Analysis of Hate Speech in the Perspective of Changes to the Electronic Information and Transaction Law

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Abstract

This study aimed to assess the effectiveness of hate speech rules concerning changes in electronic transaction information policies. It further used normative legal study which included the process of identifying legal rules, principles, and doctrines to address the constitutional issues. The results showed that the amendments from the 2008 ITE Law to the 2016 ITE Law did not adequately the basic problems. Furthermore, certain forms of hate speech rules were observed in the ITE Law, particularly in Article 27 paragraph (3) and Article 28 paragraph (2). These rules were unclear benchmarks used in assessing social media posts as hate speech, defamation, or criticism and opinion from an individual about a problem. Therefore, making improvements through legal reform was essential to ITE Law, specifically Article 27 paragraph (3) and Article 28 paragraph (2). The amendments were necessary to develop good legal certainty for the community. The government should further make legal comparisons with other countries to identify the best regulatory framework for the community.

A. Introduction

Law is a reflection of government policy contained in the legislation of a country, serving not only as a subject but also an object of development in the implementation. The primary function is to establish order and truth in society, thereby facilitating social supervision. The rapid development of the globalization era further led to significant changes, particularly in the field of electronic transactions where digital equipment is increasingly prevalent in various social activities.
The global development has gradually shifted the socialization aspect from face-to-face communication to electronic messaging where individuals greet the news of relatives, friends, and others through social media. However, this shift has also opened the door to the spread of hate speech, blurring the line between genuine information and misinformation. The Indonesian Human Rights Act further guarantees everyone the freedom to express opinions, positively impacting trade by enabling easy electronic transactions.

The digital era development influences the legal order in countries such as Indonesia where specific regulations for digital space or social media were lacking before the surge of electronic transactions. As the Criminal Code regulates hate speech including Article 154 concerning public statements of hostility toward the government and Article 156 regarding hatred directed at various Indonesian groups, the increasing use of social media and online news sites has developed fresh challenges.

The adoption of social media and online news sites which tend to increase from year to year has led to a new phenomenon. The negative impact of the adoption is the absence of rules to regulate criminal offenses, such as fraud or misconduct against individuals or groups. This requires regulations that should be prepared by the government. Using information technology as well as establishing legal frameworks to combat various unlawful acts and cybercrimes necessitates discussion of ITEUU.

Criminal offenses in regulations are written through sentences and phrases possessing specific meanings, with the elements of the misconduct forming the basis for assessment. The complexity of the elements can be interpreted as a criminal offense that serves as a threat when a prohibited act is committed by a legal subject, either individual or group. Consequently, the despicable attitudes of an individual are less pertinent in criminal law.

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emphasizing actions or inactions to be constituent elements of the offenses, as articulated by Jan Remmelick.⁶

Indonesia introduced the law regulating electronic digital transactions in 2008 commonly known as ITE Law. This regulation extends beyond only addressing criminal offenses, comprising national-level rules concerning electronic transactions. The primary objective is to educate and enhance the nation’s livelihood by optimizing and spreading electronic information technology evenly. ITE Law officially comes into existence on April 21, 2008, consisting of 13 chapters and 54 articles explaining the rules governing cyberspace and transactions.⁷ Referred to as Cyber Law in English, ITE Law comprises internet-related transactions and information adoption which provides legal protection for various activities.

The Ministry of State Communication and Information (KOMINFO) initiated the drafting of ITE Law in March 2003, initially named the Electronic Communication and Transaction Information Law. The drafting process includes collaboration between the Transportation, Industry, and Trade Departments as well as several leading universities in Indonesia including Padjajaran University, University of Indonesia, and Bandung Institute of Technology. ITE Bill was eventually approved by 10 factions in House of Representatives (DPR) on March 25, 2008. Subsequently, the bill was enacted into Law No. 11 of 2008 on ITE signed by President Susilo Bambang Yudhoyono (SBY), and published in state sheet No. 587 of 2008 as well as additional state sheets.⁸

Individuals often misuse the pretext of freedom of expression to perpetrate acts of hate speech in contemporary society.⁹ Every individual is entitled to communicate with the process in various contexts both physically, socially, and psychologically because communication transcends spatial boundaries.¹⁰ The passage of time and the influence of various factors made ITE Law experience a slight revision precisely in 2016 with the birth of Law No. 19 of 2016 regarding amendments to ITE Law No. 11 of 2008. This amendment includes several additional explanations such as Article 27 Paragraph 3 with references to defamation regulated in the Criminal Code.

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Therefore, the study anticipates that the existence of ITE Law will mitigate crimes in the electronic digital world by subjecting individuals’ acts on the platforms to monitoring, particularly in commercial activities serving as the rationale behind the inception.

Various sectors of community life are rapidly evolving including the government, banking, business, education, and health sectors all integrating information technology into social activities. The role of information and communication technology in the era of globalization holds a strategic position, presenting a world without borders, space, and time. There are 9 articles on ITE criminal offenses in ITE Law from Article 27 to 35 which define and categorize crime in the field of information technology and cybercrime. The proliferation of electronic information systems has led to an increase in criminal activities, particularly social media platforms. Hate speech in certain social media platforms such as Facebook, Twitter, and Instagram, has garnered significant public attention due to numerous arrests related to offensive statements posted or uttered.

Acts of hate speech include provocation, insults, and incitement targeting individuals or groups based on characteristics such as race, skin color, social status, culture, gender, religion, and sexual orientation. Legally, hate speech is an act of communication from an individual or group that can incite violence and prejudice from both perpetrators and victims. The significant concern arising from the digital world's evolution is the dissemination of posts containing hate speech in various forms such as images, words, videos, and voice messages through digital platforms often leading to insults, defamation, and blasphemy. The widespread use of social media amplifies the impact, as a single post can offend individuals or groups, sparking public outrage and leading to legal reports under ITE Law.

Hate speech on social media affects numerous victims, prompting aggrieved individuals to take legal act, often using criminal law instruments to address the offenses. Despite the amendment in Law No. 19/2016, defamation cases on electronic and social media are still addressed under Article 27 Paragraph (3) of ITE Law, as evidenced by the indictment referencing this study. Numerous hate speech cases predominantly include Article 27 Paragraph 3 which is often an unclear benchmark, as experienced by Ahmad Dhani. Even after the 2016 revision of ITE Law through Law No. 19/2016, the problems with the study persist which lacks explicit legal clarity. The presence of provisions such as Article 28 in ITE Law continues to pose a threat of unjustly criminalizing individuals and stifling criticism.

Despite the 2016 amendment to ITE Law, it fails to provide legal certainty showing concerns about the impact on freedom of expression in

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Indonesia. Individuals are still easily arrested based on the activities on social media as perceived in cases including Baeq Nuril and more recently Ahmad Dhani who was accused of hate speech. This underscores a profound issue in Indonesian law, emphasizing the urgent need for comprehensive reform to safeguard fundamental rights and ensure justice for all. ITE Law is often criticized as vague and easily misused which leads to the suppression of criticism, a fundamental aspect of democracy.

ITE Law is not ideal according to observer and activist Damar Juniarto from the Southeast Asia Freedom of Expression Network (Safenet). Numerous cases including citizens originate from expressing opinions or criticizing government policies which should be tolerated in a democratic society. The government through the Indonesian police further issued a circular regulating hate speech, appearing to infringe on the freedom of speech. The issue lies in the lack of clarity regarding the definition of criticism as either defamation or hate speech under ITE Law. Consequently, individuals expressing criticism may face arrest despite criticism being a protected form of freedom of speech in a legal state.

The recent cases which include Baiq Nuril accused of transmitting a message prohibited by ITE Law and Ahmad Dhani criticized a group with hate speech, show the ambiguity of the implementation. When facing allegations of legal infringement, the actions of the accused should be perceived as only criticism rather than criminal behavior. This emphasizes a fundamental problem with ITE Law, originally intended to protect consumers in online transactions but now used to stifle speech on social media platforms. Therefore, there is a legal problem in the regulation requiring a pressing need for further study of the law particularly regarding the necessity to regulate or remove Article 27 on defamation and hate speech. This implies individuals communicating opinions or criticisms of the governing authorities could face charges under the regulation.

The lack of clear criteria for distinguishing hate speech from legitimate criticism in Articles 27, 28, and Government Regulation No. 82 of 2012 concerning the Implementation of Electronic Systems and Transactions (referred to as PP No. 82 of 2012) contributes to the legal ambiguity. Individuals risk being unfairly penalized for communicating personal views in a democratic society without proper guidelines. This ambiguity is often referred to as norm vagueness in legal study.

Societal tensions may persist when appropriate revisions are not taken on the issues leading to further conflicts and reports. Therefore, enacting effective legal reforms to address hate speech on electronic social media platforms. This necessitates a comprehensive examination of the problems, serving as the basis for further studies aimed at understanding and addressing hate speech in the context of changes to the Electronic Information and Transactions Law.

The study acknowledges and explores previous publications relevant but distinct from the current focus. This serves to underscore the novelty of
the author’s efforts, emphasizing the unique contribution of the publication in addressing specific gaps and expanding upon existing knowledge in the field. For instance, Nur Rahmawati, Muslichatun, and M. Marizal conducted a qualitative investigation titled “Freedom of Expression against the Government through Social Media in the Perspective of ITE Law”. It primarily examined student reactions to social media posts criticizing the government. However, the study explores the normative aspects of ITE Law and other legal frameworks governing hate speech on social media with a broader scope beyond governmental criticism.

The publication conducted by Atikah Mardhiya Rohmy, Teguh Suratman, and Arifni Indah Nihayaty entitled UU ITE in the Perspective of Information and Communication Technology Development was also discovered. The study focused on ITE Law's response to technological advancements and citizens' constitutional right to access information. However, this study aims to analyze the latest legal regulations addressing hate speech, emphasizing the need for citizen protection against unfounded defamation charges under ITE Law. This study adopted the normative legal method outlined by Peter Mahmud Marzuki, which focused on identifying legal rules, principles, and doctrines. The method was instrumental in effectively addressing constitutional issues by conducting a thorough review of legal literature and jurisprudence.

B. Results and Discussion
1. Regulation of Hate Speech on Social Media in the Perspective of Legislation

Following periods of authoritarian rule in Indonesia particularly during the old and new orders, the nation experienced a significant shift in 1998. This transition signified the commencement of the reformation period, characterized by increased democratic practices and the recognition of freedom of speech as a fundamental right. The reformation period evolved in response to public demonstrations that led to the resignation of the new order’s leadership. This transition triggered a period of freedom of speech where power was subject to limited terms through electoral processes.

Freedom of speech was a right that needed to be protected by power, with the protection being guaranteed in the constitution. It was also an inherent right, not solely a privilege granted by the state. According to John Austin, jurisprudence was tasked solely with analyzing the real elements of the modern legal system which could not be separated from the historical context.12 Furthermore, the role of the state was to protect citizens against any

infringements upon the rights, including the expression of opinions. In the digital age, the state needed to safeguard citizens' freedom of speech online with a reform-minded approach. Consequently, the government issued ITE Law regulation in 2008 despite the controversies surrounding the ambiguous provisions. Freedom of speech was considered a fundamental right that should not be restricted, as reflected in the existence of laws. However, these laws were often used to restrain individuals' opinions leading to criminal repercussions over time. The acts suggested a pressing issue prompting experts to advocate for a comprehensive review of the legal framework.

Indonesia adhered to a democratic system of government as the largest democracy, where the constitution and the state were expected to protect the freedom to communicate opinions orally or in writing under any circumstances. Article 1 Paragraph (1) of Law No. 9 of 1998 concerning freedom of expression in public (referred to as the Freedom of Expression Law) explicitly guaranteed every individual in the country the right to communicate views, thoughts, and opinions publicly both orally and in writing. Following this Act, including through social media, which had become an essential platform for societal discourse.

After closer examination, the Freedom of Expression Law was suggested to be a further provision of Article 28 of the 1945 Constitution (referred to as the 1945 Constitution). The Article stipulated that "the freedom of association and assembly to express personal thoughts orally and in writing shall be determined by law." Consequently, the state granted legality to the space and freedom of individuals to consciously exchange thoughts.

Friendman referred to legal theory as a science that examined the essence of the law in this context, positioned between legal philosophy and political theory. The study focused on expressing the essence of the relevant rules regarding the problem at hand allowing for the legal explanation of the shortcomings in existing legal frameworks. Hate speech was further examined from various perspectives of the rule of law, comprising four regulatory viewpoints namely the 1945 Constitution, ITE Law, Law No. 40/2008 on the Elimination of Racial and Ethnic Discrimination (referred to as the Racial Discrimination Law).

Indonesia was a state of law as stated by Article 1 paragraph (3) of the 1945 Constitution, necessitating the confirmation of freedom of behavior through four rules which served as the primary foundation. Therefore, the law was not solely a product produced by state institutions but also a guiding principle underlying the acts of various state bodies, directing all aspects of community life, nationality, and state. In the book "The Freedom of Expression," Riant D Nugroho underscored the connection between freedom of association and assembly, as outlined in Article 28 of the 1945 Constitution. The study suggested that participation in decision-making processes, either directly or indirectly through legitimate institutions representing the interests was integral. This participation was also rooted in freedom of association,
speech, and expression, which formed the foundation for democratic engagement.\(^\text{13}\)

Participation or freedom of opinion was an elaboration of human rights, either directly or through social media as stipulated in the 1945 Constitution. The prolonged struggle for human rights was not only a historical occurrence but also an essential part of the journey toward recognition. This also represented an important stage or phase in the development of the idea of human rights.\(^\text{14}\)

a. The 1945 Constitution

The term “basic law” referred to “constitution” and “konstitusi” in English and Indonesian, respectively. In France, it was known as “constitution” derived from the word “constituer” implying “to form”, while the Dutch used the term “Grondwet”, where “wet” signified law and “grond” denoted land or basis.\(^\text{15}\) This constitution served as the main foundation for governing life in a nation and state. The term originated from an understanding of the limitation of power and the guarantee of citizen’s rights through a concept called constitutionalism.\(^\text{16}\)

Jibong Lim in the publication titled “Korean Constitutional Court Standing at the Crossroads” explained that every country in the world possessed a constitution. The basic rights of citizens were safeguarded by the constitution which played a significant role in regulating governmental power. Therefore, the study of constitutional law or political science focused on protecting the basic rights of citizens. The constitution also addressed aspects such as the anatomy of power subject to law, human rights protection, an impartial judiciary free from external influence, and the accountability of authorities to the populace reflecting the principle of popular sovereignty.\(^\text{17}\)

Furthermore, the 1945 Constitution of Indonesia served not only as the initial concept for subsequent laws and regulations but also as a guarantee and protection of citizens’ rights. Article 28 of the 1945 Constitution also affirmed the freedom of association, assembly, and expression of thoughts orally and in writing, which were subject to legal determination.

During the formulation of the Constitution, Indonesian proclaimer Mohammad Hatta (Bung Hatta) contributed to Article 28 advocating for human rights. Bung Hatta persistently advocated for clear constitutional

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\(^{13}\) Riant D Nuroho, _Kebijakan Publik, Formulasi, Implementasi Dan Evaluasi_ (Jakarta: Elex Media Komputindo, 2003).


\(^{15}\) et.al H. Dahlan Thaib, _Teori Dan Hukum Konsitusi_ (Jakarta: Raja Grafindo Persada, 2005), 7.

\(^{16}\) Abdu Mukthie Fajar, _Hukum Konstitusi Dan Mahkamah Konstitusi_ (Jakarta: Konstitusi Press, 2006), 16.

\(^{17}\) H. Dahlan Thaib, _Teori Dan Hukum Konsitusi_, 1-2.
provisions guaranteeing the human rights of all citizens, a matter of little concern to other participants at the time. Based on the thoughts and experiences during the struggle for Indonesian independence, Bung Hatta emphasized the importance of incorporating human rights into the constitutional framework. Considerable attention was dedicated to human rights as evidenced in the publication titled "Demand for Press Freedom". This study emphasized the freedom of individuals to express, write, print, and spread personal thoughts without prior censorship by authorities.

In BPUPKI session, Bung Hatta proposed the inclusion of the concept of guaranteeing rights and freedoms in Article 28. The original concept stated that "The right of an individual to express feelings orally and in writing, the right to convene and assemble, should be recognized by the state and determined by law". This laid the groundwork for the integration of the freedom to communicate opinions into Indonesian society. The struggle to formulate Article 28 of the 1945 Constitution by the Founding Fathers of the Indonesian nation solidified the rules of communicating opinions with three features. The study elucidated the following elements as factors that were supportive and interrelated.

The first feature pertained to freedom of association and assembly. The second element addressed the freedom to express and communicate thoughts orally and in writing. The final feature concerned the laws regulating the first and second elements.

The elements were further the basis for the guarantee of freedom of assembly, ensuring that individuals were free to express opinions and views without suppression, intervention, coercion, and prohibition. Any restriction on this freedom would be contrary to Article 28 of the 1945 Constitution, which further regulated freedom of expression through subordinate laws. The constitutional rules represented the ideals of law for the citizens, serving as the basis for constructing legal principles.

b. Law No. 19 of 2016 to Law No. 11 of 2008 on Information and Electronic Transactions

In the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), Article 4 described hate speech as a form of propaganda based on the theory of the superiority of a race, or group of individuals with a certain color or ethnic origin. Hate speech also included acts that justified or promoted racial hatred and discrimination followed by immediate act designed to eradicate racist acts. This concept was grounded in the Declaration of Human Rights using the principles of dignity and equality.

Criticism was not considered a criminal offense, but categorized into hate speech when coupled with hatred to the extent that it becomes defamatory. Analyzing hate speech required examining various critical aspects including the context, the speaker or perpetrator, the content, the intent, the form of expression, and the manner in which the message was
communicated. These elements should be thoroughly tested to establish clear benchmarks before identifying an act as hate speech.18

After a thorough examination of the provisions concerning hate speech regulation in Indonesia, several amendments were introduced. These amendments aimed to address shortcomings and improve clarity in defining and prosecuting hate speech offenses.

1) In the previous ITE Law, the definition of the phrase “continuously distributing” was adequately explained. However, it was anticipated that any ambiguities in interpretation would be addressed in the updated version of ITE Law, allowing clearer accountability regarding acts conducted through electronic media. This clarification was detailed as follows:
   a. “Distribute” was defined as the act of disseminating and sending electronic information or documents. This definition implied that even when an individual was not the main perpetrator but only distributed the perpetrator’s hateful content, the person could still be held liable for the criminal offense of hate speech.
   b. “Distributing” referred to sending electronic documents and electronic information to another party directly. Therefore, the main source of the criminal offense of hate speech lay in the direct act of the perpetrator.
   c. “Making accessible” comprised acts leading to electronic documents and information being known by other parties or the public. This definition implied that even when hate speech was posted on someone’s account but accessible to others, the crime falls in the purview of the offense.

2) Article 27 Paragraph (3)

In the provisions of this Article, the reference followed the defamation regulations stipulated in the Criminal Code, particularly under Articles 310 and 321. This article reaffirmed that the offense mentioned was a complaint offense, implying “a prosecuted offense only when there was a complaint from a party with an interest in the prosecution.” The offense cannot be prosecuted in the absence of a complaint.19 According to the Criminal Code Articles 72-75, complaint offenses were generally divided into two categories including.
   a. Absolute complaint offenses, were interpreted as crimes that should not be changed or remain complaint under any circumstances. Vos further asserted that "absolute zinj die, welke als regel allen op klachte vervolgbaar zijn...". For prosecuting any event or all matters requiring prosecution, a complaint should be filed.

18 M Choirul Anam, “Surat Edaran Kapolri Tentang Penanganan Ujaran Kebencian (Hate Speech) Dalam Kerangka Hak Asasi Manusia” 1 No 3 (2015), 16.
b. Relative complaint offenses, where complaints were not observed under certain circumstances despite being considered a common crime. The relative complaints allowed the complainant to select whom to accuse. For instance, when there was theft in a family including two children, the parents could only file a complaint against a child. This relative complaint provision could be found in various articles of the Criminal Code, such as Articles 367, 370, 376, and 394.

After examining the elements of the articles outlined in ITE Law provisions, this study observed that the qualification of the offense as a misdemeanor or crime was not explicitly mentioned or distinguished. In this case, Article 27 paragraph (3) stated before the revision.

"Any individual who intentionally and without right distributed and/or transmitted and/or made accessible information and/or electronic documents having insulting and/or defamatory content would be punished."

Article 45 Paragraph (1) of ITE Law further served as the basis for sanctions for violations of Article 27 Paragraph (3), with a maximum penalty of 6 years imprisonment. In the progression, various communities stimulated the government and DPR to abolish all provisions of Article 27 paragraph (3). The revision of this regulation was prompted by the government insistence. However, the government revision only partially addressed the criminal threat reducing the imprisonment to 4 years. The explanations provided in Article 27 were reverted to those used by the Criminal Code, specifically Article 30 and 311.

This study suggested that the revisions implemented by the government and DPR render detention unnecessary for offenses under the Article because the threat of imprisonment was less than 5 years. The diminished the significance of Article 27, making the issue appear trivial. However, the reduction in criminal threats did not fully address the regulation problems. The partial revision conducted by the government and DPR regarding the Article required a similar spirit and ideals to realize responsive legal reforms for society.

Not all violations of Article 27 could be sanctioned due to the revisions made as exceptions were provided in the Criminal Code. Article 310 Paragraph (3) stipulated that defamation or written slander were not applicable when the act aimed to protect or defend the public interest.

Caution was considered necessary in implementing proof under the Article to prevent any loopholes for individuals with vested interests to exploit the regulation for political purposes. Therefore, Article 27 Paragraph (3) of ITE Law needed to be interpreted more broadly, rather than solely relying on interpretations from ITE Law and the Criminal Code.

20 Ahmad Faizal Azhar, “Kebijakan Hukum Pidana Dalam Pengaturan Dan Penanggulangan Ujaran Kebencian(Hate Speech)Di Media Sosial.”
c. Law No. 40/2008 on the Elimination of Racial and Ethnic Discrimination

Special attention was given to hatred which had an international standard established in Article 20 of the International Covenant on Civil and Political Rights (ICCPR). The article was subsequently adopted by the United Nations General Assembly in 1981 through the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief. This comprised all forms of intolerance and discrimination including prejudice against individuals or the propagation of insulting stereotypes based on religion or belief. Additionally, Article 16 of Law No. 40 of 2008 on the elimination of racial and ethnic discrimination stated that:

"Any individual who intentionally exhibited hatred or resentment towards others based on racial and ethnic discrimination as outlined in Article 4 Clauses B number 1, 2, or 3, shall be punished with a maximum imprisonment of five years and/or a maximum fine of Rp.500,000,000.00."

The provision was associated with the deliberate manifestation of hatred towards others due to race and ethnicity as delineated in Article 4 Clauses B numbers 1 and 2, or number 3, comprising both direct and indirect advocacy. The formulation of the article used became Article 16 of Law No. 40 of 2008 in conjunction with Article 4 Clauses B numbers 1, 2, and 3, as well as Article 7 Paragraph (2) of Law No. 39 of 1999. In this context, the study suggested that hate speech in Article 28 paragraph (2) should fulfill elements such as inciting individual and group hostility and causing hatred based on race, ethnicity, religion, and intergroup relations.

d. Criminal Code

Hate speech, insult, and slander were regulated separately in the Indonesian criminal law system. Various acts of defamation and slander were addressed in several regulations, including Articles 142, 142a, 143, 144, 154a, 156, 157, 156a, 177, 207, 310 Paragraph (1) and Paragraph (2), 311, 315, 317, 318, as well as 321 Paragraph (1). Hate speech in the context of Indonesian criminal law was a significant consideration in addressing the offenses. This study emphasized the interconnectedness between the provisions of ITE Law governing hate speech and those in the Criminal Code. Besides examining general regulations, the aspect of criminal liability should also be considered.

Criminal responsibility included holding individuals accountable for all acts committed. This responsibility originated from the commission of criminal offenses and was required to be imposed on individuals who had committed a crime. The accountability was based on the fulfillment of four essential elements, namely.

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1. The commission or omission of an act by a perpetrator.
2. Adherence to the elements of the offense as stipulated by the law.
3. The act should be unlawful, and
4. The accountability of the perpetrator's acts.

The legal principle of Lex Specialis Derogat Lex Generalis was subsequently applied to the perpetrators of hate speech offenses as outlined in ITE Law concerning social media. The study further concluded that the hate speech regulation aimed to realize responsive law ideals and promote a progressive legal system. Several perspectives were also provided based on criminal provisions which was divided into various parts, namely.

1. The need for a broad interpretation of indicators or benchmarks related to hate speech.
2. Confirmation regarding the form of complaint offenses.
3. Enforcement of authority to access electronic transactions in strengthening the government role.
4. Protection of the privacy of the harmed party or those who feel harmed, including the right to be forgotten.

2. Legal Reform Regarding Hate Speech on Social Media in the Perspective of Laws and Regulations

Artamimi quoting from Burkhardt Krems argued that activities concerning the regulation content, substance, formation process, and procedure constituted legislation. To ensure the juridical, political, and sociological validity of the rules, each aspect of the activity had to fulfill the requirements for proper enforcement. Consequently, Krens asserted that legislation was not solely a juridical activity but also an interdisciplinary effort. This implied that for legal products to be accepted and recognized by the community, the process of forming laws and regulations required input from various sciences.

The understanding that law enforcement equated to implementation suggested a focus on the regulation. However, the challenges of law enforcement extended beyond only legal statutes to comprise moral, behavioral, and cultural dimensions. The law also served as an instrument for societal reform or social engineering, guiding individual acts relating to

legal requirements. The process of legal reform comprised discussions, ratifications, proposals, planning, and designs which constituted a form of developmental effort. Legislators’ level of awareness and appreciation further served as a measurement for realizing legal ideals which reflected the process of values realization. The gap in legal reform would evolve in the absence of sufficient appreciation and awareness of constitutional values. Therefore, legal reform should integrate the values inherent in the law ideals in Indonesia, where Pancasila formed the basis of legislative regulations. The law should further adhere to four principles of legal thought to ensure justice and fairness for all.

1. Protecting all elements of the nation for completeness.
2. Achieving social justice in the economic and social domains.
3. Upholding the rule of law and popular sovereignty.
4. Promoting religious tolerance based on humanity and civilization.

The four principles needed to serve as general principles consistently because legal ideals were normative and constitutive beliefs to realize the concepts and objectives of the state. The law aimed to achieve the state desired will making the legal ideal a fundamental requirement underlying any positive law. Correlating with these provisions, legal reforms were expected to accommodate the interests and ideals of a common law contributing to the establishment of a national life order. Law was indeed part of socio-philosophical, socio-political, socio-economic, and socio-cultural systems.

Regarding legal reform concerning hate speech on social media, this study emphasized the necessity of firmness in revising several vague provisions, particularly addressing the ambiguity of an individual affected by ITE Law blunders. Several recommendations were further provided for the direction of Indonesian hate speech regulation policy to be formulated correlating with the ideals and national legal reform objectives. The government subsequently initiated partial revisions by changing certain provisions of Article 27 paragraph 3. However, a comprehensive revision of the entire Article 27(3) was advocated due to several reasons below.

1. First, the regulation posed a threat to freedom of expression due to the multiple interpretations which could potentially be misused.
2. Second, there was duplication as the sense regulations governing defamation and insults were covered in the Criminal Code. Therefore,

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28 Warrasih, 45.
reinstating the form of punishment in the Criminal Code would ensure legal certainty.

3. Third, the diverse responses arising from these multiple interpretations have led to uncertainty in legal proceedings. This impacted various processes from the investigation to detention and influencing judicial deliberations. Consequently, the situation has led to excessive judicial practice.

The shortcomings required updates to the regulations, aiming to enhance legal certainty which was a fundamental objective of a rule-of-law state as stipulated in the 1945 Constitution. This certainty was crucial for citizens and was established through meticulous policy formulation in laws and regulations.

In this situation, the study conducted a comparative analysis of hate speech regulations in several other countries' constitutions, as well as the criminal laws. The method ensured a comprehensive and objective examination, facilitating the development of effective criminal law policies. According to Rene David and Brierly in the publication titled “Barda Nawawi Arief in 2003”, comparative law offered several benefits including:

1. Provision of historical and philosophical insights into legal study.
2. The development and a better understanding of national law, and
3. Fostering positive international relations and legal development which contributed to the understanding of international law.  

a. Netherlands (Dutch Criminal Code)

Hate speech offenses were addressed through an alternative criminal formulation system in the Dutch system. Corporations found guilty of the offenses were not subject to imprisonment. However, the punishment for corporations was primarily in the form of fines under the Dutch Criminal Code as stipulated in Book I Article 23. The fines were categorized into various classes, similar to the classification system in the Indonesian KHP.

b. India with the rules of The Information Technology Act No. 21 of 2000 in India or UU No. 21 of 2000 concerning Information Technology in India

The Indian law regarding electronic transactions was governed by Article 66A of Act No. 21 of 2000. This study did not rely on the physical act paradigm but instead incorporated a functional framework to interpret potentially criminalized acts.

c. Australia (Act 2001 No. 47 on Racial and Religious Tolerance for the State of Victoria-Australia)

Penalties for violations related to religious and social tolerance are regulated under Article 7 of Act 47 in Australia. This underscored the necessity for legal reform and recommendations, particularly concerning Article 27 Paragraph (3) which was directly related to issues of defamation and insults. Criminal defamation often served as a shield for the government in addressing public criticism, specifically on social media platforms. Consequently, there remained a persistent risk that hate speech could be used as a pretext to suppress freedom of expression.

C. Conclusion

The regulation of hate speech in Indonesia was an effort to realize the ideals of responsive law as envisioned to promote a progressive legal system. However, there were still forms of hate speech rules in ITE Law, particularly Article 27 paragraph (3) and Article 28 paragraph (2). The rules were unclear benchmarks used in assessing the posts or contents on social media being hate speech, defamation, or only criticism and opinion from someone about a problem. The Article could further be repressive towards the community and used by the authorities to silence criticism. Therefore, the indicators or benchmarks related to hate speech should be clear and interpreted more broadly.

Improvements were considered necessary through legal reform to ITE Law, particularly Article 27 paragraph (3) and Article 28 paragraph (2) to establish strong legal certainty for the community. The government was expected to conduct legal comparisons with other countries to identify the best regulatory frameworks for the community.

D. Suggestion

1. The government as a policy maker should evaluate and improve the regulations regarding hate speech in ITE Law to establish a good rule of law while fulfilling a sense of justice as well as legal certainty for the community.

2. Lawmakers including the government and DPR are expected to further reform the legislation of hate speech on social media, thereby fostering the rule of law rather than appearing to restrict freedom of speech.
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**Analysis of Hate Speech...**

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