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Criminalization of Freedom of Expression and Opinion for Environmental Activists from a Criminal and Positive Law Perspective

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Abstract

Freedom of expression and explanation is a right for the public to convey their criticism and aspirations to the state. However, over time, cases of criminalization have emerged for environmental activists, where they received criminal penalties while fighting for environmental rights in Indonesia. This study aims to explain and analyze the form of regulation of freedom of expression and opinion in Indonesia from a criminal and positive legal perspective regarding the criminalization experienced by environmental activists while fighting for the community's right to a good and healthy environment. The research method used is a normative juridical method with data collection techniques through literature studies, and further explained using qualitative descriptive methods. The results of the study indicate that the freedom of expression and opinion is the responsibility and right of the Indonesian state. However, the implementation of freedom of expression and opinion is not applied comprehensively to the community, especially for activists. Activists are subject to specific penalties in Law Number 11 of 2008 concerning Information and Electronic Transactions. This will impact freedom of expression for the community in the future, so an in-depth analysis is needed regarding the criminalization of freedom of expression and opinion.

Keywords: *Criminalization; Freedom of Opinion and Expression; Human Rights*

Introduction

Freedom of expression and opinion is a necessary condition for everyone to contribute to public discourse. Freedom of expression and opinion must be upheld because it provides a way for people to express their aspirations and opinions to everyone. This is the foundation of a democratic society and a necessary prerequisite for enjoying other rights, such as freedom of assembly and association, and freedom of the press. (Octora, 2022)

Freedom of expression and opinion arose from 17th-century history, which gave rise to calls for religious tolerance and then transformed into a defense of the principle of pluralism as a societal ideal. Subsequently, in 1948, the United Nations (UN) adopted the Universal Declaration of Human Rights (UDHR), which included an article on freedom of expression. Following the adoption of the UDHR, freedom of expression and opinion has also been protected in relevant international human rights treaties. Based on Article 19 of the UDHR, everyone has the right to freedom of expression and opinion, including the right to hold opinions without interference or restrictions in seeking, receiving, and imparting opinions through any media.(United Nations, 2011) Meanwhile, Article 2 of the International Covenant on Civil and Political Rights (ICCPR), which has been ratified through Law Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights (ICPR), states the state's responsibility to guarantee the rights recognized in the Covenant, including political and other opinions.(Eko, 2018)

The right to express and express opinions may still be restricted by the state as stated in Article 19 paragraph (3) of the KIHSP, but this may only be done in accordance with the law to the extent necessary to: (a) respect the rights and reputations of others; (b) protect national security or public order or public health or morals. These two restrictions are aimed at protecting legitimate interests. Article 20 of the KIHSP, which is one of the restrictions, states the prohibition on war propaganda and actions that "incite hatred based on nationality, race or religion that constitutes incitement to discrimination, hostility or violence." The restrictions referred to in Article 19 paragraph (3) of the KIHSP do not give the state or groups the right to impose restrictions that actually negate the enjoyment of any rights and freedoms regulated in the KIHSP. (Smet, 2010) Therefore, if the state wishes to restrict the right to freedom of expression, it needs to ensure that the form of restriction does not endanger that right in a substantive manner. However, although there is a regulatory basis for freedom of expression and opinion and guidelines for limiting it, there is a tendency for restrictions on freedom of expression to go beyond these limits.

Criminalization of freedom of expression and opinion in Indonesia throughout 2023 has reached 146 cases of violations of freedom of expression with a total of 170 reported or victims. These violations mostly occurred in the digital space, followed by journalism, public opinion, scientific discussions, and court testimony. One case that has attracted public attention is the criminalization of freedom of expression against environmental activists, where Article 27 paragraph (3) and Article 28 paragraph (2) of Law Number 11 of 2008 concerning Electronic Information and Transactions are the criminal offenses most often used to limit or violate the freedom of expression and opinion of environmental activists. Since its revision in 2016, Law Number 11 of 2008 concerning Electronic Information and Transactions has tended to be used to ensnare individuals or groups who have interests that differ from the government or parties with "power," including in the context of democracy and the environment.(Aditya & Al-Fatih, 2021) Based on the research results of Adhigama et al., from 2016-2020, of 768 cases, there were 286 (37.2%) cases that used Article 27 paragraph (3) of Law Number 11 of 2008 concerning Information and Electronic Transactions regarding defamation.(Budiman et al., 2021)

In January 2024, Article 27 paragraph (3) of Law Number 11 of 2008 concerning Electronic Information and Transactions was amended to Article 27A of Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions (hereinafter referred to as the ITE Law). There is a different formulation of the article in this new provision, namely the formulation of the same elements as the 2023 Criminal Code (Law Number 1 of 2023 concerning the Criminal Code). However, this change in the article does not mean that the use of defamation to criminalize environmental activists has stopped. Therefore, it is necessary to examine the provisions on criminal acts of insult, one of which is the criminal act of defamation, which must always be tested for interpretation and limitations on its application so that it does not end up destroying the right to freedom of expression and opinion for environmental activists.

Methodology

The research method used is normative juridical research, where the researcher conducted research on national regulations related to freedom of expression and opinion in Indonesia to be able to analyze cases of criminalization of freedom of expression in environmental activities. The researcher chose this method because the results of this study emphasize a deep understanding of the criminal and positive legal views on the criminalization of freedom of expression and opinion.(Sugiyono, 2019) Then, data collection in this study uses normative data, where normative data is obtained by researchers from literature studies, such as books, journals, and other legal literature, as well as comparative studies with previous research related to the criminalization of freedom of expression and opinion in environmental activists. After the data has been obtained, the researcher analyzes the data using qualitative methods, because the researcher analyzes descriptive studies of regulations on freedom of expression and opinion in Indonesia comprehensively. (Amalia et al., 2016)

Results and Discussion

The Case of Criminalization of Freedom of Expression and Opinion against Environmental Activist Daniel Frits

In 2022, the Indonesian public was shocked by illegal shrimp farming in Karimun Jawa, operated by several irresponsible individuals, resulting in various responses from environmental activists and the public. This became a serious focus in addressing marine ecosystem problems and fighting for the rights of fishermen around the Karimun Jawa area. One environmental activist and academic, Daniel Frits Maurits Tangkilisan, criticized the waste resulting from illegal shrimp farming activities at Cemara Beach, Karimun Jawa Islands, through his social media account on Facebook. The post received attention from several major media outlets in Indonesia, such as Mata Najwa, Narasi TV, Tempo, and others. However, after his post received widespread attention, Daniel Frits was assaulted and threatened by a group of people who claimed to disagree with his opinion. Furthermore, Daniel Frits was also reported to the police for alleged criminal defamation and hate speech.

In case No. 14/PID.SUS/2024/PN.Jpa, Daniel Fritz was charged with the alternative charge of Article 45A paragraph (2) in conjunction with Article 28 paragraph (2) of Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions (hereinafter referred to as the ITE Law) or Article 45 paragraph (3) in conjunction with Article 27 paragraph (3) of the ITE Law. In the first alternative charge, the public prosecutor argued that Daniel Fritz's actions in uploading posts on his Facebook account were unacceptable to some of the Karimunjawa community so that they could cause feelings of hatred or hostility among individuals or groups in society, which could cause feelings of hatred or hostility among individuals or groups in society in the Karimunjawa islands.

The trial process for Daniel Frits has entered the decision stage as stated in Decision Number 14/Pid.Sus/2024/PN Jpa, where the Panel of Judges stated that Daniel Frits was legally and convincingly proven to have committed a crime in Article 28 Paragraph (2) of the ITE Law. In this condition, the Panel of Judges should be able to consider Article 1 paragraph (2) of the Criminal Code concerning the Principle of Applicability, which requires the most favorable provisions for the Defendant if there is a change in the law. The meaning of the most favorable provisions is not limited to changes in criminal sanctions and decriminalization (removal of criminal status) from certain acts, and these provisions must be interpreted broadly including changes in the formulation of criminal acts, such as changes in Article 28 Paragraph (2) of the ITE Law.

The full text of the Amendment to Article 28 paragraph (2) of the ITE Law is as follows: "Any person who intentionally and without the right to disseminate information intended to incite hatred or hostility towards individuals and/or certain community groups based on ethnicity, religion, race, and inter-group relations (SARA)." This amendment is very significant, as it mentions a clearer formulation of elements related to protected groups and the amendment is less burdensome for Daniel Frits because of the clarity regarding ethnicity, religion, race, and inter-group relations (SARA). In addition, the amendment to Article 28 paragraph (2) of the ITE Law clarifies that hate speech must be limited to identities that are permanent and inherent. This provision also cannot be applied to speech referring to the general public. Daniel Frits' criticism containing the phrase "shrimp brain" to the general public is no longer included in the scope of Article 28 paragraph (2) of the ITE Law. In this case, the public prosecutor must prove that groups in the community in the Karimunjawa Islands are classified as certain community groups based on ethnicity, religion, race, and inter-group relations (SARA). The social differentiation of Karimunjawa community groups based on SARA that the public prosecutor is indicting is definitely not based on ethnicity, race or religion, but rather inter-group relations.

The Constitutional Court (MK) in its legal considerations in Decision Number 76/PUU-XI/2017 is of the opinion that the term "intergroup" is not a term that has a clear and definite meaning. The meaning of this term cannot be immediately known, unlike the terms "ethnicity, religion, race and intergroup", where the four are placed on the same level and even give rise to the popular abbreviation "SARA". This makes the definition of intergroup according to the Constitutional Court Decision Number 76/PUU-XV/2017 unable to be used to interpret Article 28 Paragraph (2) of the ITE Law in the critical case of Daniel Frits. However, the Panel of Judges could not interpret Article 28 Paragraph (2) of the ITE Law and only interpreted the provision as whether or not there is a change in sanctions and decriminalization of certain acts. The Panel of Judges also limited the principle of applicability only to the condition that a criminal act is no longer a criminal act. The Panel of Judges' error in interpretation gave rise to other errors in proving the elements of Article 28 Paragraph (2) of the ITE Law.

In the case of Daniel Frits, the Panel of Judges also attempted to draw legal facts related to the pros and cons of society, as well as public reports as a form of inter-group conflict. The pro and con debates of society are not considered a criminal act, but are a logical consequence of an opinion expressed by someone, thus giving rise to rejection or agreement with that person's opinion. The pros and cons of public criticism cannot be interpreted to fulfill Article 28 Paragraph (2) of the ITE Law. The Panel of Judges also did not consider his actions in interpreting the significance of hate speech, where the important elements in actions listed in Article 28 Paragraph (2) of the ITE Law must include actions, such as inciting, inviting or influencing others.

The Impact of Criminalization of Freedom of Expression and Opinion on Environmental Activists

Cases of silencing in environmental law literature are known as Strategic Lawsuits Against Public Participation (SLAPP). SLAPPs are actions that actually endanger freedom of expression and participation in a democratic society. One form of SLAPP is reporting using criminal defamation, specifically defamation, by private parties or the state. According to Sembiring et al., besides slander or other defamation, which are the most commonly used, other types of violations used for SLAPPs include interference with the public interest, interference with privacy, conspiracy, malicious acts, and others. Furthermore, according to them, SLAPPs are intended to intimidate or threaten the public and eliminate public participation. Regardless of whether the victim is acquitted or wins in court, SLAPP reports have a corrosive impact on society, such as costs, time, and other impacts. (Riyadi & Hadi, 2021)

Currently, Anti-SLAPP regulations have emerged as a legal basis for resolving cases that fall into the SLAPP category, which are only regulated sectorally in Law Number 32 of 2009 concerning Environmental Protection and Management (hereinafter referred to as the PPLH Law), as well as several

technical regulations in law enforcement agencies. Anti-SLAPP has been regulated in Article 66 of the PPLH Law which cannot be separated from Article 65 concerning the rights of the community to a good and healthy environment. (Paka & Najicha, 2023) Article 66 of the PPLH Law states that "any person who fights for the right to a good and healthy environment cannot be prosecuted criminally or sued civilly. The provisions in Article 66 of the PPLH Law still contain weaknesses. The narrow interpretation of Article 66 of the PPLH Law has resulted in many communities or environmental defenders being reported for their activities. (Aulia et al., 2021)

The numerous cases of criminalization of environmental rights advocates raise significant questions about the fundamental essence of upholding democracy in Indonesia and raise concerns due to the numerous threats and repression against environmental activists, which continue to be widespread, as no authority recognizes a human rights advocate or an environmental advocate. Criminalization of freedom of expression, particularly against environmental activists, has far-reaching negative impacts. It can limit human rights, threaten environmental protection efforts, and weaken public participation in environmental decision-making. Criminalization can also instill fear and anxiety among activists, making them reluctant to voice their opinions and concerns on environmental issues. (Zavhorodnia et al., 2022)

The detention of environmental activists can also illustrate the dynamics between political power and economic interests in the context of environmental protection in Indonesia. The resistance or defense of detained activists can reflect the extent to which certain economic interests, such as the illegal shrimp farming industry, can influence environmental decision-making and law enforcement. If the government detains activists in response to pressure from parties with economic interests, it could raise questions about the independence and integrity of government institutions in protecting the environment and respecting freedom of expression. The international response to the detention of environmental activists can also affect perceptions of the quality of democracy in Indonesia. If the detentions are deemed a violation of human rights or freedom of expression by the international community, it could damage Indonesia's image as a democratic nation in the eyes of the world. The impacts could include reduced foreign investment, diplomatic pressure, or economic sanctions, all of which could affect the country's stability and prosperity. (Rachmawaty et al., 2024)

The detention of environmental activists in Indonesia also reflects several challenges facing the quality of democracy in the country. The detention of activists is often seen as an indicator of restrictions on freedom of expression and civil liberties, which are essential components of a healthy democracy. Threats against environmental defenders in Indonesia include strategic lawsuits against public participation (SLAPPs), which can intimidate and silence activists and hinder environmental conservation efforts. The arrest and detention of activists, journalists, and social media content creators demonstrates restrictions on individual freedoms, negatively impacting the country's democratic process. Thus, the detention of environmental activists not only highlights specific environmental issues but also demonstrates how civil liberties and democratic rights can be threatened in situations where the government and certain business interests may attempt to restrict public discussion and criticism. (Banulita & Utami, 2021) This is an important signal for civil society and the international community to continue monitoring and supporting efforts to preserve democracy in Indonesia.

Criminal and Positive Legal Perspectives on the Criminalization of Freedom of Expression and Opinion

Criminal law provisions, on the one hand, protect recognized and guaranteed rights, and on the other hand, restrict certain rights. However, the position of criminal law and human rights is complementary and harmonious, due to the existence of various shared principles and values between the two, such as proportionality, necessity, truth, and fairness. The recognition and guarantee of freedom of expression, as stipulated in international human rights instruments and national law, carries special obligations and responsibilities, and can be limited by permissible limitations. These limitations are

implemented in various forms, including through provisions in criminal law. Indonesian law regulates various criminal provisions related to and intersecting with the right to freedom of expression, for example provisions on insult, defamation, and so on.(Howie, 2018)

The provisions on defamation have also been contested and corrected, particularly in their excessive application and numerous violations of freedom of expression, including the elimination of articles on defamation of the president and revisions to defamation provisions in the ITE Law. The defamation articles in the Criminal Code touch on the context of protecting the reputation of officials and public bodies and do not provide a clear enough threshold between defamation and public opinion or criticism. The criminal law on defamation in Indonesia and its application in court are also inseparable from the issue of conflicts between protected rights, namely the protection of expression and the protection of reputation.(Antari, 2017) Various court decisions on defamation have been widely criticized and have become one of the grounds for the decline in protection of basic freedoms and freedom of expression. Court decisions often do not sufficiently consider the protection of expression and only focus on proving the actions of the accused, whether the accused actually said the words accused, whether written or verbal, and whether the words in question were insulting or not.(Widyati, 2017)

Defamation is an umbrella term for various different criminal acts regulated in the Criminal Code. In the Criminal Code, the term "defamation" is the title of Chapter XVI (sixteen) which includes the crimes of defamation (Article 310 of the Criminal Code), slander (Article 311 of the Criminal Code), minor insults (Article 315 of the Criminal Code), slanderous complaints (Article 317 of the Criminal Code), false allegations (Article 318 of the Criminal Code), defamation of the deceased (Article 320 of the Criminal Code), and the spread of defamation of the deceased (Article 321 of the Criminal Code). All of these criminal acts, when viewed from their elements, have the same nature of action, namely an accusation regarding something stated by the perpetrator to the victim, except in the case of minor insults where the accusation is not part of the act. In general, defamation is an act that attacks the honor or reputation of another person.(Prahassacitta & Harkrisnowo, 2021)

The criminalization of freedom of opinion and expression in both criminal and positive law has sparked debate. On the one hand, there is a need to protect the public and individual interests from hate speech, defamation, and other harmful actions. On the other hand, excessive criminalization can restrict the human right to participate in public discourse and criticize the government. One of the most common forms of freedom of opinion and expression in society is individual expressions on matters concerning other parties or individuals in various forms. These opinions and expressions are then considered offensive, insulting, and even "attacking" others. Several articles in the ITE Law have been challenged several times before the Constitutional Court and faced various problems in their implementation. This revision was subsequently revised in 2016. This revision has an important note, namely that the application of the ITE Law, particularly articles regulating restrictions on rights, must be carried out in accordance with the conditions of permissible restrictions and is solely intended to guarantee recognition and respect for protected rights.(Malecki, 2012)

Indonesian laws and regulations, particularly criminal law, regulate various acts and expressions of hatred and actions deemed to incite hatred and hostility among individuals, groups, or segments of the population. The application of criminal articles on hostility and hatred in various cases closely intersects with the right to freedom of expression, including criminal laws that have implicated various legitimate expressions, including:

Article 156 and Article 157 of the Criminal Code, there are 3 (three) categories of actions that are threatened, namely "hatred", "hostility" and "insult". The original word "insult" in these two articles is originally formulated using the term "minachting" which can be interpreted as "dislike", "demeaning" or "harassment" which is different from the concept of "beleediging" or insult.

Article 28 paragraph (2) of the ITE Law explains that any person who intentionally and without the right to disseminate information intended to incite hatred or hostility towards individuals and/or certain community groups based on ethnicity, religion, race, and inter-group relations (SARA). The absence of adequate explanations of the elements of the criminal act in Article 28 paragraph (2) makes this provision a fairly controversial and excessive article when applied. Various expressions that are considered to be criticism, for example Jerinx's statement and journalistic reports, can easily be charged with inciting hatred. The interpretation of the elements of the criminal act in Article 28 paragraph (2) is then inconsistent and lacks clear and definite references.

In general, the constitution and laws and regulations in Indonesia have recognized the guarantee of freedom of expression. The recognition, protection and fulfillment of freedom of opinion and expression are constitutionally regulated in the 1945 Constitution. Article 28E paragraph (2) of the 1945 Constitution states "Everyone has the right to freedom of belief, to express thoughts and attitudes, in accordance with his conscience." In paragraph (3), everyone has the right to freedom of association, assembly and expression. Article 28F of the 1945 Constitution states that "Everyone has the right to communicate and obtain information to develop his personality and social environment, and has the right to seek, obtain, possess, store, process and convey information using all available channels." Provisions regarding this freedom are also regulated in Law Number 9 of 1998 concerning Freedom of Expression in Public and Law Number 39 of 1999 concerning Human Rights. However, the guarantee of freedom of expression has not been able to fully protect the public from the threat of criminalization for opinions or expressions that are legitimate to be conveyed.(Fernando et al., 2022) On the one hand, positive developments have occurred,with provisions aligning with human rights principles or receiving more stringent interpretations from the Constitutional Court, making them clearer or more stringent. On the other hand, various provisions remain problematic, both because their formulation is broad, flexible, and open to interpretation, often easily exploited by ordinary citizens and state officials to stifle legitimate and protected expression.

The paradigm for regulating hate speech and hostility needs to emphasize the paradigm of protection for minority and vulnerable groups, so that it does not become a regulation that is actually used to ensnare minority groups with accusations of hatred towards those in power and to silence public criticism, including the use of accusations of hate speech to silence different views. In addition, proof of the elements of Article 28 paragraph (2) needs to be carried out in depth using clear indicators, including in defining the meaning of "hate" and "hostility" by ensuring from the statements or content of hate speech and hostility.

Conclusion

This research also found the fact that in a number of cases, for the same act, the Public Prosecutor was charged with an alternative charge that equates Article 28 paragraph (2) of the ITE Law with Article 27 paragraph (3) of the ITE Law. In fact, these two articles regulate different criminal acts with different elements, which shows that law enforcement does not understand the differences between the two criminal acts. The application and interpretation of Article 28 paragraph (2) of the ITE Law appears to be very excessive, for example, in the name of public order, the crime of hate speech and hostility is applied to individuals or minority groups who are considered to be attacking, for example attacking beliefs and religions, majority groups, and attacking power, or attacking groups that should not include the element of "group". It appears that the application of the crime of hate speech emphasizes a security and order approach or is based on maintaining the interests of the majority group or power. Proof of the elements of Article 28 paragraph (2) needs to be carried out in depth using clear indicators, including in defining the meaning of "hate" and "hostility" by ensuring from the statements or content of hate speech and hostility.

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