

The Juridical Analysis of a Comparative Study on the Law of Evidence in Cases of Individual Hate Crimes against Religion and Race (A Case Study of the Verdicts with Register Numbers: 1876/Pid.Sus/2018/PN.Mdn and 2429/Pid.Sus/2018/PN.Mdn).

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ABSTRACT

The comparison of the law of evidence in criminal offenses is based on the civil code, which includes three theories of evidence: the theory of the law of evidence according to positive law, the theory of the law of evidence according to the judge's consideration, and the theory of the law of evidence according to negative law. This research used the juridical normative method, which is deductive in nature. The data were obtained from primary, secondary, and tertiary legal materials, gathered through documentary study (library research), and analyzed using deductive logic. The conclusion was reached through explaining something from general to specific in relation to court verdicts that are final and conclusive. The research concluded that electronic information, electronic documents, and/or their prints are valid evidence and an extension of documents according to the law of procedure applicable in Indonesia. This evidence cannot be separated from Article 184 of the KUHP, as they have the same position and function as documents used as evidence. The opinions of forensic digital experts also strengthen the validity of electronic evidence before the court by reconstructing it so that the proceedings are clear.

Keywords : Comparison of Law Of Evidence, Individual Hatred Criminal Offense on SARA (Ethnic, Religious, Racial, Intergroup Relations).

INTRODUCTION

Indonesia is a constitutional state that adheres to a democratic system, where individuals are free to express their opinions both orally and in writing, as long as they comply with reasonable regulations. People have the freedom to express their opinions, which is a right granted to every Indonesian citizen. However, most of our society is generally unaware of the limits for expressing opinions, and they do not understand the difference between expressing opinions and spreading hate towards individuals or groups of people. Such behavior, from a legal standpoint, may constitute an act that goes against the norms, and society must adapt to the changing times, especially with the continuous development of information technology.

Behaviors or actions that comply with the applicable legal norms are not problematic, but actions that go against legal norms usually result in legal issues and harm to individuals or groups in society. As a result, there are often issues in society such as violations and even crimes. Every opinion must be accountable and must not contradict existing norms. Unlimited freedom of expression can lead to the occurrence of hate speech crimes. Hate speech crimes are not specifically regulated in Indonesian legislation. Criminal liability for hate speech crimes on social media is generally regulated in the Criminal Code (KUHP) and Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Electronic Information and

Transactions.¹

The development of time and technology not only has a positive impact but also has a negative impact, such as the criminal act of defamation or hate speech and/or insults directed towards individuals or groups in public or on social media with the intention of inciting hatred or hostility towards a certain individual or group based on ethnicity, religion, race, and inter-group (SARA). Conversely, communication and the provision of information by an individual or group in the form of provocation, incitement, or insults towards other individuals or groups on various aspects such as race, skin color, gender, disability, sexual orientation, nationality, religion, and others, are the meaning of Hate Speech itself.

Hate speech has been declared a criminal act by the Indonesian Police through a Circular Letter on Hate Speech issued on October 8, 2015 with the number SE/06/X/2015. The forms of hate speech that are referred to in the Indonesian Criminal Code (KUHP) include insults, defamation, blasphemy, unpleasant actions, provocation, incitement, and spreading of fake news. The negative impacts of hate speech and the spread of fake news can be quite distressing. They can range from experiencing shame and social sanctions from netizens and the general public, to losing reputation and even threatening lives.

Tommy Daniel Patar P. Hutabarat has been found guilty of committing hate speech in public by officially committing blasphemy against a religion practiced in Indonesia. By indirectly expressing feelings of hostility, hatred, or insult against residents or groups of people who practice a particular religion in Indonesia, specifically in the city of Medan. It is stated that the defendant, Tommy Daniel Patar P. Hutabarat, on Thursday, May 10, 2018, around 06:55 am or at least at some other time in May 2018 or still in 2018, at Jalan Bunga Lau No.17, Kemenangan Tani Village, Medan Tuntungan District, Medan City, North Sumatra Province, precisely at the Nurul Iman Mosque at the Haji Adam Malik General Hospital, or at least in a place that is still within the jurisdiction of the Medan District Court, "in public expressing feelings or committing acts that are essentially hostile, abusive, or blasphemous against a religion practiced in Indonesia."²

Based on the statement of criminal expert Prof. Maidin Gultom, SH, M.Hum, the owner of the Facebook account named Faisal Abdi, the defendant who wrote the sentence "Eramas is definitely going to win, Batak people don't be sad if Djoss loses, please eat your pig's feces haha... stupid Batak" in the comment section of a Facebook account with an unknown name, wrote a sentence about the quick count result of the North Sumatra Gubernatorial Election which was not in accordance with the actual percentage of votes obtained by the Candidate pair number 2 (Djoss) who was said to be leading over the Candidate pair number 1 (Eramas). This action spread information intended to incite hatred or hostility towards individuals and/or specific groups of society based on ethnicity, religion, race, and inter-group relations (SARA).³

From both of the above cases, it is clear that there are differences when seen from the elements of the hate speech crime. The experience of Tommy Daniel Patar P. Hutabarat is

¹<https://ojs.unud.ac.id/index.php/kerthawicara/article/view/39787>, diakses pada tanggal 25 januari 2020, pukul 19.20 Wib.

²*Ibid*

³Direktori Putusan Mahkamah Agung Republik Indonesia putusan.Mahkamahagung. go.id Hlm. 5-6 dari 29 Putusan Nomor: 2429/Pid.Sus/2018/PN Mdn

different from that of Faisal Abdi Lubis as a defendant of hate speech crime against individuals based on ethnicity, religion, and race. Which one is direct and which one is indirect can be seen, and the application of evidence by the judge needs to be reviewed again, so what is the basis for the judge's consideration in proving hate speech crime against both verdicts above, as well as how further legal arrangements related to hate speech crimes both in the Criminal Code and Law Number 19 of 2016 Concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions.

LITERATURE REVIEW

Comparison of Evidence Law

The comparison between the rules of evidence in Indonesia and the United States is based on their different systems of proof. Indonesia adheres to the negative proof system, while the United States follows the conviction-in-time system regarding the admissibility of evidence in court, although in practice, the types of evidence used in court are not much different. As for the burden of proof in general, both countries adopt the ordinary burden of proof. However, for certain cases where the burden of proof is deemed difficult to be imposed on the prosecution, it is shifted to the defendant without reducing their fundamental rights as a defendant.

Criminal Offence

Criminal offense is a legal term. Its formal legal definition states that any behavior that violates criminal law is a form of criminal act. Therefore, any type of behavior or action that is prohibited by law must be avoided and will be subject to punishment for anyone who violates it. Thus, every citizen is obliged to comply with all obligations and prohibitions as stipulated in the law, regulations by the government, both at the central and regional levels. Criminal offense also has another term, namely "strafbaar feit" which means "strafbaar" is punishable, while "feit" is defined as part of a fact that, when combined, becomes a punishable reality.⁴

Hate Speech

Hate speech can be defined as an act that aims to incite and spread hatred from one group to another, expressed through speech and/or writing made by an individual in public, usually due to differences in race, religion, belief, gender, ethnicity, disability, and sexual orientation. Hate speech, according to the law, can be defined as a communication act in the form of incitement, provocation, or insult carried out by an individual or group towards another individual or group related to various aspects such as skin color, ethnic race, gender, nationality, religion, and others.

METHODS

The type of research used in this study is normative legal research supported by field data. The type of research used in this thesis is normative juridical, which is a deductive research that begins with the analysis of articles and legislation governing the issues in this thesis. With analytical approach, statute approach, case approach, historical approach, and

⁴P.A.F Lamintang, *Dasar-Dasar Hukum Pidana Indonesia*, Cet.4 (Bandung: PT. Citra Aditya Bakti, 2011). hlm. 181.

conceptual approach using primary, secondary, and tertiary legal materials which are then concluded and given new arguments related to the problem studied.

The data collection technique used in this writing is Library Research, which is conducted by conducting research on various reading sources, namely: Scholarly books, Lecture materials, Newspapers, Articles, and News obtained by the author, which aims to obtain or search for concepts, theories, materials, or doctrines. The data obtained through Library Research will then be interpreted to obtain the suitability of the application of regulations related to the problem being studied and systematized to produce a classification that is in line with the problem in this research.⁵

RESULTS AND DISCUSSION

Legal Regulations Regarding Evidence in Cases of Religious or Ethnicity-Based Crimes According to the Indonesian Criminal Procedure Code (KUHAP)

Regarding evidence of crimes related to SARA according to the Indonesian Criminal Code (KUHP), Article 156 of the KUHP is more directed towards actions that express hostility (*vijanschap*), namely actions that express in words that are perceived by the public as hostile towards a particular group of Indonesian citizens. Actions that express hatred (*haat*) are in the form of utterances that are perceived or assessed by the public as being hateful towards a particular group of Indonesian citizens. Actions that are perceived by the public as utterances that insult, demean, or humiliate a particular group of Indonesian citizens are also considered as evidence of crimes related to SARA. In general, according to the KUHP, valid evidence is evidence that is related to a criminal act and can be used to prove the truth of a crime committed by the defendant, in order to persuade the judge of the defendant's guilt.

The criminal procedural legal system through the provisions of Article 184 paragraph (1) of the Criminal Procedure Code (KUHAP) has determined valid evidence tools according to the law, meaning that the use of these evidence tools is necessary and not permitted for proving the defendant's guilt. This is especially important in proving crimes related to SARA. The evidence tools in Article 184 KUHAP can be seen as follows:⁶

1. Witnesses Testimony

The witness testimony is the most important piece of evidence in criminal cases, as almost all criminal case evidence relies on the examination of witness testimony. The definition of a witness and witness testimony is clearly stated in the KUHP. According to Article 1 number 26 of the KUHP, "A witness is a person who can provide information for the purposes of investigation, prosecution, and trial of criminal cases that they heard, saw, or experienced themselves." Meanwhile, Article 1 number 27 of the KUHP states, "Witness testimony is one of the pieces of evidence in criminal cases that is in the form of testimony from a witness about a criminal incident that they heard, saw, and experienced themselves by mentioning the reasons for their knowledge".

In the development of the definition of a witness as referred to in Article 1 number 26 jo.

⁵ Bambang sunggono, *metode penelitian hukum (suatu pengantar)*, (jakarta: PT. Raja Grafindo Persada, 2001), hlm. 195-196.

⁶ H.P. Panggabean, *Hukum Pembuktian Teori- Praktik Dan Yurisprudensi Indonesia*, Alumni, Bandung, Thn 2002, hal. 84

Article 1 number 27 jo. Article 184 paragraph (1) letter a of the Criminal Procedure Code (KUHAP), it has been expanded based on Constitutional Court Decision Number 65 / PUU-VIII / 2011 dated August 8, 2011. According to the Constitutional Court decision, the definition of a witness statement as evidence is a statement from a witness about a criminal event that he heard himself by citing the reasons for his knowledge, including statements in the context of investigating, prosecuting, and adjudicating a criminal act that he did not always hear himself, see it himself, and experience it himself. A witness who directly sees a criminal act is often referred to as an eyewitness or eye witness. Eyewitnesses are the most important evidence in criminal cases.

2. Expert Testimony

Expert testimony can be presented by the public prosecutor, legal counsel, to be delivered orally and directly recorded in the court hearing minutes, and there is also supporting expert testimony during the investigation examination under Article 120 and Article 133 of the Criminal Procedure Code (KUHAP). According to Article 186 KUHAP, expert testimony is what an expert declares in their field of expertise. In the explanation, it is said that expert testimony can also be given at the time of the investigation by the investigator or the public prosecutor, which is recorded in a form of report and made with the oath when they take on the position or job.

It should be noted that KUHAP distinguishes between the testimony of an expert witness in court and written expert testimony presented in court. If an expert gives testimony directly in front of the court and under oath, that testimony is considered valid expert witness evidence. Meanwhile, if an expert has given written testimony under oath outside of the court, and that testimony is read in court, that expert testimony is considered both documentary evidence and expert witness evidence

3. Documentary Evidence

The definition of a document is anything that contains punctuation marks, intended to express one's thoughts or convey one's ideas and can be used as evidence. Beyond that definition, there are several forms of punctuation marks that are not considered documents (referred to as demonstrative evidence = objects used to convince only), including photos and maps, even though they contain punctuation marks, they do not contain one's thoughts or ideas. In judicial practice, through the Circular Letter of the Supreme Court No. 39/TU/88/102 Pid dated January 14, 1989, it was determined that "microfilms or microchips can be used as valid evidence in criminal cases, (replacing document evidence as regulated in article 184 paragraph (1) sub c of KUHAP)" with the provision that "both the microfilm or microchip must be guaranteed for their authenticity which can be traced back and documented." Based on the contents of the above Supreme Court Circular Letter (SEMA), evidence can be categorized as: first, oral evidence, which are the words spoken in court (testimony of witnesses, expert witnesses, and defendants); second, documentary evidence: documents; and third, demonstrative evidence: physical evidence such as microfilms and microchips.

4. Material Evidence

Based on Article 188 Paragraph (1) of the Criminal Procedure Code (KUHAP), evidence is defined as an act, event, or circumstance which, because of its correspondence, either

between one another or with the crime itself, indicates that a criminal act has occurred and who the perpetrator is. Such evidence can only be obtained from witness testimony, documents, and defendant statements. Compared to the criminal procedure law in the Netherlands based on Article 339 Wetboek van Starfvordering, evidence can be equated with *eigen waarneming van de rechter*, which means the judge's observation or knowledge. Therefore, the strength of evidentiary proof is based on the judge's observation to assess the correspondence between the facts at hand and the crime being charged, as well as the correspondence between each piece of evidence and the facts and crime being charged..

There are two guidelines for obtaining valid evidence. Each guideline may not have the same strength of evidence. The strength of evidence depends on the relationship between the many acts considered as guidelines and the accused's alleged acts. The assessment of the guidelines is not carried out by the law, but is entrusted to the judge, who must evaluate it wisely.

5. Testimony of the Accused

Testimony of the Accused in the context of evidentiary law in general can be equated with confession evidence. According to Mark Frank, John Yarbrough, and Paul Ekman, a confession without supporting evidence is worthless on its own. KUHAP provides a definition of *keterangan terdakwa* as what the defendant states in court about the actions they have committed, known or experienced. The defendant's confession as evidence has two requirements, namely:⁷

- a. Admitting to committing the alleged criminal act;
- b. Admitting guilt.

There are several facts that can occur during a trial, including;

- a. In the practice of justice, there are several forms of confession, including:
 - 1) The defendant admits to the charges but not to the guilt.
 - 2) The defendant admits guilt but not to the charges.
- b. The obligation to have an interpreter present (Article 177, Article 178 of the Criminal Procedure Code).
- c. The obligation for the defendant to provide cause-based testimony (Article 153 (2) letter b of the Criminal Procedure Code).
- d. The binding situation for the defendant because the defendant does not want to answer (the right of remain silent) under Article 175 of the Criminal Procedure Code, which requires the judge to ask the defendant to provide testimony that can mitigate their situation.
- e. The defendant's behavior disrupts the trial. Under Article 176 of the Criminal Procedure Code, if the judge fails even after warning the defendant who tends to disturb the trial, the defendant will be removed from the trial until the reading of the verdict.

The defendant retracts the statement made in the police report. In these situations, the judge is authorized to assess the defendant's testimony wisely because the retraction of the defendant's statement must be based on a generally understandable reasons.

⁷H.P. Panggabean *Op,cit* hal, 93

The Legal Regulation of Evidence in Relation to Criminal Acts of SARA According to Law Number 19 of 2016 concerning Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions.

With the increasing use of electronic activities, the legal means of evidence that can be used must also include electronic information or documents to facilitate the implementation of the law. In addition, the printouts of such documents or information must also be admissible as legal evidence. The means of evidence in investigation, prosecution, and trial according to the provisions of Law No. 11 of 2008 are other evidence in the form of Electronic Information and/or Electronic Documents as referred to in Article 1 number 1 and number 4 and Article 5 paragraph (1), paragraph (2), and paragraph (3).

Article 1 number 1 reads: Electronic Information is one or a collection of electronic data, including but not limited to writing, sound, images, maps, designs, photos, electronic data interchange (EDI), electronic mail, telegram, telex, telecopy, or the like, letters, signs, numbers, Access Codes, symbols, or perforations that have meaning or can be understood by those who are capable of understanding it. Article 1 number 4 reads: Electronic Document is any Electronic Information made, forwarded, transmitted, received, or stored in analog, digital, electromagnetic, optical, or similar form that can be viewed, displayed, and/or heard through a Computer or Electronic System, including but not limited to writing, sound, images, maps, designs, photos or the like, letters, signs, numbers, Access Codes, symbols or perforations that have meaning or can be understood by those who are capable of understanding it..

Article 5 paragraph (1) reads: Electronic Information and/or Electronic Document and/or its printed version are valid legal evidence. Article 5 paragraph (2) reads: Electronic Information and/or Electronic Document and/or its printed version as referred to in paragraph (1) is an extension of valid evidence according to the applicable procedural law in Indonesia. Article 5 paragraph (3) reads: Electronic Information and/or Electronic Document is declared valid if using Electronic System in accordance with the provisions stipulated in this Law.

Regulations related to evidence against hate crimes often result in different interpretations among law enforcement officials, especially during court hearings. This is due to the lack of clear rules regarding the recognition of such evidence. Therefore, the regulation of evidence against hate crimes can be seen from legal facts and judges' considerations of the elements in a hate crime case. To facilitate the use of electronic evidence (whether in electronic form or printed), electronic evidence can be considered an extension of legitimate evidence, in accordance with the applicable procedural law in Indonesia, as stated in Article 5, paragraph (1), (2), and (3) of Law No. 11 of 2008 concerning Information and Electronic Transactions (ITE):

1. Electronic Information and/or Electronic Documents and/or their printed results are valid legal evidence.
2. Electronic Information and/or Electronic Documents and/or their printed results as referred to in paragraph (1) are an extension of valid evidence in accordance with the applicable procedural law in Indonesia.
3. Electronic Information and/or Electronic Documents are considered valid if they are used in accordance with the provisions set out in this law.

Based on article 1 paragraph (1) and paragraph (4) of the ITE Law, it is clear that

anyone who intentionally and without right spreads information aimed at inciting hatred or hostility towards individuals and/or certain groups in society based on ethnicity, religion, race, and inter-group (SARA) is threatened with imprisonment for up to 6 (six) years and/or a fine of up to Rp1,000,000,000. It is stated that anyone who intentionally and without right spreads information aimed at inciting hatred or hostility towards individuals and/or certain groups in society based on ethnicity, religion, race, and inter-group (SARA) is subject to criminal punishment.

CONCLUSION

Based on the discussion of the three problems in this study, it is concluded as follows:

1. The comparison of the Law of Proof Elements of Criminal Acts based on the Criminal Code indicates that there are three theories of evidence used, namely: the theory of evidence based on positive law, the theory of evidence based on the judge's conviction, and the theory of evidence based on negative law. Therefore, to determine whether someone is guilty or not, it must be carried out in accordance with the mandate stipulated in Article 183 of the Criminal Procedure Code, which is based on at least two (2) pieces of evidence as referred to in Article 184 paragraph (1) and the judge's conviction.
2. In two cases, the court decisions of Medan with the numbers 1876/Pid.Sus/2018/Pn Mdn and 2429/Pid.Sus/2018/Pn. Mdn show differences in the judges' considerations. In the case of court decision number 1876/Pid.Sus/2018/PN Mdn, the judge's consideration was that the defendant was charged with an alternative indictment, namely the first indictment of violating Article 156 a letter a of the Criminal Code or the second indictment of violating Article 156 of the Criminal Code. Since the indictment was in the form of an alternative, the panel of judges could immediately consider the most proven indictment, and based on the facts obtained during the trial, the first indictment was proven (violating Article 156 a letter a of the Criminal Code, the elements of which are as follows: "Anyone who, intentionally in public, expresses feelings or performs actions that are essentially hostile, abusive or blasphemous towards a religion practiced in Indonesia"). Meanwhile, in the case of court decision number 2429/Pid.Sus/2018/PN Mdn, the judge's consideration was that the elements of the criminal act charged in the indictment of violating Article 28 paragraph (2) in conjunction with Article 45 A paragraph (2) of Law No. 19 of 2016 concerning the Amendment of Law No. 11 of 2008 concerning Electronic Information and Transactions (ITE) had been proven legally and convincingly. Therefore, the defendant had legally and convincingly been proven to intentionally and without authority spread information aimed at creating hostility towards individuals or certain groups of society based on ethnicity, religion, race, and inter-group (SARA), as stipulated in Article 28 paragraph (2) in conjunction with Article 45 A paragraph (2) of Law No. 19 of 2016 concerning the Amendment of Law No. 11 of 2008 concerning ITE, and the defendant must be given a suitable punishment.
3. According to the Criminal Procedure Code (KUHP), the legal evidence is evidence that is related to a criminal act, where the evidence can be used as proof to create conviction for the judge about the truth of a criminal act committed by the defendant. Legal evidence according to Article 184 paragraph (1) of Law Number 8 of 1981 (KUHP) consists of

Witness Testimony, Expert Testimony, Letters, Directions, Defendant Testimony. Meanwhile, according to the Electronic Information and Transactions Act (ITE), the evidence in the investigation, prosecution, and trial in cases of hate crimes based on race, ethnicity, religion, and inter-group (SARA) seen in Indonesian Law Number 19 of 2016 Amendment of Indonesian Law Number 11 of 2008 Concerning ITE is electronic information and/or electronic documents as referred to in Article 1 numbers 1 and 4 as well as Article 5 paragraph (1), paragraph (2), and paragraph (3). This is punishable by criminal acts under Article 28 paragraph (2) in conjunction with Article 45 A paragraph (2) of Indonesian Law Number 19 of 2016 Amendment of Indonesian Law Number 11 of 2008 Concerning ITE.

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