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Criminalization of the Action of Submitting Criticism to the Government Based on the Electronic Information and Transaction Law in Indonesia, And Protection of the Right to Freedom of Speech in a Democratic Country



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ABSTRACT: Indonesia as a democratic country guarantees the freedom for its citizens to express opinions. This is as stated in Article 28 E of the 1945 Constitution which states that everyone has the right to freedom of association, assembly and expression. The order of laws and regulations in force in Indonesia must be in line with the mandate of the constitution. However, since the enactment of Law Number 11 of 2008 as amended by Law Number 19 of 2016 concerning Electronic Information and Transactions (hereinafter referred to as ITE Law), the public feels that there are restrictions in expressing opinions. The use of social media is increasing. Opinions and criticisms are also widely conveyed through social media. Many criticisms / opinions are then categorized as hate speech, even insults. These elements are elements of offenses in the ITE Law which result in the perpetrators being subject to criminal sanctions. This study will examine the criminalization of the act of submitting criticism to the government based on the ITE Law and the protection of the right to freedom of expression in a democratic country. This research uses normative juridical research methods, namely research on principles, legal principles and the rule of law. The data used, obtained through literature study. The ITE Law is a law that aims to create conduciveness for public interaction in the cyber space, so it should not reach out / criminalize all forms of electronic information that are critical of the government. It is still necessary to limit the submission of criticism through the internet media, where the criticism must not contain insults and hate speech. In order to create an ideal democratic atmosphere, it is necessary to protect and limit rights in a balanced way.

KEYWORDS: criminalization, submission of criticism, UU ITE, democracy, freedom of opinion

I. INTRODUCTION

Indonesia is a democratic country. Democracy is a form of government in which all citizens have equal rights in making decisions that can change their lives. Democracy allows citizens to participate either directly or through representation in the formulation, development, and making of laws. Democracy comes from the Greek, *demokratia*, which means people's power.¹

In a democracy, people have the freedom to express their opinion. Likewise in Indonesia, this is regulated in Article 28E paragraph 3 of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) which states that, "Everyone has the right to freedom of association, assembly and expression".

Likewise, the people are given the freedom to express criticism for the government. In mid-February 2021, the President of the Republic of Indonesia, Joko Widodo, asked the Indonesian people to be more active in criticizing the government's performance, especially those related to public services. This was stated by the President of the Republic of Indonesia Joko Widodo when giving a virtual briefing at the launch of the 2020 Annual Report of the Ombudsman RI. The President of the Republic of Indonesia Joko Widodo said that, "The public must be more active in submitting criticism, input, or potential maladministration, and public services must continue to improve improvement efforts."²

Criticism is a response, or an explanation which is sometimes accompanied by good or bad descriptions and considerations of a work, opinion, performance, and so on.³ Along with the development of technology, the delivery of criticism can be done not only directly, for example through demonstration activities, but can use electronic means (social media and so on).

Activities in the cyber world are regulated in Law Number 11 of 2008 as amended by Law Number 19 of 2016 concerning Information and Electronic Transactions (hereinafter referred to as UU ITE). In Indonesia, the issue of potential restraints on

¹ Darmawan Harefa, *Fatolosa Hulu, Demokrasi Pancasila di Era Kemajemukan*, Banyumas, PM.Publisher, 2020, page. 3,

² Chandra Gian Asmara, "Saat Jokowi Minta Rakyat Lebih Aktif Sampaikan Kritik" <https://www.cnbcindonesia.com/news/20210209092653-4-222041/saat-jokowi-minta-rakyat-lebih-aktif-sampaikan-kritik> accessed on 19February 2021.

³ Kamus Besar Bahasa Indonesia, from <https://kbbi.kemdikbud.go.id/>, accessed on 3 March 2022.

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democracy due to the enactment of articles in the ITE Law is an important issue to be discussed. There are several articles in the ITE Law which have multiple interpretations and have a very broad scope. The material of the ITE Law has the potential to threaten again the right to freedom of expression in Indonesia, one of which is related to defamation.

In the context of delivering criticism, several regulations that apply in Indonesia that need attention include:

1. Article 207 of the Criminal Code which states that:

"Anyone who intentionally publicly orally or in writing insults an authority or a public body in Indonesia, is threatened with a maximum imprisonment of one year and six months or a maximum fine of four thousand five hundred rupiahs."

2. Article 27 paragraph (3) of the ITE Law, which states that "Everyone intentionally and without rights distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that contain insults and/or defamation. .

3. Article 28 paragraph (2) which states that: Everyone intentionally and without rights disseminates information aimed at causing individual hatred or hostility towards ethnicity, religion, taste, and inter-group.

From these articles, concepts that need to be studied further are the concepts of freedom of opinion, criticism, and humiliation. Basically, "criticizing" is an activity that is different from "insulting" activities, but there are many cases that occur in Indonesia where opinions expressed with the intention of being criticism are considered to meet the element of insult. Such interpretation creates legal uncertainty.

In reality, law enforcement officers are also often very repressive towards people who give criticism. The data collected by the Institute of Criminal Justice Reform include:

1. On October 25, 2020, the results of the Indonesian Political Indicator Survey to 1,200 people throughout Indonesia showed that 36% of respondents stated that Indonesia was a less democratic country. 47.7% of respondents stated that they somewhat agree that residents are increasingly afraid to express their opinions. 57.7% of respondents also stated that the apparatus is considered to be increasingly arbitrarily arresting residents who have different political views from those of the authorities.

2. Even today, Indonesia still contains material laws that are repressive and contrary to the spirit of protecting civil liberties, especially in a modern democratic climate, namely the ITE Law, which although it has been revised, contains a rubber article that creates a climate of fear in the community. Articles in the ITE Law attack groups that should be protected by the state. More specifically, the regulation of insults in Article 27 paragraph (3) which does not pay attention to the limitations on insults in the Criminal Code⁴

From the point of view of criminal law, the formulation of an act as a criminal act needs to consider the fulfillment of aspects of the principle of legality. In the tradition of the Civil Law System, there are four aspects of the principle of legality that are strictly applied, namely: statutory regulations (law), retroactivity (retroactivity), *lex certa*, and analogy⁵

In relation to the issue of articles of the ITE Law which have multiple interpretations, an important aspect to be discussed is the *lex certa* principle.

In relation to written law, legislators (legislatives) must formulate clearly and in detail the actions called criminal acts (crimes). This is called the *lex certa* principle. Legislators must define clearly without ambiguity (*nullum crimen sine lege stricta*), so that there is no ambiguous formulation regarding prohibited acts and sanctions. Unclear or overly complex formulations will only create legal uncertainty and hinder the success of prosecution (criminal) efforts because citizens will always be able to defend themselves that such provisions are not useful as guidelines for behavior.⁶ Based on the description of the background that has been compiled, legal problems were found in the form of unclear formulation of articles in the ITE Law which resulted in legal uncertainty, and violated the constitutional rights of the community. Based on these problems, the research team will arrange a study with the title: "CRIMINALIZATION OF THE ACTION OF SUBMISSION OF CRITICISM TO THE GOVERNMENT BASED ON THE ITE LAW AND PROTECTION OF THE RIGHT TO FREEDOM OF EXPECTATION IN A DEMOCRATIC COUNTRY"

II. PROBLEM IDENTIFICATION

1. How can the act of submitting criticism to the government through electronic media be qualified as a crime?
2. How can the regulation of submitting criticisms of the government in the order of laws and regulations in Indonesia guarantee the protection of the right to freedom of expression?

III. RESEARCH METHOD

This study uses a normative juridical research method, namely research to find out how the positive law is regarding a particular thing, event, or problem.⁷ The research approach used is a statutory approach and a conceptual approach. The statutory approach is

⁴ <https://icjr.or.id/masyarakat-nyatakan-takut-berpendapat-tamparan-keras-untuk-iklim-demokrasi/>, accessed on 21 December 2021.

⁵ Roelof H. Heveman, *The Legality of Adat Criminal Law in Modern Indonesia*, Tata Nusa, Jakarta, 2002, page 50.

⁶ Jan Remmelink, *Hukum Pidana: Komentar Atas Pasal-pasal Terpenting dari Kitab Undang-undang Hukum Pidana Belanda dan Padanannya dalam Kitab Undang-undang Hukum Pidana Indonesia*, Jakarta, PT Gramedia, 2003, page. 358.

⁷ Soerjono Soekanto, *Pengantar Penelitian Hukum*, Jakarta : UI Press, 1986, page. 45.

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an approach that is carried out by reviewing all laws and regulations related to the problems or legal issues being faced. The conceptual approach is an approach that departs from the views and doctrines that develop in the science of law. The data used are relevant laws and regulations and legal literature (books and legal journals), the data obtained through literature study.

IV. ANALYSIS AND DISCUSSION

1. Analysis of the act of submitting criticism as a crime

Criminal law is one of the fields of law that regulates various acts that are considered to be unlawful acts, where violators can be subject to sanctions. According to Sudarsono, in principle, criminal law is the one that regulates crimes and violations of the public interest and such actions are punishable by punishment which constitutes suffering.⁸

Van Bemmelen stated that the criminal law is an *ultimum remedium* (last drug). As far as possible it is limited, meaning that if other parts of the law are not sufficient to enforce norms recognized by law, then criminal law is applied. He pointed to a speech by the Dutch Minister of Justice Modderman which stated, among other things, that the criminal threat must remain an *ultimum remedium*. Every criminal threat has objections, but this does not mean that the criminal threat will be abolished, but must always consider the advantages and disadvantages of the criminal threat, and must ensure that the drugs given are worse than disease.⁹

In the case of conveying criticism from the public to the government, law enforcement should consider that not all criticism can be equated with insults or hate speech. Therefore, we need to reiterate the difference between criticism and contempt and hate speech. Grammatically, criticism is a criticism or response, or an explanation which is sometimes accompanied by good or bad descriptions and considerations of a work, opinion, performance, and so on.¹⁰

According to the Big Indonesian Dictionary (KBBI), criticism is a response given in the form of good or bad objects to be criticized.¹¹ Criticism and hate speech are 2 (two) different things. Hate speech is abusive or threatening speech or writing that is intended for certain individuals or groups.¹²

While criticism is speech or writing regarding good or bad considerations of a work, opinion, performance, and so on.¹³

Indonesia regulates electronic information distribution activities in several articles of the ITE Law. Some electronic information that is prohibited is that which contains decency violations, gambling, insults, extortion/threats, misleading information, hate speech, and threats intended to scare personally.

In the case of submitting criticism via the internet, the author will focus on analyzing 2 articles, namely Article 27 paragraph (3) concerning the prohibition of insulting or defaming content, and Article 28 paragraph (2) concerning the prohibition of content intended to incite hatred or tribal hostility, religion, race, and intergroup (SARA). In both articles, there are elements of insult and hatred, which are often applied non-selectively to utterances that actually contain criticism.

These articles provide restrictions on things that are prohibited in relation to the delivery of criticism via the internet. The purpose of the formulation of these articles is to make the cyber space a conducive place for interaction. But in reality, the application of these articles is used non-selectively by law enforcers. Data taken from Amnesty International Indonesia, during early 2021 to mid-March there were 15 cases and 18 victims of the ITE Law related to freedom of expression. Criminal cases against people who play social media in 2019 to 2020 have increased, recorded in 2019 there were 24 cases and in 2020 there were 84 cases, of course this is a real threat for people who play social media and of course this will injure the critical thoughts of the people whose freedom of expression is restricted as a result of this article.¹⁴

Based on SAFEnet's records, there were 381 victims of the ITE Law since it was first promulgated in 2008 until 2018. In addition, the Civil Society Coalition also reported that cases charged with Articles 27, 28, and 29 of the ITE Law showed that the sentences were up to 96, 8 percent (744 cases) with a very high rate of imprisonment, reaching 88 percent (676 cases)¹⁵

The Indonesian Political Indicators survey of 1,200 people throughout Indonesia on October 25, 2020 also showed that 36% of respondents acknowledged that Indonesia was a less democratic country and 47.7% of respondents said they somewhat agreed that the public was increasingly afraid to express their opinion. Not only that, 57.7% of respondents even considered that the apparatus was increasingly being arbitrary in arresting citizens who had different political views with the authorities.¹⁶

⁸ Titik Triwulan Tutik, *Pengantar Ilmu Hukum*, Jakarta, Prestasi Pustaka, 2006, page. 216-217.

⁹ Andi Hamzah, *Asas-Asas Hukum Pidana*, PT. Rineka Cipta, Jakarta, 1994, page.10.

¹⁰ Pusat Bahasa Departemen Pendidikan Nasional, *Kamus Bahasa Indonesia*, Jakarta: Pusat Bahasa, 2008, page. 761.

¹¹ *ibid*

¹² Lilith Bekaryan, "An Analysis of Hate Speech among Armenian Facebook Users", *Fleks Scandinavian Journal of Intercultural Theory and Practice*, Vol 7, No. 1, 2020, page. 3.

¹³ Pusat Bahasa Departemen Pendidikan Nasional, *Op.Cit*, page. 761.

¹⁴ Badan Eksekutif Mahasiswa Universitas Muhammadiyah Malang, *Revisi UU ITE, Akankah Bisa Lindungi Kebebasan Berekspreasi Masyarakat?* from: <https://bemu.umm.ac.id/id/berita/revisi-uu-ite-akankah-bisa-lindungi-kebebasan-berekspreasi-masyarakat.html>, accessed on 10 May 2022.

¹⁵ Tengku Raka, *Polemik UU ITE, Bukti Anti Kebebasan Berpendapat?*, LBH Masyarakat (LBHM), 2021, from <https://lbhmasyarakat.org/kolom-opini-polemik-uu-ite-bukti-anti-kebebasan-berpendapat/>, accessed on 10 May 2022.

¹⁶ Institute for Criminal Justice Reform, *[Rilis ICJR menyikapi Pidato Kepresidenan 16 Agustus 2021] Pidato Presiden Jokowi Soal Kritik dan Demokrasi: Masih Belum Nyata dalam Kebijakan dan Implementasi*, 2021, from <https://icjr.or.id/rilis-icjr-menyikapi-pidato-kepresidenan-16-agustus-2021-pidato-presiden-jokowi-soal-kritik-dan-demokrasi-masih-belum-nyata-dalam-kebijakan-dan-implementasi/>, accessed on 10 May 2022

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In 2021, a Joint Decree was issued between the Minister of Communication and Information of the Republic of Indonesia, the Attorney General of the Republic of Indonesia, and the Head of the Indonesian National Police regarding Guidelines for the Implementation of the ITE Law. The decree is expected to serve as a guide for law enforcers in interpreting and applying the applicable regulations in cases that occur, so as not to create legal confusion or uncertainty.

In the Joint Decree it is stated that "It is not an offense relating to insults and/or defamation in Article 27 paragraph (3) of the ITE Law, if the content or content that is transmitted, distributed or made accessible is in the form of an assessment, opinion, evaluation result, or a reality."

The victim as a reporter must be an individual with a specific identity, and not an institution, corporation, profession or position. For guidelines for the interpretation of Article 28 paragraph (2) regarding hate speech, the thing to note is that the electronic information that can be accessed can cause feelings of hatred or hostility towards individuals, or community groups based on ethnicity, religion, race, and between groups.

The phrase inter-group is an entity of people's groups outside of ethnicity, religion and race, as the definition of inter-group refers to the decision of the Constitutional Court Number 76/PUU-XV/2017. In the decision it is stated that the meaning of the phrase between groups includes all entities that are not represented or accommodated by the terms ethnicity, religion and race.

The ambiguity of the meaning of "between groups" in Article 28 paragraph (2) of the ITE Law has resulted in the application of this article being very widespread. Criticism of the government can be punished by a criminal because the phrase between groups can be considered to include government groups. In addition to government groups, inter-group elements can also be expanded to protect individuals from humiliation on the basis of profession, position, political group and others. This of course creates legal uncertainty and threatens freedom of expression for the community.

Intergroups should be based on the identity of the community or citizens, which is something that is inherent and difficult to change, not professions, groups, or other things that are easy to change. Identity that is inherent and difficult to change such as: race, country of origin, religion, place, origin, descent, nationality or position according to constitutional law, or other identities that are stable and permanent.¹⁷

The following are some cases that have occurred in Indonesia, where criticism of the government resulted in the imposition of criminal sanctions.

No.	Name of Criminal Offender	Case Summary	Accusation	Verdict
1	I Gede Ari Astina a.k.a Jerinx	Jerinx wrote a critique of the Indonesian Doctors Association which requires all patients who are about to give birth to be tested for Covid 19. This procedure set by the Government is considered burdensome to the people. In his upload, Jerinx wrote that Indonesian Doctor Association is a slave of World Health Organization. ¹⁸	Article 27 paragraph (3) ITE Law and Article 28 paragraph (2) ITE Law	Proven to violate Article 28 paragraph (2) ITE Law Denpasar District Court verdict: 14 months in prison
2	M.Asrul	M. Asrul is a journalist who writes news related to allegations of corruption. The three news stories are Prince of Palopo Allegedly 'Mastermind' Corruption PLTMH and Chips Zaro Rp11 billion published on 10 May 2019, Aroma of Corruption in Palopo Pancasila Field Revitalization Allegedly Dragging Farid Judas published May 24 2019, and finally Volume II Corruption of Rp. 5 M, Investigator Signal for Fairid Judas? published May 25, 2019 ¹⁹	Article 27 paragraph (3) ITE Law	Palopo District Court verdict: 3 months in prison

¹⁷ Sustira Dirga, *Menelisik Pasal Bermasalah Dalam UU ITE Pasal 28 Ayat (2) tentang Ujaran Kebencian*, Jakarta : Institute for Criminal Justice Reform (ICJR), 2021, page. 6.

¹⁸ Contributor CNN Indonesia, *Jejak Kasus Jerinx 'IDI Kacung WHO' Hingga Bebas*, 8 Juni 2021, diakses melalui : <https://www.cnnindonesia.com/nasional/20210608085701-12-651556/jejak-kasus-jerinx-idi-kacung-who-hingga-bebas/2> , accessed on 11 May 2022.

¹⁹ Amran Amir, *Beritakan Kasus Dugaan Korupsi di Palopo, Jurnalis Asrul Divonis 3 Bulan Penjara*, 23 November 2021, diakses melalui <https://regional.kompas.com/read/2021/11/23/210916978/beritakan-kasus-dugaan-korupsi-di-palopo-jurnalis-asrul-divonis-3-bulan?page=all> , accessed on 11 May 2022.

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3	Dhandy Dwi Laksono	Police arrested activist and journalist Dandhy Dwi Laksono on Thursday, September 26, 2019. The arrests were made due to Dandhy's tweet about conditions in Papua. During that period, Dandhy was known to have tweeted a lot about the riots in Papua caused by acts of racism. The police on 27 September 2019 stated that they had named Dandhy a suspect in the hate speech case. ²⁰	Article 28 paragraph (2), and Article 45 A paragraph (2) ITE Law	The process was stopped at the investigation stage
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From the three examples above, we can see that there is a very unclear line between the act of delivering criticism and the elements of hate speech and insults/defamation. In addition to the unclear boundaries, there is an imbalance in position between the party suspected of being a law violator and the reporting party. The reporting party is part of the authorities, while the reported party is the community. The unclear understanding of the phrase between groups has also led to the widespread use of Article 28 paragraph (2) of the ITE Law as a means of abuse of power by the government. The meaning of intergroup phrases that are too broad can lead to criminalization.

The act of submitting criticism cannot be categorized as a crime if the statement / sentence of criticism contains an element of humiliation / degrading (Article 27 paragraph (3) of the ITE Law), or if the submission of the statement is not intended to criticize, but to cause hatred or ethnic, religious, racial, and inter-group hostility (SARA).

2. Analysis of the protection of freedom of expression in Indonesia

Indonesia is a state of law. This is clearly stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. According to Julius Stahl, the concept of the rule of law which he calls the term 'rechtsstaat' includes four important elements, namely:

1. Protection of human rights.
2. Power sharing.
3. Government by law.
4. State administrative court.²¹

Apart from being a state of law, Indonesia is a democratic country. Etymologically, the word democracy comes from the Greek "demos" meaning the people, and "kratos" which means power or power. Thus democracy means government by the people, where the highest power is in the hands of the people and is exercised directly by them or their elected representatives under a free electoral system. Democracy is the best principle and system in the political and constitutional system, it cannot be denied. repertoire of thought and political pre-reform in various countries to a common point about this: democracy is the best choice of various other options.²²

According to C.F. Strong, democracy as a system of government in which the majority of the adult members of the political society participate through representative means which ensure that the government is ultimately accountable for its actions to that majority. In other words, a democratic state is based on a representative system that guarantees the sovereignty of the people.²³

Democracy is known by various terms: constitutional democracy, parliamentary democracy, guided democracy, people's democracy, Soviet democracy, and national democracy. Of the many schools of thought regarding democracy, there are 2 (two) very important groups, namely: constitutional democracy and democratic groups that base themselves on communism. The fundamental difference between the 2 (two) groups is that constitutional democracy aspires to a government with limited powers, namely a state (rechtsstaat) that is subject to the rule of law. Meanwhile, democracy, which is based on communism, aspires that the government has unlimited power (machtsstaat) and is totalitarian in nature.²⁴

A distinctive feature of constitutional democracy is the idea that a democratic government is a government that has limited powers and is not allowed to act arbitrarily against its citizens.²⁵

²⁰ Eko Ari Wibowo, *Mereka yang Berhadapan dengan Polisi Setelah Kritik Pemerintahan Jokowi*, diakses melalui <https://nasional.tempo.co/read/1432712/mereka-yang-berhadapan-dengan-polisi-setelah-kritik-pemerintahan-jokowi/full&view=ok>, accessed on 17 May 2022.

²¹ Jimly Asshiddiqie, *Makalah: Gagasan Negara Hukum Indonesia*, from: http://www.jimly.com/ /Konsep_Negara_Hukum_Indonesia.pdf, accessed on 11 May 2022.

²² Ni'matul Huda, *Ilmu Negara*, Raja Grafindo, Jakarta, 2014, page 196.

²³ Eddy Purnama, *Negara Kedaulatan Rakyat*, Nusamedia, Jakarta, 2007, page 4.

²⁴ Ni'matul Huda, *Hukum Tata Negara Indonesia*, Jakarta, Raja Grafindo Persada, page 263.

²⁵ *Ibid*, page 265.

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Democracy can simply be interpreted as a system of government based on people's sovereignty. Therefore, in a democratic country, all policies set by the government, including all forms of regulations that are enacted, are aimed at the interests and welfare of the people.

In a democracy, people have the right to express their opinion. The fundamental characteristic of a country with a democratic system is the involvement of citizens in every political decision-making, either directly or through representatives. This description provides the view that everyone has the right to discuss every state policy on behalf of the people. The involvement of citizens in every political decision making of the country. The involvement of people in political decision-making is a form of democracy, thus every citizen has a sense of responsibility for government policies.²⁶

The concept of protecting human rights is not with the state allowing every citizen to act freely without limits. Bahder Johan Nasution stated: From the point of view of regulating human rights, on the one hand, human rights have a basic nature that limits government power, but on the other hand, the government is given the authority to limit basic rights in accordance with the sturing function. So although basic rights contain the nature of limiting the power of government, these restrictions do not mean turning off the power of government which basically contains the authority to control people's lives.²⁷

This control function is manifested by the enactment of various legal rules, including the rule of criminal law. Each criminal code is enforced based on certain policies. Criminal law policy has a similar meaning to criminal politics. Criminal politics (criminal policy) is a rational effort to tackle crime. This criminal politics is part of law enforcement politics in a broad sense (law enforcement policy). Everything is part of social politics (social policy), namely the efforts of the community or the state to improve the welfare of its citizens²⁸

To tackle crime, the state needs to establish a criminal law policy. Criminal law policies can be in the form of penal or non-penal policies. Two central problems in criminal policy using the means of penalization (criminal law) are the problem of determination:

1. What actions should be criminalized, and;
2. What sanctions should be used or imposed on the violator

In the context of delivering criticism, the act of delivering criticism should not be categorized as a criminal act. Legislators should understand that an act that deserves to be categorized as a criminal act is an act that can cause harm to the victim or loss to the state. Based on the current enactment of the ITE Law, criticism can be qualified as a criminal act if it contains elements of humiliation, defamation, hate speech, threats, SARA and violations of decency.

Regarding the freedom to express opinions in the context of conveying criticism to the government, in principle in Indonesia, the state allows the public to freely express their thoughts, opinions, both verbally and in writing, but must not violate the rights of others.²⁹

The implementation of the ITE Law is certainly inseparable from internet usage activities. Legislators certainly need to understand the characteristics of social interaction through internet media. On the internet the real authority holder is not the state, but the server or the manager of the website in question. In other words, the highest control holder of the internet is the internet user community itself. So, thus, the position of the community is actually very central in order to realize the good values to be achieved from a regulation.³⁰

For example, if a user violates one of the clauses made by Facebook, Facebook administrators can impose sanctions whose impact is far more effective than what is stipulated by the state through its law. For certain users who spread pornographic content, Facebook will immediately act by removing the content from its page. Facebook can also cancel the account of the internet user in question so that the user can no longer do activities on Facebook using his personal account.

The same applies to hate speech. The providers of social media platforms usually already have community guidelines which include what kind of words are prohibited from being published because they can be considered as spreading hatred, demeaning other individuals, and so on.

In Indonesia, the enactment of the ITE Law raises pros and cons, especially regarding the regulation of offenses against insults, defamation, and hate speech. Regarding the ambiguity of inter-group elements in the hate speech article, it has been described in the previous sub. In this section, the author wants to review the elements of humiliation and defamation in the ITE Law.

²⁶ Latipah Nasution, *Hak Kebebasan Berpendapat dan Bereksprei Dalam Ruang Publik di Era Digital*, 'Adalah: Buletin Hukum dan Keadilan, Vol. 4, No. 3 (2020), page. 42.

²⁷ Bahder Johan Nasution, *Negara Hukum dan Hak Asasi Manusia*, Bandung, Mandar Maju, 2011, page. 241.

²⁸ Muladi & Barda Nawawi, *Teori dan Kebijakan Pidana*. Bandung: Alumni, 1992, page 1.

²⁹ Constitutional Court of the Republic of Indonesia, Decision Number 2/PUU-VII/2009, p. 8.

³⁰ AP. Edi Atmaja, *Kedaulatan Negara Di Ruang Maya : Kritik UU ITE Dalam Pemikiran Satipto Rahardjo*, *Jurnal Opinio Juris* Vol. 16 Mei –September 2014, page. 83.

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It is interesting to reveal the views of experts regarding the material review of Article 27 Paragraph (3) in conjunction with Article 45 Paragraph (1) of the ITE Law. Soetandyo Wignjosoebroto stated that the sources of objections to Article 27 Paragraph (3) of the ITE Law are, first, the lack of clarity regarding who is the target of the regulation of the norms of the article: those who make information accessible or those who make insults and/or defamation. (*dader*). Second, the article on insults is an article that contains elements of a very subjective offense, in contrast to the formulation of other offenses which are always formulated more objectively, for example theft. Humiliation is always subjective because there must be a party who feels victimized and feels humiliated³¹

As a comparison, in the United States, arrangements regarding freedom of speech are regulated in the United States Code (U.S Code) which is a collection of codifications of United States law, consisting of 53 section titles, and published by the Office of the Legal Revision Advisor to the U.S. House of Representatives.

The U.S Code regulates freedom of expression which is prohibited from containing race, color, religion and national origin, threats to take life, kidnapping, killing or injuring the body and so on. Based on jurisprudence, the submission of criticism can only be criminalized if it directly incites criminal activity consisting of certain threats of violence directed against a person or group.³²

In addition to America, the author gets information related to the regulation of freedom of expression that applies in Singapore. The guarantee regarding freedom of expression for Singaporean citizens is guaranteed constitutionally in Article 14 paragraph (1) letter a of the Singapore Constitution. Where with the article title 'Freedom of Speech, Assembly and Association', paragraph (1) letter a of Article 14 states that every Singaporean citizen has the right to freedom of opinion and expression³³

Specifically regarding the right to freedom of expression, in Article 14 paragraph (2) letter (a) there are restrictions on this right which can be exercised by law by the Singapore Parliament on considerations including: Singapore's security, diplomatic relations with other countries, public order or morality, and restrictions aimed at protecting the interests of Parliament or to prevent harassment of the courts, or defamation.³⁴

For Singapore, very restrictive arrangements on the freedom of expression of its citizens have resulted in many cases where even peaceful assembly and expression of opinion is subject to sanctions and even criminal penalties.

Each country certainly has its own policies regarding the regulation of freedom of expression, in relation to the social facts and culture of their respective communities. This cannot be blamed, because it returns to the respective state authorities in determining the applicable law in their country. However, in terms of determining an act as a criminal act, of course it must return to the principles that apply in criminal law, one of which is the principle of *ultimum remedium*, namely criminal law as a last resort to resolve a violation. Criminal responsibility also needs to fulfill the elements of *actus reus* and *mens rea*. This is in line with the principle of no crime without guilt. The error in this case refers to the *mens rea* element, where the perpetrator whose actions meet the *actus reus* element, can only be accounted for / can be subject to criminal sanctions if the *mens rea* element is fulfilled, which is related to the psychological state of the perpetrator, inner attitude, and intention.

This principle needs to be understood by law enforcement so that in the event of a case of submitting criticism by the public using the internet media, law enforcers need to pay attention to the intent of the perpetrator's actions. Do the perpetrators intend to criticize the government or do the perpetrators have the aim of inciting, spreading hate speech, provoking, making noise and so on. The implementation of the principle of no crime without error is also of course related to the evidentiary process. In the evidentiary process, law enforcers need to investigate the intent / motive for committing the act, and not only provide limited evidence of their actions in order to ensure that the action fulfills the elements of the article being charged.

Currently, unlawful acts occur in cyberspace. The state, in order to carry out its control function, needs to assert its authority in cyberspace. Affirmation of state authority by criminalizing an act certainly needs attention. Criminalization of an act needs to pay attention to the following:

1. "The purpose of criminal law

Criminal law is tasked with or aims to tackle crime.

2. Determination of unwanted actions

That an act that is not harmful cannot be determined as an unwanted act. On the other hand, not all harmful actions need to be prevented by using criminal law.

3. Comparison between means and results

³¹ Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 2/PUU-VII/2009, hlm. 57.

³² American Library Association, "Hate Speech and Hate Crime" <https://www.ala.org/advocacy/intfreedom/hate> accessed on 11 September 2021.

³³ Yassar Aulia, Aktualisasi Kebebasan Berpendapat di Negara Demokrasi yang Lemah: Perbandingan Indonesia dan Singapura, Padjadjaran Law Review, Volume 7, Nomor 2, 2011, hlm. 3.

³⁴ *ibid*, hlm. 4.

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In criminal law, it is necessary to pay attention to the social costs incurred to finance the system of administering criminal law. In addition, it is necessary to pay attention to the effect of the crime itself on the convict. Criminal law itself is criminogen, meaning it becomes a source for the emergence of criminal acts. Ineffective criminal regulations should not be made

4. The ability of law enforcement agencies By creating criminal acts, it can be estimated that the burden on law enforcers will increase, and therefore this must also be taken into account before any criminalization occurs.³⁵

Based on the description that has been presented in this section, the author is of the opinion that in Indonesia, freedom of expression is guaranteed by the constitution. Weaknesses found are related to the rules of the ITE Law which have multiple interpretations and law enforcers are often reluctant to explore the intent / purpose of the critical statements submitted by the perpetrators, and only focuses on whether the actions taken fulfill the elements of the offense.

V. CONCLUSION

The ITE Law is a law that aims to create conduciveness for public interaction in cyber space. The ITE Law should not reach out / criminalize all forms of electronic information that are critical of the government. It is still necessary to limit the submission of criticism through the internet media, where the criticism must not contain insults and hate speech. In order to create an ideal democratic atmosphere, it is necessary to protect and limit rights in a balanced way. When dealing with suspected criminal cases, law enforcers need to apply the principles that apply in criminal law, one of which relates to proving the intent / purpose of the actions committed by the perpetrator.

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