals and groups. Meanwhile, Europe (Alaburic; 2018) has ratified the convention and as a result Europe prohibits hate speech which includes types of speech attacking certain groups and that can spread, promote and/or justify hatred, hostility, humiliation, intolerance, exclusion, separation and prejudice and call for or incite violence and / or discrimination against other groups.

Third, the literature discusses the media and objects used to carry out hate speech acts. Among the writings are Frenda's (2019) work on Hate speech on Twitter, Febriana (2019) on cyberbullying on Twitter, Macavaney (2019) who studies statistically about the distribution of hate speech in online media such as Facebook, Twitter and online forums.

The discussion in the article is aimed at how hate speeches are carried out, what media are used and how constitutional treatment of hate speech actors unfolds. In general, this research has similarities with the work of Alaburic but has a different locus and place of research.

DISCUSSION

Indonesian Perspective on the Characteristics of Hate Speech

According to Cohen-Almagor, hate speech is defined by words that encourage hatred, aimed at hurting, degrading people, harassing, intimidating, lowering and sacrificing the target group or other parties and mobilizing insensitivity and brutality towards them. (Iqbal & Barda, 2019). In detail, such definitions are not found in regulations and laws in Indonesia because there are no specific regulations governing hate speech. This is fairly new phenomenon. However, there are a number of regulations that are related to them, such as the Law on Human Rights and freedom of speech.

In Indonesia, the recognition of human rights is contained in several regulations, namely human rights in the constitution, human rights regulations in the provisions of the People's Consultative Assembly, human rights regulations in law and human rights regulations in government regulations and presidential decrees. However, among the legal instruments relating to human rights are the 1945 Constitution Article 28 of the 1945 Constitution, Presidential Decree Number 50 of 1993 concerning the National Commission on Human Rights, Law Number 9 of 1999 concerning Independence in Expressing Opinions in

Public and Law Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights (Muladi, 2009).

The 1945 Constitution article 28 states "Freedom of association and assembly, expressing thoughts verbally and in writing, etc. are stipulated by law." Then Article 28 E paragraph (3) states that "Everyone has the right to freedom of association, get together, and give opinions". Then Law No. 9 of 1998 concerning Freedom of Expressing Opinion in Public, Article 1 paragraph (1) states that "freedom of expression is the right of every citizen to express his thoughts orally and in writing, freely and responsibly in accordance with the provisions of applicable laws and regulations". Still in the same Law, Article 5 states "Citizens who express their opinions in public have the right to express their thoughts freely and obtain legal protection".

Article 23 paragraph (2) and article 25 of Law Number 39 of 1999 concerning Human Rights explains freedom of speech. In article 23 paragraph (2), it is stated that: "everyone is free to have, issue and disseminate opinions according to his conscience verbally and or in writing through print and electronic media by paying attention to religious values, decency, order, public interest and integrity of the. nation. Furthermore, in article 25 of the same law that it is stated "Everyone has the right to express opinions in public, including the right to strike in accordance with statutory provisions".

In addition to the human rights law there is also Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Information and Electronic Transactions (UU ITE). In this regulation, it is stated that anyone who intentionally and without the right to disseminate information has as intention to incite hatred or hostility of certain individuals and / or groups of people based on ethnicity, religion, race and intergroup (SARA), will be convicted with imprisonment, the maximum of 6 (six) years and / or a maximum fine of Rp1,000,000,000.00 (one billion rupiah).

Although it does not specifically discuss hate speech, several regulations in Indonesia have banned the expression of hatred. On the one hand, Indonesia highly values freedom of speech within the confines of its human rights regulations but on the other hand limits it and provides punishment to those who carry out expressions of hatred and excessive opinion. Therefore, one needs to be careful and intelligent in expressing opinions while understanding the criteria of hate speech.

In a study of human rights, two theories are known, namely derogation rights and non derogation rights (Matompo: 2014), as contained in the International Covenant on Civil and Political Rights (ICCPR). Derogation theory (Riyadi, 2018 & A.H.Robertson and J.G Merrills, 1994) refers to the understanding that the state has the opportunity to ignore international obligations in fulfilling human rights in emergencies that threaten the life of the nation. This is based on article 4 of the ICCRP, i.e. "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the

exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.

The category of emergency, as in conventions, according to Jayawickrama (2002) is an extraordinary crisis situation or emergency that affects the whole population and is a threat to organized community life. Emergencies can be caused by internal and external factors. Threats can be in the form of armed military threats or non-military terror that result in casualties and property. (Binsar Gultom: 2010).

Derogation theory is also called limitation. Limitation theory is interpreted as a mechanism that allows for the state to restrict human rights without violating the rights of its citizens. This is different from the derogation theory, because in the limitation theory, the state is given the authority to limit the human rights of its citizens and not merely in an emergency that threatens the life of the nation. The state can also apply it in a safe condition as long as it is based on statutory provisions, so that the intended limitation does not mean discriminatory attitudes and arbitrary actions by the government. (Riyadi, 2018).

In the freedom of speech context, the theory of limitation can be applied not in order to reduce the human rights possessed by each individual but solely because of the provisions of the law which justifies limitation on freedom of expression. In addition, in the study of human rights, freedom of speech is classified as a basic right that is considered derogable right, which means that it can be limited as long as it can be justified by legislation. According to Kasim (2001), there are a number of rights that are classified as derogable rights, namely the right to freedom of assembly peacefully, the right to freedom of association, including forming and becoming trade union members and the right to freedom of speech or expression, including the freedom to seek, receive and provide information and all kinds of ideas without paying attention to boundaries (whether oral or written).

Non-derogation rights is theory in Human Rights, which states that in addition to having derogable rights, there are also absolute rights which must not be reduced by the states ratifying the Covenant, even in emergencies. In the International Covenant on Civil and Political Rights (ICCPR) article 4 paragraph 2 stated "No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision"

Some rights that are classified as non-derogable rights in meaning and that cannot be reduced under any conditions are the right to life, rights to be free from torture, rights to be free from slavery, the right to be free from detention because of failing to fulfill agreement (debt), the right to be free from penalties that apply retroactively, the right as a legal subject, and the right to freedom of thought, belief and religion (Kasim, 2001).

The articles contained in the Universal Declaration of Human Rights (UDHR), freedom of speech can still be limited as long as there are legal considerations.

These considerations include public safety, public order, public health, and protection of the fundamental rights and freedom of others (Pratiwi, 2014).

The category of public safety in the context of freedom of speech can be interpreted as a justification for the limitation of freedom of speech when such freedom can threaten the safety of the individual concerned or even to other individuals who are the object of the freedom exercised. While the category of restriction is based on an obsession to protect public order, it can be interpreted as a limitation on the manifestation of freedom possessed by an individual. The most important thing that needs to be outlined is the limitation of freedom based on considerations to protect the morality of society in order to protect the freedom possessed by other individuals. This means that there are moral provisions and the freedom of others which automatically becomes a limit to the freedom possessed by each individual. In the end, with the existence of such limitations, the expression of freedom of each individual leads to the principle of balance between one individual and another individual (Nasution, 2014).

Based on several regulations in Indonesia, detailed hate speech criteria can be established. From the aspect of its form, hate speech is a criminal act regulated in the Criminal Code (KUHP) and other criminal provisions outside of the Criminal Code, in the form of 6 things namely insults, defamation, defamation, unpleasant acts, provocation and inventing hoax. All of these actions have a purpose or impact on acts of discrimination, violence, loss of life, and / or social conflict (Article 1 g, Circular of the National Police Chief No 6 / X / 2015).

From the object aspect, hate speech is aimed at creating hatred in the community based on 11 reasons, namely: ethnicity, religion, religious sect, beliefs, race, intergroup, color, ethnicity, gender, people with disabilities (disabilities), and sexual orientation. From the aspect of facilities, hate speech can be done through 7 media, namely: in speeches on campaign activities, banners, social media networks, public opinion submission (demonstrations), religious lectures, print and electronic mass media, pamphlets. (Article 1 h, Circular of National Police Chief No 6 / X / 2015).

Legal Mechanism To Overcome Hate speech

Criminal cases caused by hate speeches in Indonesia have increased from time to time. If in 2016 there were 1829 cases related to hate speech, in 2017 the number of cases increased by 44.99% to 3,325. In 2018, news or statements containing hate speech spread in the media reached 3,884 cases. According to Mahfud MD (2019), the increase in hate speech crimes is closely related to election activities. In fact, after the general election was held, the number of hate speech crimes decreased by 80%. However, in general, hate speech crime is considered as dangerous crime. Therefore, from the very beginning the Indonesian government responded earnestly to resolve the hate speech problem, namely by distributing the Circular by the Indonesian National Police in 2015 (SE/06/X/2015). The community however, responded in a variety of ways.

One group did not agree with the solution provided by the government, because the regulation was not very clear as it did not distinguish between defamation

and hate speech. If not careful in its application, there will be restrictions on freedom of opinion. (Febriana, 2015). In fact, Islamic Defenders Front (Front Pembela Islam) explicitly refused to obey the Police SE/06/X/2015, because it was considered to restrict freedom of expression.

However, other groups responded well to the Police (SE/06/X/2015) which explained hate speech and how it could be resolved. Azra (2015) appreciates the actions of the Police that made regulations and put in place resolutions towards reducing hate speech crimes even though they were late and not perfect in implementation. Because, if left unchecked and not resolved, hate speech crimes will be even greater. In line with that, Mahfudz (2019) states that even though the police department is not perfect, there are many regulations and other legal instruments in Indonesia that can be used to punish those who commit hate speech crimes.

Similarly, Yusril Ihya Mahendra as cited by Rocky (2015) argues that the Police circular, SE/06/X/2015 is not restraint on freedom of expression, because the regulations contained in Police circular SE/06/X/2015 is already in the Criminal Code and other special regulations. On the other hand, although not explicitly opposing this, Refly Harun as cited by Tim Viva (2015) argues that the Police SE/06/X/2015 circular on handling hate speech should not have been announced, because the police are feared to overreact and can threaten the freedom within civil society.

In detail, the legal mechanism used to deal with hate speech, as contained in the Police Circular SE/06/X/2015, is to gradually begin preventive measures first, after which they can only provide sanctions or repressive measures. The preparations by the police (the Police Circular: 2015) are: 1) Every member of the National Police should conduct analysis or study of the situation and conditions in their respective environments, especially those relating to acts of hate speech; 2) Every member of the National Police should report to their respective leaders on the situation and conditions in their environment, especially those relating to acts of hate speech; 3) Streamlining and prioritizing the intelligence function to find out the real conditions in conflict-prone areas, especially as a result of provocation, for further mapping as part of early warning and early detection; 4) Prioritize the function of guidance to conduct counseling or outreach to the community regarding hate speech and the negative impacts that will occur; 5) Promoting the function of community development (Pembinaan Masyarakat) to carry out constructive cooperation with religious leaders, community leaders, youth leaders, and academics to optimize repressive actions over hate speech.

If an act is found that has the potential to lead to criminal acts of hate speech, each member of the Indonesian National Police is obliged to take actions (the Police Circular: 2015): a) Monitor and detect as early as possible the seeds of dissension in the community; b) Approach those suspected of committing hate speech; c) Bringing together parties suspected of committing hate speech with victims of hate speech; d) Look for a peaceful solution between the warring parties; e) Provide an understanding of the impact that will arise from the expression of hatred in society.

If the resolution of the hate speech by preventive means is not successful, then the settlement mechanism that is carried out is by means of repressive compliance with existing regulations. Among them are resolving hate speech crimes based on the Criminal Code, Law Number 11 Year 2008 concerning Information and Electronic Transactions, Law Number 40 Year 2008 concerning the Elimination of Racial Discrimination and also Law Number. 7 of 2012 concerning Handling of Social Conflicts.

Based on the statements above, it appears that the mechanism for the resolution of hate speech crimes in Indonesia is carried out in stages, namely prevention (non-penal) then sanctions (penal). This is done as a form of state prudence so that the resolution of the hate speech cases does not violate freedom of opinion and does not lead to conflict.

CONCLUSION

Expressing an opinion is a basic right granted and is inherent in every individual. Laws and regulations in Indonesia regarding Human Rights expressly protect everyone and there is freedom to express their opinions. However, freedom of speech is identified as a right that can be restricted (*derogable rights*). Therefore, violation of the limitations of expressing opinions is considered an act that is prohibited and can be categorized as hate speech. Identification of freedom of expression limits can be specified by the state as long as it is legitimized by existing laws and regulations. In order to strike a balance between freedom of speech and a prohibition against hatred, the mechanism for resolving hate speech cases by the state is a model of non-punishment (preventive action) and penalties (providing sanctions or punishments if they violate the laws and cannot be prevented from doing so)

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