

## **Hate Speech Crime: Is it Violating the Rights of Freedom of Speech?**

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In the current digital era, taking advantage of a social media platform is a common thing practiced by many people, including young teenagers. The presence of social media platforms does not only result in the positive expressions of people but are also found to be used to express their negative views and opinions. This has brought issues and concerns of hate speech that occur within the social media platform.

Indonesia as a democratic country has guarantee the concept of freedom of speech towards its citizens. This concept can be seen from the enactment of the 1945 Constitution, specifically within Article 28E where “every person shall has the right to the freedom to associate, to assemble and to express opinions”. It is further specified in Article 28F that “every person shall have the right to communicate and to obtain information for the purpose of the development of his/herself and social environment and shall have the right to seek, obtain, possess, store, process, and convey information by utilizing all available types of channels”. The 1945 constitution here acts as the *lex generalis* in guaranteeing the right to freedom of speech. However, the right to freedom of speech guaranteed by the 1945 Constitution does not provide absolute freedom toward people to express their views and opinions. In some cases, many of their expressions have led them to a criminal liability.

Freedom of speech is a part of human rights guaranteed by the 1945 Constitution, and thus it is subjected to limitations through enactment of laws and regulations. An example of its limitations could be seen from Law No. 11 of 2008 regarding Electronic Information and Technology (“**EIT Law**”), specifically Article 28 paragraph 2 which states that “any person deliberately and without rights distributes information that is intended to cause hatred or hostility to certain individuals and/or community groups based on ethnicity, religion, race, and inter-group relations (SARA)”.

Law No. 16 of 2016 (“**Amendment of EIT Law**”) further specifies the element of hate speech which could be accounted for criminal liability. This criminal element could be seen from Article 45(A) Paragraph 2 of the Amendment of EIT Law that “any person who knows and without rights disseminates information aimed at creating feelings of hatred or hostility towards certain individuals and/or community groups based on ethnicity, religion, race, and inter-group relations (SARA) .... Shall be subject to criminal sanctions of imprisonment for a maximum of 6 (six) years and/or a maximum fine of Rp1,000,000,000.00 (one billion rupiah)”. From these limitations, however, it still does not provide clear threshold as to what constitute as hate speech and what entails as a mere criticism.

A common issue regarding criticism and/or hate speech is concerning hate speech crime against the president and/or state representatives.<sup>1</sup> One case could be seen from Bambang Tri Mulyono case in 2017 where Bambang published a statement to its Facebook account that result in criminal liability. He was later found guilty and charged with Article 28 paragraph 2 *Jo.* Article 45 paragraph 2 of EIT Law on the basis of hate speech against President Joko Widodo, in which the statement published by Bambang has attacked the honor of the President at the same time create negative impact towards the community.<sup>2</sup>

The criminalization of hate speech thus has resulted in a lot of criticism coming from the community, as it is not only limiting the concept of freedom of speech but have also refrained people from criticizing in any matter.<sup>3</sup> The vagueness of hate speech could be seen from several perspective. First, the idea of criminalizing hate speech can guarantee protection of other fundamental rights. For example, the right to be protected from discriminatory treatment in cases of hate speech against minority groups. On the other hand, criminalizing hate speech also result in the violation of rights of freedom of speech as guaranteed in 1945 Constitution. Thus, it is questioned as to how a statement is considered as hate speech and the limitations to the guaranteed rights to freedom of speech. From the case above, it could be seen that the use social media has created an impact in creating criminal liability. By having the right to freedom of speech, a person shall have their freedom to express its views and opinions in any matters, including the action or decision-making of the state representatives as their action would have direct effects towards the people.<sup>4</sup> By imposing criminal sanctions towards hate speech therefore results in limitation as how we as a citizen could correct, advice, or express our opinions of certain matter within the state.

It is questioned whether the existing law has already provided accurate definition in distinguishing hate speech crime and criticism as a form of freedom of speech. Therefore, it is important to have a certain threshold to determine whether a written statement shall be deemed as a hate speech crime. Such statements made cannot be seen only through the wording. It is also important to also look from the bigger perspective, such as determining the intent of the author who made such statements. This is to make sure whether the statements made shall be deemed as hate speech crime.<sup>5</sup>

Public opinions towards certain matters are important within a democratic state. As public opinions may derive from different groups of people coming from different communities. By having

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<sup>1</sup> Al Fatih and ZF Aditya, "Indonesian Constitutional Rights: Expressing and Purposing Opinions on the Internet".

<sup>2</sup> *Blora District Court Decision Number 47/Pid.SUS/2017/PN Bla* (2017)

<sup>3</sup> Banks James, "Regulating Hate Speech Online", Sheffield Hallam University, <http://orcid.org/0000-0002-1899-9057>

<sup>4</sup> Tarlach McGonagle, "The Council of Europe against Online Hate Speech: Conundrums and Challenges," *Council of Europe Conference Expert Paper* (2013): 1–37,

<http://www.coe.int/t/dghl/standardsetting/media/belgrade2013/McGonagle - The Council of Europe against online hate speech.pdf>.

<sup>5</sup> *Ibid*

the ability and rights to criticize, it does not mean that a criticism shall always bring negative impact; their different perspective may also create positive impact and thus will influence the construction of political bodies and its state matters.<sup>6</sup> The growth of technology and the modern society has also created a more active and creative individuals which enable them to express their opinions pertaining to any matters, including state and political matters.<sup>7</sup> Thus, maintaining and upholding freedom of speech is a precondition for a healthy democracy in which public interest shall be protected.

The fact that the right to freedom of speech is guaranteed under Indonesian 1945 Constitution, it could still be subjected to limitations to certain laws including the EIT Law. Thus, it is important to take into account that the 1945 Constitution is not an absolute right due to the fact that it could be overridden by statutory restrictions, where such opinions or statements made shall not enter the territory of individual privacy, contain elements of hatred, attack, or hostility to the rights of other people.

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<sup>6</sup> Information Society Department, “Freedom of Expression in 2021”, <http://www.coe.int/freedomofexpression>

<sup>7</sup> M. Markovik, “Political Attitude and Personality in a Democratic Society,” *the Western Balkans Policy Review* 1, no. 1 (2010): 168–184.