



The Effectiveness of Criminalizing Hate Speech Through Electronic Media In Dealing With Social Changes of Communicating In Cyberspace

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Abstract

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Abstract

The existence of the internet has a positive impact and has a negative impact, one of which is the rampant hate speech that is spread through social media. The government then issued Law No. 11 of 2008 concerning Electronic Information and Transactions as amended by Law No. 19 of 2016, which regulates the criminalisation of hate speech conducted via electronic media. Nonetheless, even though there have been criminal threats against acts of hate speech through cyberspace, the number of cases of hate speech handled by the police has increased in years. The research aims to discover social changes' influence in the criminalisation of hate speech through electronic media. Moreover, the research investigates the criminalisation of hate speech's effectiveness through electronic media to tackle the rise of hate speech in cyberspace. This research uses the normative legal research method. The research explains that social changes related to sharing information via electronic media have an impact on applicable law in Indonesia with regulations regarding hate speech through electronic media. However, since the enactment of this regulation, hate speech acts through electronic media has increased. Therefore, the criminalisation policy



must pay attention to the principle of subsidiarity. Criminal law must be the last resort in overcoming crimes using a penal instrument. Other efforts needed that should be prioritised apart from punishing the perpetrators of criminal acts.

A. Introduction

The development of science has led humans to make various valuable discoveries in human life. One of the inventions that had a very significant impact on social life was the discovery of the internet. As one of the results of the development of information technology, the internet is an information resource capable of reaching the entire world.¹

The development of technology has led to a communication revolution that causes people's lives in various countries to be inseparable and has even been determined by information and communication.² Therefore, there are various people behaviour patterns around the world regarding how to disseminate information and communicate. In the past, people could only send letters through the post office by writing the words in advance on paper media. Nowadays people can easily send letters just by typing on the computer and sending them using the internet. This can be done with the invention of e-mail. Another example, in the past, when people wanted to spread information to the public, people had to make posters and post them on various street corners. In contrast, people nowadays share information publicly by simply typing on a computer or smartphone and then sharing it on social media, such as Facebook, Twitter, Instagram, and many more.³

Apart from the examples mentioned above, there are still many previously difficult things to do in the real world. Still, with the invention of the internet, everything can be done efficiently only through electronic media. However, the internet is close to positive things that can help human life. With the convenience offered, only using a smartphone, tablet, laptop, or computer can communicate and spread information with just a snap of a finger. Since people can freely communicate and socialise with electronic media, it enables people to convey inappropriate content. Many adverse effects arise after the invention of the internet. One is currently rife with information dissemination to generate hatred or enmity.

Indonesia is a constitutional state. Therefore all aspects of community life are regulated by law. The use of technology in people's lives also requires that the law adapts to social changes due to these technological developments.⁴ Therefore, the government then issued Law No. 11 of 2008 concerning Electronic Information and Transactions as amended by Law No. 19 of 2016, where the law regulates the criminalisation of hate speech conducted through electronic media, as regulated in Article 28 paragraph (2) and Article 45A paragraph (2) of the law. The criminalisation of hate speech through electronic media is interesting to study, so the author is

¹ Titik Mildawati, "Teknologi Informasi Dan Perkembangannya Di Indonesia," *EKUITAS (Jurnal Ekonomi Dan Keuangan)* 4, no. 2 (2016): 101, <https://doi.org/10.24034/j25485024.y2000.v4.i2.1904>.

² Renny Koloay, "Perkembangan Hukum Indonesia Berkenaan Dengan Teknologi Informasi Dan Komunikasi," *Jurnal Hukum Unsrat* 22, no. 5 (2016): 16–27, <https://ejournal.unsrat.ac.id/index.php/jurnalhukumunsrat/article/view/10754/10342>.

³ Riza Azmi, William Tibben, and Khin Than Win, "Review of Cybersecurity Frameworks: Context and Shared Concepts," *Journal of Cyber Policy* 3, no. 2 (2018): 258–83, <https://doi.org/10.1080/23738871.2018.1520271>.

⁴ F.H. Edy Nugroho, "Kemampuan Hukum Dalam Mengantisipasi Perkembangan Teknologi," *Jurnal Paradigma Hukum Pembangunan* 1, no. 2 (2016): 109–17, <http://ejournal.atmajaya.ac.id/index.php/paradigma/article/view/1723>.

interested in discussing the effect of social changes on the regulation of hate speech through electronic media.⁵

Before this article was written, several writings have discussed how technological developments affect the law in Indonesia. Whereas in this writing, the author will discuss more specifically on social changes impact in sharing information and communication at this time on hate speech through electronic media, which is then regulated in the Law on Electronic Information and Transactions.⁶ Furthermore, after enacting the Law on Electronic Information and Transactions, which regulates the prohibition of hate speech via electronic media, there have been many cases handled by the police in this regard.⁷ By so many cases that have already been tried, the author is also interested in exploring the effectiveness of criminalising hate speech in the Law on Electronic Information and Transactions in creating orderly behaviour in sharing information dan communicating in cyberspace.

Based on the background as previously described, the author is interested in raising the following problems: 1) How do social changes influence the criminalisation of hate speech through electronic media? 2) Is the criminalisation of hate speech through electronic media effective in creating order in communicating in cyberspace?

This legal writing uses normative legal research with comparative studies, where the data sources include research on legal principles, legal systematics, legal synchronisation, and legal comparisons.⁸ The author uses a statute, comparative, and conceptual approach to obtain accurate information and data on various issues related to this legal writing.⁹ Library material in this legal writing consists of primary legal materials, namely in statutory regulations, and secondary legal materials, namely books, journals, results of scientific activities, research reports, and many more.

B. Discussion

1. The Effect of Social Changes in the Criminalization of Hate Speech Acts through Electronic Media

Along with technological developments, people are increasingly spoiled with various digital platforms that simplify communicating and sharing information. This has an impact on social changes in social life. Social change, in general, can be defined as a process of shifting or changing the structure/order in society, including a more innovative mindset, attitudes, and social life to get a more active life.¹⁰

With the help of technology, communicating and sharing information that used to only can be done conventionally, nowadays can be done by simply typing on a smartphone screen or by typing through a computer medium without physically meeting one another. Not meeting physically and efficiently typing with fingers on their gadgets makes it not uncommon for parties to share inappropriate content easily. With many conveniences offered, technological developments have many positive and negative impacts. One of them is spreading hate speech; namely communication actions carried out by individuals or groups in the form of provocation,

⁵ Katharine Gelber, "Differentiating Hate Speech: A Systemic Discrimination Approach," *Critical Review of International Social and Political Philosophy* 24, no. 4 (2021): 393–414, <https://doi.org/10.1080/13698230.2019.1576006>.

⁶ Zaka Firma Aditya and Sholahuddin Al-Fatih, "Indonesian Constitutional Rights: Expressing and Purposing Opinions on the Internet," *The International Journal of Human Rights* 25, no. 9 (2021): 1395–1419, <https://doi.org/10.1080/13642987.2020.1826450>.

⁷ Ady Anugrahadi, "Polda Metro Catat 443 Hoaks Dan Ujaran Kebencian Selama Maret Hingga April 2020," *Liputan 6*, 2020, <https://www.liputan6.com/news/read/4245084/polda-metro-catat-443-hoaks-dan-ujaran-kebencian-selama-maret-hingga-april-2020>.

⁸ Soerjono Soekanto, *Pengantar Penelitian Hukum*, 3rd ed. (Jakarta: UI Press, 1986).

⁹ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2011).

¹⁰ Agus Budijarto, "Pengaruh Perubahan Sosial Terhadap Nilai-Nilai Yang Terkandung Dalam Pancasila," *Jurnal Kajian Lemhannas RI* 6, no. 2 (2018): 5–21, <http://jurnal.lemhannas.go.id/index.php/jkl/article/view/118>.

incitement, or insults to other individuals or groups in terms of various aspects such as race, gender, disability, skin colour, sexual orientation, nationality, religion, and others.¹¹ This has happened in Indonesia since the internet, computers, and smartphones penetrated.

There are several factors behind an individual or group making hate speech, namely¹² :

- a. Self-psychological conditions such as mental disorders, emotional power, and low mental illness;
- b. Lack of social control from family and society;
- c. Environmental influences;
- d. Public ignorance of the impact of their actions;
- e. Tools, facilities, and technological advances, where people can spread hate speech quickly via the internet, including through social media such as Facebook, Instagram, Twitter, and others;

There is a significant relationship between society's social changes development and hate speech's rise through electronic media. Consequently, the Indonesian government then regulates criminal acts of hate speech through electronic media with the issuance of Law No. 11 of 2008 concerning Electronic Information and Transactions as amended by Law No. 19 of 2016 (Law on Electronic Information and Transactions). Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of Law No. 19 of 2016, stipulates that every person knowingly and without right distributes information aimed at creating hatred or enmity for specific individuals and/or groups of people based on ethnicity, religion, race, and inter-group relations, shall be punished with a maximum imprisonment of 6 (six) years and/or a maximum fine of IDR 1,000,000,000.00 (one billion rupiahs).

Article 28 paragraph (2) and Article 45A paragraph (2) of the Law on Electronic Information and Transactions are a form of criminalisation against acts of hate speech committed via electronic media. According to Soerjono Soekanto, criminalisation has the meaning of an act or determination by the authorities regarding specific actions which the community or community groups consider as an act that can be punished as a criminal act.¹³ Criminalisation can also be interpreted as the process of determining a person's actions as punishable. This process ends with forming a law punishable by a criminal sanction.¹⁴

Before enacting the Law on Electronic Information and Transactions, the prohibition on hate speech was regulated in the Criminal Code, to be precise in Articles 156, 156a, and 157. However, regulations regarding hate speech crimes were later regulated in Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of the Law on Electronic Information and Transactions, a *lex specialis* aimed at acts of hate speech committed through electronic media. According to Paul Cornil, the notion of criminalisation is not limited to determining an act as a criminal act. It can be convicted and includes the addition (increase) of criminal sanctions against existing crimes.¹⁵

Article 156 of the Criminal Code regulates hatred against racial and ethnic groups of the Indonesian population with a maximum imprisonment of four years or a maximum fine of four million five hundred thousand rupiahs. Article 156a of the Criminal Code regulates hatred of religion with a maximum imprisonment of five years. Article 157 of the Criminal Code

¹¹ I Made Kardiyasa, Anak Agung Sagung Laksmi Dewi, and Ni Made Sukaryati Karma, "Sanksi Pidana Terhadap Ujaran Kebencian (Hate Speech)," *Jurnal Analogi Hukum* 2, no. 1 (March 4, 2020): 78–82, <https://doi.org/10.22225/ah.2.1.1627.78-82>.

¹² Meri Febriyani, "Analisis Faktor Penyebab Pelaku Melakukan Ujaran Kebencian (Hate Speech) Dalam Media Sosial," *Ius Poenale* 6, no. 3 (2018), http://digilib.unila.ac.id/31298/2/SKRIPSI_FULL.pdf.

¹³ Soerjono Soekanto, *Kriminologi: Suatu Pengantar* (Jakarta: Ghalia Indonesia, 1981).

¹⁴ Sudarto, *Kapita Selekta Hukum Pidana* (Bandung: Alumni, 1986).

¹⁵ Paul Cornil, "Criminality and Deviance in a Changing World," in *United Nations Congress IV 1970 About Prevention of Crime and Treatment of Offenders*. (New York: United Nations, 1970), <https://undocs.org/pdf?symbol=en/A/CONF.43/5>.

regulates the dissemination of hatred against groups of the population employing writing with a maximum imprisonment of two years and six months or a maximum fine of four million five hundred thousand rupiahs.¹⁶ Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of the Law on Electronic Information and Transactions regulates the dissemination of information that causes hatred or enmity for individuals or specific groups of society based on ethnicity, religion, race, and inter-group relations. This can be imposed maximum imprisonment of six years and/or a maximum fine of one billion rupiahs. When referring to the formulation of the article, the criminal acts in Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of the Law on Electronic Information and Transactions combine hate speech against ethnicity, religion, race, and inter-group relations into one article with the same threat of criminal penalty. In the Criminal Code, the discussion is spread over three articles. Moreover, the threat of criminal penalty in Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of the Law on Electronic Information and Transactions include the addition (increase) of criminal sanctions against criminal acts in the Criminal Code, namely with a maximum penalty of six years and/or a maximum fine of one billion rupiahs. Thus, as regulated in the Law on Electronic Information and Transactions, hate speech through electronic media is included in the definition of criminalisation as intended by Paul Cornil.

According to Sudarto, several things need to be considered related to criminalisation, including:¹⁷

- a. Criminal law facilities must pay attention to national development objectives to create a just and prosperous society based on Pancasila. In this regard, criminal law is aimed at tackling crimes and holding the countermeasures themselves for the welfare and protection of the community;
- b. Acts that are attempted to be prevented by criminal law are undesirable actions, namely actions that cause harm to the community;
- c. Criminal law facilities must also consider the cost-benefit principle;
- d. The use of criminal law must also pay attention to the capacity or capability of the work power of law enforcement agencies. That is, there should be no overbearing.

The results of the formulation (conclusion) of the 1976 Criminal Law Reform Symposium also shared Sudarto's views regarding the criteria for criminalisation, namely:¹⁸

- a. Is the act disliked or hated by the community because it is detrimental or potentially cause harm, cause victims, or potentially cause victims?
- b. Is the cost of criminalising this act balanced with the results to be achieved. The cost mentioned is making, monitoring, and enforcing the law. Another cost is the burden borne by the victim. Furthermore, the perpetrator of the crime themselves must be balanced with the orderly situation to be achieved.
- c. Will this criminalisation add to the unbalanced workload of law enforcement officers or cannot be fulfilled by their capabilities?
- d. Did these actions slow down or hinder the goals of the Indonesian nation and thus pose a danger to the whole society?

Based on Sudarto's opinion and the conclusions of the 1976 Criminal Law Reform Symposium, the spread of hate speech through electronic media in Indonesia is, in fact, in line with the criteria regarding the dangers and impacts of harm caused to society. Hate speech has various negative and dangerous impacts on people's lives, especially for a multicultural

¹⁶ Based on Article 3 of the Regulation of the Supreme Court of the Republic of Indonesia No. 2 of 2012 concerning Adjustments to the Limits of Minor Crimes and the Number of Fines in the Criminal Code, each maximum amount of the fine punishable by the Criminal Code except Article 303 paragraph 1 and paragraph 2, 303 bis paragraph 1 and paragraph 2, is multiplied to 1,000 (one thousand) times.

¹⁷ Sudarto, *Kapita Selekta Hukum Pidana*.

¹⁸ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Bandung: Citra Aditya Bakti, 1996).

democratic country like Indonesia. First, hate speech can hinder idea exchange. Second, hate speech can trigger hostility or hatred towards specific individuals or groups. Third, hate speech is recruitment by hardline groups that can disrupt unity. Fourth, hate speech is generally directly related to and followed by discrimination and violence.¹⁹

Although the criminalisation of hate speech through electronic media is in line with the criteria regarding the dangers and losses incurred, the criteria regarding the cost and benefit principle and the workload of law enforcement officials are equally essential criteria to ensure effective law enforcement.

Several cases of hate speech in Indonesia which later implemented Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of the Law on Electronic Information and Transactions²⁰, including:

a. Hate speech on social media by Ahmad Dhani Prasetyo

This case involved a musician known as Ahmad Dhani in 2017. Through his Twitter account, Ahmad Dhani stated, "Anyone who supports blasphemy is a bastard who needs to be spat in his face -ADP." For his statement conveyed via social media, namely Twitter, Ahmad Dhani was charged with Article 45A paragraph (2) in conjunction with Article 28 paragraph (2) of the Law on Electronic Information and Transactions. Ahmad Dhani was then sentenced to prison for one year and six months by a panel of judges at the South Jakarta District Court. This verdict was lighter than the demands of the public prosecutor, namely two years in prison.²¹ However, the sentence imposed on Ahmad Dhani was reduced to only one year in prison at the appeal level.²²

b. The Jonru Ginting case

Jon Riah Ukur, known as Jonru Ginting, was convicted of hate speech through his content on social media, namely Facebook. Jonru's upload is considered very dangerous, and if left unchecked, it can divide the nation. One of Jonru's posts questioned by investigators was about Quraish Shihab, who will become the imam of the Eid prayer at the Istiqlal Mosque in Jakarta. According to Jonru, Quraish Shihab does not deserve to be an imam because of his statement that says Muslim women do not need to wear hijab. Jonru invites Muslims not to pray Eid at the Istiqlal Mosque if the imam is Quraish Shihab.

In the verdict of the East Jakarta District Court, Jonru was found guilty of violating Article 45A paragraph (2) in conjunction with Article 28 paragraph (2) of the Law on Electronic Information and Transactions and was sentenced to prison for one year and six months and a fine of fifty million rupiahs. The East Jakarta District Court's decision was upheld at the court of appeal.²³

c. The Jerinx SID case

The most recent case related to the alleged hate speech crime through electronic media is the case that occurred in Gede Ari Astina, also known as Jerinx. The Public Prosecutor charged Jerinx with Article 45A paragraph (2) in conjunction with Article 28 paragraph (2) of the Law on Electronic Information and Transactions. This case arose because Jerinx, through his Instagram account, said IDI was the WHO lackeys. For his actions, the Public Prosecutor considered Jerinx to have been legally and convincingly proven guilty of committing a criminal act intentionally. The prosecutor values Jerinx acts without the right

¹⁹ Mohammad Iqbal Ahnaf, "Isu-Isu Kunci Ujaran Kebencian (Hate Speech): Implikasinya Terhadap Gerakan Sosial Membangun Toleransi," *Jurnal Harmoni* 13, no. 3 (2014): 153–64, https://scholar.google.com/citations?view_op=view_citation&hl=en&user=HtqUNHwAAAAJ&citation_for_view=HtqUNHwAAAAJ:qxL8FJIGzNcC.

²⁰ Merlyna Lim, "Freedom to Hate: Social Media, Algorithmic Enclaves, and the Rise of Tribal Nationalism in Indonesia," *Critical Asian Studies* 49, no. 3 (2017): 411–27, <https://doi.org/10.1080/14672715.2017.1341188>.

²¹ South Jakarta District Court Verdict Number 370/Pid.Sus/2018/PN Jkt. Sel.

²² DKI Jakarta High Court Verdict Number 58/PID.SUS/2019/PT.DKI.

²³ DKI Jakarta High Court Verdict Number 142/PID.SUS/2018/PT.DKI.

to disseminate information aimed at causing hatred or enmity for specific individuals and/or community groups based on ethnicity, religion, race, and inter-group relations. In their lawsuit, the public prosecutor then charged Jerinx with imprisonment for three years and a fine of ten million rupiahs.²⁴

Some of the cases above are a few small examples of criminal cases that proceed to the trial process by applying Article 45A paragraph (2) in conjunction with Article 28 paragraph (2) of the Law on Electronic Information and Transactions. This shows that social change has a tangible impact on the applicable law, including law enforcement in Indonesia. The fast development of science makes the law demanded to adapt to existing social changes; to achieve order, the law is expected to regulate all aspects and dimensions that are considered dangerous and can have a significant negative impact on the orderliness in society.

2. The Effectiveness of Criminalising Hate Speech Acts through Electronic Media in Creating Orderliness in Cyberspace

Since the Law on Electronic Information and Transactions enactment, there have been many cases of hate speech through electronic media that have been processed legally. The Institute for Criminal Justice Reform (ICJR) considers that Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of the Law on Electronic Information and Transactions is implemented in various hate-spreading cases in Indonesia. This contrasts to articles in the Law on Racial Discrimination, which has never been used in court. Some cases that use articles in the Law on Electronic Information and Transactions generally focus on spreading religious hatred and have never been used concerning racial and ethnic-based hate speech cases.²⁵

The number of hate speech cases handled by the Indonesian National Police (Polri) has increased from year to year. Throughout 2015, the number of reports related to hate speech was 671 reports. Then in 2017, the National Police handled 3,325 cases related to hate speech crimes. This figure increased by 44.99% compared to 2016, totalling 1,829 cases.²⁶

According to the views of some jurists, there are several theories regarding punishment purposes. These theories are fundamental theory (retributive), teleological theory (goal), and retributive teleological theory. However, criminalisation in Indonesia is aligned with the teleological theory. This theory is aligned with the punishment to achieve worthwhile goals for social welfare protection. The emphasis is on the goal: to prevent people from committing crimes.²⁷ By paying attention to data on cases of hate speech through electronic media, which is increasing from year to year, it can indicate that there is something wrong with the formulation of the law. This could result from over criminalisation.²⁸ Overlapping crime is defined as conducting the same crime over and over again or the decriminalisation of a prohibited act by another law.²⁹ In this regard, there is a view that the provisions of Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of the Law on Electronic Information and Transactions overlap from the provisions regarding the prohibition of hate speech in the Criminal Code. There are no new norms and new actions regulated in Article 28

²⁴ Angga Riza, "Jerinx SID Dituntut 3 Tahun Penjara Kasus 'IDI Kacung WHO,'" Detiknews, 2020, <https://news.detik.com/berita/d-5239390/jerinx-sid-dituntut-3-tahun-penjara-kasus-idi-kacung-who>.

²⁵ ICJR, "Tren Penggunaan Pasal 28 Ayat (2) ITE Terkait Penyebar Kebencian Berbasis SARA Akan Meningkat," ICJR, 2017, <https://icjr.or.id/tren-penggunaan-pasal-28-ayat-2-ite-terkait-penyebar-kebencian-berbasis-sara-akan-meningkat/>.

²⁶ Yulida Medistiara, "Selama 2017 Polri Tangani 3.325 Kasus Ujaran Kebencian," Detiknews, 2017, <https://news.detik.com/berita/d-3790973/selama-2017-polri-tangani-3325-kasus-ujaran-kebencian>.

²⁷ Marcus Priyo Gunarto, "Sikap Memidana Yang Berorientasi Pada Tujuan Pemidanaan," *Jurnal Mimbar Hukum* 21, no. 1 (2012): 93–108, <https://doi.org/10.22146/jmh.16248>.

²⁸ Mahrus Ali, "Overcriminalization Dalam Perundang-Undangan Di Indonesia," *Jurnal Hukum Ius Quia Iustum* 25, no. 3 (2018): 450–71, <https://doi.org/10.20885/iustum.vol25.iss3.art2>.

²⁹ Stephen F Smith, "Overcoming Overcriminalization," *Journal of Criminal Law and Criminology* 102, no. 3 (2012), <https://scholarlycommons.law.northwestern.edu/jclc/vol102/iss3/3/>.

paragraph (2) in conjunction with Article 45A paragraph (2) of the Law on Electronic Information and Transactions. The only difference is the means used to spread hate speech. However, because it is seen as a new and more severe form of crime, a heavier threat of criminal penalty is regulated in the Law on Electronic Information and Transactions, which is imprisonment with a maximum of six years.³⁰

In this case, the author agrees that hate speech through electronic media in practice has led to over criminalisation. However, the author believes that regulations regarding the prohibition of hate speech through electronic media are still necessary because Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of the Law on Information and Transactions Electronics cannot be equated with Articles 156, 156a, and 157 of the Criminal Code. Although the difference between the two laws lies only in the media, they are disseminated. Still, the existence of Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of the Law on Electronic Information and Transactions is very much needed. The distribution media via electronic media (in this case, the internet) has a much broader distribution power when compared to the conventional method of distribution, which is usually carried out orally or in writing. The spread through internet media is complicated to stop because once information is published and disseminated, with only a few minutes, the information can be accessed by a vast scope, can include one country or even the world.³¹ So that this can have an extensive impact, cause massive hatred and division, and even endanger state security. Therefore, with the consideration that the impact that can be caused can be much more significant, this makes the criminal threats regulated in Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of the Law on Electronic Information and Transactions, heavier when compared to with Articles 156, 156a, and 157 of the Criminal Code. The author opines that the main problem regarding the increase of legally processed hate speech cases is the importance of the subsidiarity principle's implementation, not because of an overlapping situation.

The criminalisation policy must pay attention to the subsidiarity principle. Therefore, criminal law must be placed as a last resort (*ultimum remedium*) in tackling crime using a penal instrument, not as a primary effort (*primum remedium*) to solve crime problems.³² The increasing number of cases of hate speech through electronic media shows that the determination of an act to be a criminal act does not automatically affect the behaviour and obedience of society not to commit or repeat the act. Seeing that many cases have been processed legally, it can be concluded that penal efforts in enforcing hate speech violations through electronic media have been implemented in Indonesia, but these efforts are not sufficient. In line with the subsidiarity principle in the criminalisation policy, efforts to punish perpetrators are not a priority.

As explained in the previous sub-chapter, several factors cause hate speech through electronic media. Some of these factors are caused by public ignorance technology means that make it easy for people to spread hate speech through internet media such as Facebook, Instagram, Twitter, and others. When considering these factors, in line with the principle of subsidiarity, there are at least two ways that the government can optimise as the main effort to overcome hate speech through electronic media through non-penal efforts, including:

a. Optimising socialisation and counselling efforts

³⁰ vidya Prahassacitta, "Menjaga Ketertiban Atau Kriminalisasi: Catatan Atas Penindakan Tindak Pidana Ujaran Kebencian Melalui Sosial Media Di Indonesia, Singapura Dan Malaysia," *Konferensi Nasional Perbandingan Hukum Indonesia*, 2017.

³¹ Timbul Mangaratua Simbolon, Gunarto, and Umar Ma'ruf, "Kebijakan Hukum Pidana Terhadap Tindak Pidana Penghinaan Atau Pencemaran Nama Baik Melalui Internet Di Indonesia Sebagai Cybercrime," *Jurnal Daulat Hukum* 1, no. 1 (2018): 13–22, <https://doi.org/10.30659/jdh.v1i1.2560>.

³² Salman Luthan, "Asas Dan Kriteria Kriminalisasi," *Jurnal Hukum Ius Quia Iustum* 16, no. 1 (2009): 1–17, <https://doi.org/10.20885/iustum.vol16.iss1.art1>.

The State Police have made Non-penal efforts to the Republic of Indonesia by issuing Head of the Indonesian Police Circular Number: SE/6/X/2015. Internal instructions within the police environment at the operational level for practical handling of acts seen as hate speech if the act has a purpose or could lead to discrimination, violence, loss of life, and/or social conflict.³³ In the circular, there are instructions for taking preventive measures in handling hate speech, one of which is by prioritising the function of Binmas and Polmas to provide counselling or outreach to the public regarding hate speech and the negative impacts that potentially will occur because of it. Furthermore, if action is found that can lead to hate speech, every member of the National Police must make peace efforts first. If it is unsuccessful, a settlement will be made through penal measures.³⁴

Nonetheless, the issuance of this circular since 2015 has not had a significant impact because hate speech cases via electronic media are increasing. There should be an improvement in reach out and counselling. Not only limited to the Police environment but also through the wider environment, the government can involve ministries or state institutions in conducting counselling or outreach in the work environment under them. For example, the Ministry of Communication and Information Technology can collaborate with media parties to disseminate information/socialisation electronically, such as through television, websites, social media, and others. Another example, the Ministry of Education and Culture can also issue a circular regarding an appeal for outreach to school students about using social media appropriately and the dangers of hate speech via electronic media.

b. Increase digital platform participation

In 2019, the Ministry of Communication and Informatics called on Facebook to use artificial intelligence (AI) technology to ward off harmful content on its platform.³⁵ Suggestions alone are not enough to provide coercion to social media service providers or communication media to ward off harmful content sent or spread through their platforms. In reality, there is still much harmful content on digital platforms in Indonesia.

One of the efforts that Indonesia can learn is the effort made by Germany, which has issued a law on hate speech on social media. This regulation is known as the Network Enforcement Act or NetzDG, which stipulates that social media companies delete various offensive posts. Facebook, Twitter, and various other media companies have to investigate hate speech complaints on their platforms promptly.³⁶ Social media companies must remove posts containing threats of violence, slander, and hateful content within 24 hours of filing a complaint or within one week if the problem at hand is more complicated. Any social media that does not comply with these regulations will be threatened with a fine of 50 million Euros or around 798 billion Rupiahs.³⁷

So far, convictions in Indonesia related to hate speech through electronic media have only focused on the perpetrators of the criminal acts themselves. The state does not impose coercion or obligation on social media platform providers to filter harmful content. Reflecting on Germany, it is necessary to regulate the participation of social media

³³ Veisy Mangantibe, "Ujaran Kebencian Dalam Surat Edaran Kapolri Nomor: Se/6/X/2015 Tentang Penanganan Ucapan Kebencian (Hate Speech)," *Lex Crimen* 5, no. 1 (2016): 159–62, <https://ejournal.unsrat.ac.id/index.php/lexcrimen/article/view/10614>.

³⁴ Head of the Indonesian Police, "Handling Hate Speech" (2015).

³⁵ Cindy Mutia Annur, "Patuhi Kominfo, Facebook Tangkal Konten Negatif Dengan Teknologi Robot," *Katadata.co.id*, 2019, <https://katadata.co.id/happyfajrian/digital/5e9a503264e13/patuhi-kominfo-facebook-tangkal-konten-negatif-dengan-teknologi-robot>.

³⁶ Sun Sun Lim and Kai Ryn Tan, "Front Liners Fighting Fake News: Global Perspectives on Mobilising Young People as Media Literacy Advocates," *Journal of Children and Media* 14, no. 4 (2020): 529–35, <https://doi.org/10.1080/17482798.2020.1827817>.

³⁷ Andina Librianty, "Jerman Berlakukan UU Anti Ujaran Kebencian," *Liputan 6*, 2018, <https://www.liputan6.com/tekno/read/3215391/jerman-berlakukan-uu-anti-ujaran-kebencian>.

platform providers in overcoming harmful content, considering that criminalising hate speech through electronic media is not enough. Still, it must also be supported by other efforts and the involvement of other parties who also have a role in creating orderly behaviour in sharing information and communicating in cyberspace.

C. Conclusion

Since the enactment of Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of the Law on Electronic Information and Transactions regulation, the number of acts of hate speech through electronic media has increased from year to year. This shows that the criminalisation of hate speech actors does not effectively overcome the spread of hate speech through electronic media. Therefore, the criminalisation policy must pay attention to the principle of subsidiarity. Criminal law must be the last resort in overcoming crimes using a penal instrument, not the main effort. Other efforts are needed that should be prioritised apart from punishing the perpetrators of criminal acts. First, the government can increase the involvement of various parties such as ministries, state institutions, or other necessary parties to promote socialisation and outreach to all elements of society. Second, the government needs to issue regulations that focus on punishing perpetrators and regulate the participation of digital platform service providers to take part in controlling the content that is negative and contains hate speech.

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