PROTECTING EXPRESSION

Criminal and Human Rights Law Analysis of Court Judgements in Indonesia

Stanford Center for Human Rights and International Justice

Norwegian Embassy Jakarta
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<th>Full Form</th>
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<td>1945 Constitution</td>
<td>Constitution of the Republic of Indonesia Year 1945</td>
</tr>
<tr>
<td>CERD</td>
<td>Committee on the Elimination of Racial Discrimination</td>
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<tr>
<td>CSIS</td>
<td>Centre for Strategic and International Studies</td>
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<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>General Comment No. 34</td>
<td>ICCPR's General Comment No. 34 Article 19: Freedom of Opinion and Expression</td>
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<tr>
<td>General Comment No. 37</td>
<td>ICCPR's General Comment No. 37 Article 21: Right of peaceful assembly</td>
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<td>Human Rights Law</td>
<td>Law Number 39 Year 1999 on Human Rights</td>
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<tr>
<td>IACHR</td>
<td>Inter-American Commission on Human Rights</td>
</tr>
<tr>
<td>IACtHR</td>
<td>Inter-American Court of Human Rights</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<tr>
<td>ICJR</td>
<td>Institute for Criminal Justice Reform</td>
</tr>
<tr>
<td>ITE Law</td>
<td>Law Number 11 Year 2008 on Electronic Information and Transaction as amended by Law Number 19 Year 2016 on the Amendment of Law Number 11 Year 2008 on Electronic Information and Transaction</td>
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<tr>
<td>KUHP</td>
<td>Kitab Undang-Undang Hukum Pidana (Criminal Code)</td>
</tr>
<tr>
<td>MA</td>
<td>Mahkamah Agung (The Supreme Court of Republic of Indonesia)</td>
</tr>
<tr>
<td>MPR</td>
<td>Majelis Permusyawaratan Rakyat (People's Consultative Assembly)</td>
</tr>
<tr>
<td>MvT</td>
<td>Memorie van Toelichting</td>
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<tr>
<td>PN</td>
<td>Pengadilan Negeri (District Court)</td>
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<td>Press Law</td>
<td>Law Number 40 Year 1999 on Press</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<td>Rabat Plan of Action</td>
<td>The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence</td>
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<tr>
<td>SARA</td>
<td><em>Suku, Agama, Ras dan Antar-Golongan</em> (tribe, religion, race and inter-group)</td>
</tr>
<tr>
<td>SE</td>
<td><em>Surat Edaran</em> (circular)</td>
</tr>
<tr>
<td>SKB</td>
<td><em>Surat Keputusan Bersama</em> (Joint Decree)</td>
</tr>
<tr>
<td>Sr.</td>
<td><em>Wetboek van Strafrecht</em> (Penal Code of the Netherlands)</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UU</td>
<td><em>Undang-Undang</em> (<em>Laws</em>)</td>
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# Glossary

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<td><strong>Johannesburg Principles</strong></td>
<td>These principles were adopted on 1 October 1995 by a group of experts on international law, national security and human rights who gathered by ARTICLE 19, International Centre Against Censorship, in cooperation with the Centre for Applied Legal Studies of Witwatersrand University at Johannesburg. These principles are based on the international and regional law and standards related to human rights protection, the development of state practice (as reflected on, among other, in the national court judgments), and general principles recognised by nations.</td>
</tr>
<tr>
<td><strong>General Comment</strong></td>
<td>A document developed by the United Nations' independent experts as a detailed explanation on how the State shall implement and operationalise certain rights.</td>
</tr>
<tr>
<td><strong>United Nations Human Rights Committee</strong></td>
<td>An independent committee with the mandate to monitor the implementation of the ICCPR by State Parties. The committee also has the authority in drafting and issuing General Comments to interpret certain rights guaranteed by the Covenant.</td>
</tr>
<tr>
<td><strong>United Nations Special Rapporteur</strong></td>
<td>Independent expert elected by the United Nations Human Rights Council with the mandates to report and advise on certain human rights themes or country situation. The position is unpaid, and the Special Rapporteur holds his/her mandate for a period of 3 years and could be extended for another period.</td>
</tr>
<tr>
<td><strong>Siracusa Principles</strong></td>
<td>Principles of the limitation and derogation provisions as provided in the International Covenant on Civil and Political Rights.</td>
</tr>
<tr>
<td><strong>Rabat Plan of Action</strong></td>
<td>Strategy on prohibition of acts that promote hatred based on nationality, race, and religion to incite discrimination, hostility, or violence.</td>
</tr>
<tr>
<td><strong>Three-part test</strong></td>
<td>A method used by various regional human rights courts to assess whether limitation by the State against the exercise of the right to freedom of expression is legitimate based on human rights law principles. The stages include whether the limitation a) provided by the law, b) has legitimate purpose, and c) &quot;necessary in a democratic society&quot;.</td>
</tr>
<tr>
<td><strong>Chilling Effect</strong></td>
<td>A term used to explain fear within the society caused by the ambiguity of law or legislation.</td>
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CHAPTER I

INTRODUCTION
1.1. Background

The 1998 Reformasi Era marked the beginning of fundamental changes in the constitutional system and the strengthening of democracy in Indonesia. Also among the important changes was the strengthening of the human rights protection system. A number of regulations and policies were formulated, including the recognition and guarantee of human rights as constitutional rights through the second amendment to the 1945 Constitution. In line with the strengthened democratic principles in the state administration system, one of the fundamental rights recognized and guaranteed is freedom of expression.

Aside from the 1945 Constitution, freedom of expression is regulated in various laws and regulations, including Law no. 39 of 1999 on Human Rights. Accession to the International Covenant on Civil and Political Rights in 2005 also strengthened the protection of freedom of expression in Indonesia. All these developments signify that the normative guarantee for freedom of expression in Indonesia is stronger.

However, freedom of expression in Indonesia continues to face challenges. Various laws and regulations in the past are still in effect and have not been amended to be in line with human rights principles, including those on defamation and various other stipulations in the Criminal Code which affect the enjoyment of the right.

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2 Presidential Decree No. 85 of 1998 on Clemency which grants amnesty and abolition to political prisoners detained during President Soeharto’s era, Law no. 2 of 1999 on Political Parties, Law no. 3 of 1999 on Elections, Law no. 40 of 1999 on the Press, and Law no. 39 of 1999 on Human Rights. In addition, Indonesia has also ratified and acceded to various international human rights instruments including the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (ratified through Law No.5 of 1998), the International Convention on the Elimination of All Forms of Racial Discrimination (Law No. 29 of 1999), and the International Covenant on Civil and Political Rights (Law No. 12 of 2005).

3 Second Amendment, Chapter XA on Human Rights, Articles 28A-28J.

4 In the 1945 Constitution, among others the right to express an opinion (Article 28E paragraph (3)) and the right to information (Article 28 F).


6 Law on Human Rights, Law Number 39 Year 1999, Article 23 paragraph (2).

7 UN General Assembly, Internasional Covenant on Civil and Political Rights (ICCPR), GA RES 2200A (XXI) (16 December 1966), Article 19.

8 The offence of defamation (penghinaan) is regulated in the Criminal Code (Kitab Undang-Undang Hukum Pidana-KUHP) and Law No. 11 Year 2008 on Information and Electronic Transactions as amended by Law No. 19 Year 2016. Initially, the Criminal Code did not only criminalize defamation of individuals against other individuals, but also against the President and Vice President and the government. However, the latter provisions were revoked by the Constitutional Court through Decisions number 013-022 / PUU-IV / 2006 and 6 / PUU-V / 2007. See Anggara, Indonesia Criminal Law Update, Issue No. 3/2017 (Jakarta: ICJR, 2017), p. 6-9.
to freedom of expression. Worse still, a number of laws and regulations passed even after the second constitutional amendment impair the protection of freedom of expression, for example Law no. 11 of 2008 on Information and Electronic Transactions (ITE Law). The ITE Law was originally formulated to promote legal protection amid the increasing use of information technology in public activities. However, the ITE Law also criminalizes defamation in Article 27 paragraph (3) and the dissemination of information aimed at inciting hate or hostility against an individual in Article 28 paragraph (2).

Apart from being problematic in their formulation, these articles are also used in criminal prosecution so excessively to the extent that they have a chilling effect on opinion and expression using electronic means. The chilling effect is evident at least in the cases of Benny Handoko, Ira Simatupang, and Muhammad Arsyad. Controversial cases involving the application of the ITE Law continue to occur, including the cases of Muhadkly Acho, Augie Fantinus, and Baiq Nuril Maknun. These cases have sparked debates in the community, mainly on whether the prosecuted expressions fulfill the criminal elements in the ITE Law's provisions applied, and whether it is even necessary to apply criminal law against them in the first place. In addition, there is a growing perception that the ITE Law has been used to silence criticism against public officials or those who have different views with the government. As a result, the condition of freedom of expression in Indonesia

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9 The offence of slander and libel in the Criminal Code is regulated in Article 310. Apart from that, the Criminal Code also regulates other offences that limit freedom of expression such as insulting public officials acting in their official capacity (Articles 207-208), calumny (Article 311), minor defamation (Article 315), calumnious charge, i.e. false defamatory report to the authorities (Article 317), calumnious insinuation, i.e. slanderous or libelous allegation of someone having committed a crime (Article 318), and defamation against a deceased (Articles 320-321).

10 It has been amended by Law no. 19 of 2016 on the Amendments to Law Number 11 of 2008 on Electronic Information and Transactions. One of the amendments concerns defamation in Article 27 paragraph (3), adding explanation for the elements of “distributing”, “transmitting” and “making accessible” and changing the offence into one to be prosecuted solely upon complaint.


CHAPTER I

...is undermined, which affects the index of democracy in Indonesia. Various court Judgments related to the application of various provisions in both the Criminal Code and the ITE Law have further contributed to the deterioration of the protection of freedom of expression in Indonesia. A number of studies conducted by the Center for Strategic and International Studies, the Institute for Criminal Justice Reform, Human Rights Watch, and other elements of civil society in general have described and analyzed how people making legitimate expressions have been put on trial, convicted, and sentenced to imprisonment. Most of them highlight, among others, that the court Judgments fail to give adequate legal considerations, particularly in assessing whether an act is a legal and protected expression or is indeed a crime. The main issue tackled in many of these studies is the extent to which human rights protection, in this context, protection of freedom of expression, is applied in dealing with various such cases.

Although there have been many studies on freedom of expression in Indonesia, they generally do not focus on the legal considerations aspects in court Judgments concerning the matter. This research intends to see how various laws and regulations related to freedom of expression are applied and interpreted by judges in concrete cases. Departing from an understanding of how judges interpret and apply criminal elements against opinions and expressions, the research also intends to offer interpretive constructs of relevant criminal articles that adhere to the principles and framework of human rights law.

Bearing in mind the broad scope of freedom of expression, this research will focus on court Judgments on certain acts, namely: defamation, political expression, and hoax. The analysis that will be used in examining these Judgments are the criminal law and human rights framework related to freedom of expression based on the constitution and the national and international human rights legal framework.

It is hoped that the research will provide a comprehensive picture on the cases

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15 The Indonesian Democracy Index (Indeks Demokrasi Indonesia-IDI); the figures of the indicators throughout 2009-2017, specifically those related to freedom of expression and opinion, while fluctuating from year to year, they tended to be on a declining trend. For the indicator “Threats / use of violence by government officials that hinder freedom of expression” the figure in 2009 was at 83.43 while in 2017 it decreased to 68.87. Meanwhile, for the indicator “Threats / use of violence by the society that hinders freedom of expression” in 2009 it was at 86.67 and in 2017 it decreased to 51.47. See Badan Pusat Statistik, Indeks Demokrasi Indonesia (IDI) Menurut Indikator 2009-2016, https://www.bps.go.id/dynamictable/2017/12/21/1276/indeks-demokrasi-indonesia-idi-menurut-indikator-2009-2016 (accessed November 13, 2019).

16 Tobias Basuki et al., Loc. Cit.

17 Anggara et al., Menimbang Ulang Pasal 27 ayat (3) UU ITE dalam Putusan Pengadilan, (Jakarta: ICJR, 2016).


19 Anggara et al., Loc. Cit.
related to freedom of expression and provide various recommendations to strengthen the protection of the right to the freedom in Indonesia through a more stringent interpretation of the law which is soundly based on the applicable human rights legal framework. In particular, this research will provide material for law enforcement to enable them to better understand and apply with caution the articles that pertain to freedom of expression. Further, the research aims to add to the perspectives and knowledge for judges, legal practitioners, academics, and civil society organizations in the effort to promote and protect the right to freedom of expression.

1.2. Research Questions

This research will answer the following key questions:

a. How does the national and international human rights legal framework regulate the protection of the right to freedom of expression?

b. How do judges in Indonesia interpret criminal articles that might affect freedom of expression and the implication of their legal interpretation for the protection of the right to freedom of expression?

c. How can the legal and human rights framework be applied in the interpretation of the elements of the relevant crimes in Indonesian law in order to protect the right to freedom of expression?

1.3. Research Methods

To answer the above questions, this research looks at a number of aspects of the right to freedom of expression, including the legal guarantees for the protection of the right to freedom of expression, the types of the right, and the formulation of articles from various regulations at the national level that restrict it. In addition, this study also examines further the types of interpretations applied by the courts on these articles, the demographics of individuals who convey expressions and parties who feel aggrieved by them, and the types of criminal sentence imposed on individuals who convey expressions.

Considering that this research aims to understand and analyze the legal framework and the implementation of the legal guarantees of the right to freedom of expression in Indonesia, particularly through judges’ decisions, this research uses doctrinal legal research methods. The main data sources used in this research are various national and international legal and human rights instruments, as well as criminal judgements within the sphere of freedom of expression. As a complementary reference, this study also uses information from interviews with judges, legal practitioners, law and human rights experts, as well as individuals who
have undergone a judicial process because of their expression. Meanwhile, other supporting data sources include scientific articles and reports, results of the studies conducted by other civil society organizations, and other relevant literature.

At the beginning of the research, the Research Team tried to limit the scope of the discussion in this study considering the broad scope of discussion on the right to freedom of expression. The Research Team then conducted a Focus Group Discussion with several freedom of expression activists to find out issues related to the right to freedom of expression which frequently cause problems in Indonesian courts. From this meeting, the Research Team decided to focus this research on the right to freedom of expression in cases of defamation of individual, legal entity, and public authority/body, both regulated in the Criminal Code, as well as the ITE Law, hate speech, and crimes against state security. Therefore, all sources of data and analysis used in this study will only refer to provisions and implementation of the right to freedom of expression in the context of defamation of individual, legal entity and public authority/body, hate speech, and crimes against state security.

In collecting judgments, the Research Team used judgments of Indonesian courts as well as foreign domestic courts, and regional human rights courts of Europe, Africa, and America as analysis materials in this research. For Indonesian courts’ judgments, the Research Team analysed 80 judgments, consisting of 5 judgments of the Constitutional Court, 50 judgments of District Courts, 6 judgments of High Court, and 19 judgments of the Supreme Court. For judgment of judiciaries under the Supreme Court (district court, high court, and the Supreme Court), the Research team chose judgments relevant to the focus area of this research which are available in the Supreme Court Judicial Judgment Directory, https://putusan3.mahkamahagung.go.id/beranda.html within the period of 1998 to 2021.

In determining the Judgments to be used as the data source, the Research Team originally intended to select cases which judgments were fully available, from the court of first instance to the level of cassation. However, in practice, the Research Team found it difficult to find cases that fit this criterion due to the incomplete Judgment data available in the Supreme Court Judicial Judgment Directory. Therefore, the Research Team chose to focus on judgments that have sufficient legal considerations to be analyzed. Moreover, not all judgments on defamation of individual, legal entity, and public authority/body, hate speech and crimes against state security were included in this research. This research is not intended to show certain statistical data and instead aims to emphasize on elaborating the variation of expression and Judges’ consideration in selected cases. Therefore, not
all judgments are described in this study and the research team only selected these judgments randomly to then be analyzed in this study. Judgments referred to in this research are not representative of all existing judgments, both in terms of quantity and quality of consideration.

To enrich the discussion, the Research Team also analyzed judgments of foreign courts that are relevant to the focus area of this research, such as courts of the United States, New Zealand, and Australia, as well as 35 judgments of regional human rights judiciaries in Europe, Africa, and America. Moreover, the Research Team also discusses 14 judgments of the UN Human Rights Committee and the Committee on the Elimination of Racial Discrimination (CERD) in disputes of the rights of freedom of expression at the international level. The discussions aim to understand the implementation of human rights principles related to the right to freedom of expression, especially in judgments of cases on defamation of individual, legal entity, and public authority/body, hate speech, and crimes against state security.

Use of Terms
In this study, **defamation is an umbrella term for various crimes regulated in the Criminal Code.** In the Criminal Code, the term “defamation” is the title of Chapter XVI (Sixteen) in which there are criminal acts of slander (Article 310 (1) of the Criminal Code), libel (Article 310 (2) of the Criminal Code), calumny (Article 311 of the Criminal Code), minor defamation (Article 315 of the Criminal Code), calumnious charge (Article 317 of the Criminal Code), calumnious insinuation (Article 318 of the Criminal Code), defamation of the dead (Article 320 of the Criminal Code), and spreading of defamation of the deceased (Article 321 of the Criminal Code).

Acts within the context of defamation are also regulated outside Chapter XVI in the Criminal Code. The terminology of “defamation” or “defaming” as an element of a criminal act can at least be found in Article 142 of the Criminal Code (defaming kings or heads of friendly countries), Article 144 of the Criminal Code (spreading defamation of kings or heads of friendly countries), Article 207 of the Criminal Code (defamation of authorities or public bodies), and Article 208 of the Criminal Code (spreading defamation against authorities or public bodies).

Therefore, this research will mention the name of the crime specifically when referring to certain criminal acts, for example slander, libel, calumny, and so on, which are contained in Chapter XVI of Defamation in the Criminal Code. In the event that the term “defamation” is mentioned, this generally refers to the entire chapter on Crime of Defamation and other acts of defamation in the Criminal Code.
1.4. Writing Framework

This research is organized into 6 chapters which are divided into:

a. Chapter I: Introduction. This chapter discusses the background of conducting the research on the condition of freedom of expression in Indonesia and the expected objectives of this research. In addition, this chapter will also explain the research methodology, the data sources used as references, and the scope of freedom of expression the analysis shall be focused on.

b. Chapter II: The Legal Framework for Freedom of Expression. This chapter outlines the concept of freedom of expression from the perspective of human rights as well as various regulations at the national level which serve as justification for limiting this right. The discussion in this chapter also covers international human rights law instruments on limiting freedom of expression, including expert opinions and judgments of regional human rights courts. These legal and human rights instruments will serve as an analytical framework in looking at various issues in the examined Indonesian judgments.

c. Chapter III: Freedom of Expression and Defamation. This chapter discusses the tension between defamation and the protection of the right to freedom of expression by analysing court judgments in defamation cases. The elaboration in this chapter will begin with the preview of relationship between protection of the right to freedom of expression and criminal defamation and outlining the defamation articles in Indonesian laws and regulations. This chapter also outlines the developmental trends of defamation cases and their relation to the protection of freedom of expression.

d. Chapter IV: Crimes of Hate Speech and Hostility in Online Sphere. This chapter discusses freedom of expression in its relation to crimes related to “hate speech” and “hostility” as provided in penal code and human rights law in Indonesia and at the international level. The beginning of this chapter will give the context of hate speech issues and its relation to freedom of expression, followed by analysis of a number of regulation and judgments related to crimes regarded as “hate speech”.

e. Chapter V: Political Expression and Crimes against State Security. This chapter discusses the exercise of political expression in Indonesia which often intersects with criminal provisions, namely crimes against state security, especially treason (makar). This chapter outlines an analysis of judges’ interpretation in judgments related to these crimes from the perspective of criminal law in Indonesia and human rights provisions that apply universally. In terms of criminal law, the analysis is carried out according to the history of the regulation of treason and
the concept of other articles related to the crime of treason, while the analysis in the context of human rights is carried out according to the implementation of political expression based on the provisions of the right to freedom of expression and the right to freedom of peaceful assembly.

f. Chapter VI: Conclusion and Recommendation. This chapter elaborates the conclusion based on various findings from the research as well as formulating recommendations that need to be considered by relevant parties in understanding, dealing with, or resolving cases related to freedom of expression, especially in cases of defamation of individual, legal entities, and authorities/public bodies, hate speech, and crimes against state security.
CHAPTER II

LEGAL FRAMEWORK OF FREEDOM OF EXPRESSION AND OPINION
This section describes the framework for regulating the right to freedom of opinion and expression in international human rights law and national law. In discussing the concept of freedom of opinion and expression, it is important to refer to international human rights law, not only because the laws are formulated jointly by the international community, but also because Indonesia is a member of the United Nations that is bound by the obligation to implement various international human rights treaties it has ratified, including the International Covenant on Civil and Political Rights (ICCPR).

2.1. International Human Rights Law

2.1.1. Regulatory Framework

The right to freedom of opinion and expression is recognized and guaranteed in various international and regional human rights instruments, as enshrined in various international treaties, which are legally binding hard law. It is also outlined in international human rights soft law, which provides regulatory framework, scope, and interpretation of freedom of opinion and expression, including the UN General Comments as documents on principles that complement the interpretation of rules on a right. In addition, the international and regional jurisprudence, such as the judgments of the European and Inter-American Human Rights Courts, also provides an overview of the developments in rights' interpretation, including the right to freedom of opinion and expression.

Freedom of opinion and expression is regulated in Article 19 of the Universal Declaration of Human Rights (UDHR), which states that:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

More detailed regulation can be found in Article 19 of the ICCPR:
1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless

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20 Law Number 12 Year 2005 on The Ratification of the International Covenant on Civil and Political Rights.
of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Freedom of opinion and expression is also contained in other articles in the ICCPR, namely Article 18 (freedom of religion and belief), Article 17 (right to privacy), Article 25 (right to participate in government and elections), and Article 27 (minority rights). This means that recognition and guarantee of the right to freedom of opinion and expression are also integral in the enjoyment of various other rights, for example those related to the right to freedom of association, including the right to form and join trade unions, and in exercising the right to vote.

Various other international human rights treaties also regulate freedom of opinion and expression. An example is Article 13 of the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (CMW) with a formulation similar to the ICCPR, but adding to the grounds for permissible restrictions to prevent war propaganda and any advocacy of hatred based on nationality, race, or religion in the form of incitement to discrimination, hostility or violence. Article 12 of the Convention of the Rights of Child (CRC) also states that the state must ensure that children who are able to form their own views can express these views freely, and these views are to be considered in accordance with age and maturity of the child. Both of these human rights instruments have been ratified by Indonesia.

Various regional human rights instruments also recognize and guarantee freedom of opinion and expression. In Europe, it is enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). In the Americas, this right is regulated in Article 4 of the American Declaration of the Rights and Duties of Man (1948) and Article 13 of the American Convention on Human Rights (1981), while in Africa it is stipulated in Article 9 of the African Charter on Human and Peoples’ Rights (1981). In Southeast Asia the provision on freedom of opinion and expression can be found in Article 23 of the ASEAN Human Rights Declaration. As an ASEAN member state, Indonesia recognizes and is a signatory to the Declaration.
2.1.2. Freedom of Opinion and Expression

2.1.2.1. State Responsibility

The right to freedom of opinion and expression is one of the pillars of democracy and a means to ensure the respect for other human rights.\textsuperscript{22} The UN Human Rights Committee (hereinafter the Human Rights Committee), which oversees the implementation of the ICCPR by state parties, in General Comment No. 34\textsuperscript{23} on Article 19 of the ICCPR states that these two freedoms are important in realizing the principles of transparency and accountability which are essential for the promotion and protection of human rights.

The Human Rights Committee further states that every branch of state power (executive, legislative and judicial) and other public or governmental authorities at all levels (national, regional and local) have the obligation to respect, protect and fulfill human rights for the rights guaranteed in the ICCPR. This State’s obligation includes protecting citizens from actions by non-state persons or parties that would interfere with the enjoyment of freedom of opinion and expression, as long as these rights can be applied in the relationship between the individuals or entities.\textsuperscript{24}

The State is obliged to respect and ensure that this right is applied without discrimination, to take steps to strengthen regulations that guarantee the right, and in the case of violations, must ensure effective remedy for victims, either through judicial, administrative, legislative or other necessary mechanisms.\textsuperscript{25} In their routine reporting to the Human Rights Committee, ICCPR’s state parties are required to also include relevant domestic regulations, administrative practices, court judgments and other sectoral practices relating to freedom of opinion and expression, as well as information on remedies available in the event of the right’s violation.\textsuperscript{26} This means that judicial institutions and their judgments are part of the providers of remedy, an essential part of the freedom’s implementation by the state. In addition, both are aspects highlighted by the Human Rights Committee in assessing the state’s performance in fulfilling the right to freedom of expression and opinion.

\textsuperscript{22} UN Human Rights Committee, General Comment No. 34 ICCPR, “Article 19: Freedom of Opinion and Expression”, CCPR/C/GC/34 (12 September 2011), para 1.
\textsuperscript{23} Ibid.
\textsuperscript{24} Ibid, para 8.
\textsuperscript{25} UN General Assembly ... ICCPR..., Op. Cit., Article 2.
\textsuperscript{26} UN Human Rights Committee, General Comment No. 34 ICCPR..., Loc. Cit.
2.1.2.2. Scope of Freedom of Opinion and Expression

1) Freedom of Opinion

The right to freedom of opinion and expression, as stipulated in Article 19 of the ICCPR is a right that can be limited for legitimate reasons. However, Article 4 of the ICCPR and the opinion of the Human Rights Committee states that there is an element in Article 19 that cannot be derogated, namely freedom of opinion. In other words, this freedom cannot be reduced, excluded or limited under any circumstances, including when the state is in a state of emergency.27

Freedom of opinion itself includes the right to have or not to have as well as change opinions at any time and for whatever reason. Thus no one should be deprived of this freedom because of their actual, perceived or supposed opinion. All forms of opinion are protected, including political, scientific, historical, moral or religious opinion. Any form of coercion to hold or not to hold an opinion is prohibited. The criminalization of certain opinions, as well as the intimidation, harassment or stigmatization of a person for their opinion, including their arrest, detention, trial or imprisonment, constitute violations of the right to freedom of expression.28

2) Freedom of expression

Freedom of expression covers a variety of expressions that include personal views and expressions (which also covers discourses) on various mediums and topics, such as political, artistic, symbolic and religious expressions. The latter encompasses, among others, religious teaching and sermons or discussions on religion and belief. In some contexts, it is possible that commercial advertising is also included in the scope of freedom of expression.29

Freedom of expression is also related to the right to participate in public affairs and the right to participate in elections, so it is important to ensure free communication of information and ideas on political issues between citizens, elected candidates, and elected representatives. It also concerns a free press and media that can comment on public issues and provide information to the public without censure or restrictions.

3) Right to information

Freedom of expression also includes the right to information,30 including access to

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27 Ibid., para. 5.
28 Ibid., para. 9-10.
29 Ibid., para. 11.
30 UN General Assembly ... ICCPR..., Op. Cit., Article 19 paragraph (2).
information held by public institutions\textsuperscript{31} regardless of form. This also includes where the information is stored, its source, and when the information was produced. This right also guarantees the right for the media to access information on public issues as well as the right of the general public to receive information from the media. Bans against or suppression of the press and practices of censorship are prohibited, and guarantees of press freedom include guarantees of journalists’ rights, journalistic work to gain access to information, editorial freedom, and freedom to set up publishing and broadcasting businesses.

The right to information also means that everyone has the right to obtain information in a comprehensible form. They also have the right to know if, when, and which of their information is automatically stored in data files and their uses. Everyone must be able to obtain information about their personal data that is held or controlled by public or private authorities. In the event that a data file contains inaccurate and irrelevant personal data or is obtained or processed in violation of the law, everyone must have the right to correct their data.

The right to information covers various domains, including in the judicial process. With regard to the justice system, the right to information includes the right of a person accused of a crime to immediately know the facts, allegations, and laws imposed against them, to obtain all evidence to be used in court, as well as other rights based on fair trial principles. The public also has the right to obtain information on the time and place of the trial.\textsuperscript{32}

To effectively fulfill the right to information, the State must provide information, including government information, which is related to the public interest and it must be easily, quickly, effectively, and practically accessible. This requires regulations on procedures for obtaining public information and its application. In the event that there is a cost to obtain information, it must be within a limit that does not limit access to information. Authorized bodies must also provide reasons when requests for information are denied as well as an appeal mechanism for non-response or denial of access.

\textbf{4) Online expression}

Along with the development of information technology and the use of the internet as a communication medium, standards and norms for regulation on the protection of freedom of expression in the online domain have continuously been developed. The UN Special Rapporteur for the Advancement and Protection of the Right to Freedom of Opinion and Expression David Kaye in his 2015 report specifically

\textsuperscript{31} Public institutions are all branches of government including semi-state bodies and other entities that carry out government functions.

\textsuperscript{32} UN Human Rights Committee, \textit{General Comment No. 34 ICCPR...}, \textit{Loc. Cit.}, para. 18, 31, 28, 31, 33.
mentioned that the internet has a very important value for freedom of expression because the internet can disseminate opinions and multiply information within the reach of everyone who has access to it.\textsuperscript{33}

This development, among others, is related to internet access as part of access to information. This is underlined by the Human Rights Council resolutions which outline the importance of the promotion, protection and enjoyment of human rights over the internet. A number of countries have stipulated that the right to access the internet, as part of the right to information, is a human right so that the state bears an obligation to fulfill it.

In addition, the standard norm of protection for online expression is that everyone is entitled to the same protection to freedom of expression both offline and online. The UN General Assembly,\textsuperscript{34} the UN Human Rights Council\textsuperscript{35}, and the UN Special Rapporteur on Freedom of Expression have repeatedly emphasized that guarantees for the protection of rights used in offline mediums are also applicable online, including the exercise of the right to freedom of expression. It can be concluded that the protection of the right to freedom of expression online is at least as important as the protection of freedom of expression offline, due to the function of the internet, which empowers everyone to express opinions and obtain or disseminate information.

\textbf{2.1.2.3. Restricting freedom of expression}

Article 19 (3) of the ICCPR regulates the requirement and grounds for permissible limitations and restrictions of freedom of expression. The restrictions must be prescribed by law with reasons for restrictions to either: (i) respect the rights or reputation of others or (ii) protect national security, public order, health or public morals. Such restrictions can only be done if it can pass the test of necessity and proportionality. Moreover, the restriction must correspond to the intended purposes and should be directly related to the specific needs that require for the limitations to be put in place.\textsuperscript{36}

In implementing restrictions, the State must do so in a way or by employing


\textsuperscript{36} \textit{Ibid.}, para 22.
mechanisms that do not jeopardize the right. Restrictions must remain in line with Article 5 paragraph (1) of the ICCPR. There is no single regulation in the ICCPR that can be interpreted as justification for the State, group or individual to take actions that aim to violate rights and freedoms or impose restrictions beyond what is regulated.

Testing the legality of a limitation on freedom of expression can be carried out using the three-part test, a framework used by various human rights institutions, including the United Nations Human Rights Committee and the European Court of Human Rights. The three-part test is useful for studying whether the restrictions are in accordance with the ICCPR and whether the applicable national laws for restricting freedom of expression are legitimate or justifiable under international human rights provisions.

The three-part test requires that all three steps must be met cumulatively for the applied limitation to be valid:

i. Restrictions are provided by law, which refers to the “formality”, “condition”, “rule” or “penalty”, as governed by law;

ii. Restrictions are purported to protect one or more the following values or interest: national security, public order, public morals or health, the rights or reputation of others;

iii. Restrictions are urgent or exigent in a democratic society. The phrase “in a democratic society” is a burden on the state to show that the restrictions imposed do not interfere with the running of democracy. The Siracusa principle states that there is no single model of democracy, so that every society that recognizes, respects and protects human rights as stipulated in the UN Charter and the UDHR can be categorized as fulfilling the definition of a democratic society.

The burden of proving whether the three stages are fulfilled or not lies with the State. In the practice of the European Court of Human Rights, the court examines the three requirements in the order above and if the State fails to fulfill any of the

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39 In Faurisson v. France, The UN Human Rights Committee elaborates the three steps sequentially. See Faurisson v. France, para 9.5 – 9.7.
40 The framework is applicable for other derogable rights, including right to privacy and family life, freedom of thought, conscience and religion, freedom of association and to join a union.
41 In practices based on the European Human Rights Convention, there is an additional interest or value that can serve as the ground for restriction, namely to prevent the revelation of confidential information and to safeguard the authority and impartiality of the court
three requirements, the Court will decide that the restriction being tested is invalid and automatically declare that freedom of expression has been violated.

Elaboration of the *Three-Part Test* is as follow:

**1) Provided by law**
Restrictions must be provided by law, namely provisions stipulated in generally applicable national law, in accordance with ICCPR and are in effect when restrictions are implemented. Restrictions on freedom of expression constitute a serious curtailment of human rights, so they become violations when the restrictions are based solely on customary laws derived from among others tradition, religion or practice.\(^{43}\)

Laws related to restrictions must be formulated on a clear basis, not arbitrarily and discriminatively, and be accessible to all.\(^{44}\) Limitation provisions must be prepared with sufficient precision so that people can regulate their actions accordingly, not give unlimited discretion to the authorities authorized in carrying them out, provide sufficient instructions so that the implementer can understand the form of expression that is legitimate or can be appropriately restricted, and must not contain sanctions that violate ICCPR, such as corporal punishment.\(^{45}\)

**2) Purposes of limitation**

a. **Respecting the rights or reputation of others**
Limitation can be applied to respect the rights or reputation of others. The word “rights” refers to all rights protected under international human rights law. Meanwhile, the meaning of “other people” is an individual or individual member of a community, for example from a religious or ethnic community.

Limitation to respect reputation should not be used to protect the State and its officials from public opinion and criticism. When there is a conflict between rights, consideration must be made by prioritizing non-derogable rights.\(^{46}\) In the event of an expression that is deemed insulting a certain public figure or official, this is not sufficient to justify the imposition of punishment, although it does not mean that public figures are not protected at all. All public figures / officials, including those holding the highest power such as the head of state or head of government, are legitimate objects of criticism.

Laws on insulting the holders of power (*lese majeste*) or *desacato* (disrespect), for

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example insulting heads of state, officials, flags, and coat of arms as well as provisions to protect the honor of public officials should not contain heavier penalties just because the identity of the aggrieved person. Criticism of public institutions, such as the armed forces or the executive, should also not be prohibited.\(^\text{47}\)

Laws and regulations on defamation must be carefully drafted to ensure that the limitations they contain are legitimate and do not undermine freedom of expression. All related regulations, especially criminal provisions, must include truth as a defense and may not be applied to forms of expression which cannot be verified. Inaccurate comments or expressions regarding a public figure, when made inadvertently and without ill will, should be considered to not be penalized or deemed to be illegal.\(^\text{48}\)

The public interest on which criticism is based must be regarded as a legitimate defense of an expression. States must take care not to impose excessive penalties and sanctions and set reasonable limits for defendants to compensate for damages. The Human Rights Committee has called upon the State to consider the decriminalization of defamation offences, and to apply criminal law only for the most serious cases. Imprisonment is not an appropriate punishment for defamation. Indicting someone of defamation and then not promptly bringing the case to trial is not permitted as this practice has a chilling effect that can limit the freedom of expression of both defendants and others.\(^\text{49}\) The prohibition on expressions that do not respect certain religions or beliefs, including the blasphemy regulations, is inconsistent with the ICCPR. However, there are exceptions, namely if the form of expression includes hate speech or incitement to discriminate. The state is not allowed to have regulations that discriminate against or affirm a religion or belief or its followers, or people who believe in God and are atheists, and are not allowed to enact regulations that prevent or punish criticism of religious leaders or opinions regarding religious doctrine and principles of belief.\(^\text{50}\)

The Human Rights Committee has examined and decided various cases related to criticism of public officials. In the case of *Njaru v. Cameroon*, a journalist and activist Philip Afuson Njaru suffered repeated intimidation, arrest and arbitrary detention and torture by the police because of his writings. The Human Rights Committee found the fact that the news written by Njaru about alleged police corruption was a protected form of expression. The UN Human Rights Committee also stated that there is no justification whatsoever to commit torture and arbitrary arrest and

\(^47\text{ UN Human Rights Committee, General Comment No. 34 ICCPR..., Op. Cit., para 38.}\)

\(^48\text{ Ibid., para 47.}\)

\(^49\text{ Ibid., para 47.}\)

\(^50\text{ Ibid., para. 48.}\)

\(^51\text{ Ibid.}\)

threaten a person's life because of their expression.

Another example is the case of *Kerrouche v. Algeria*. Kouider Kerrouche is an Algerian civil servant who was fired for exposing a corruption case by the director of the state-owned company where he worked. When the reported cases were not processed by law enforcement, Kerrouche reported to the President. His report letter later became the object of criminal charges under Article 144 of the Algerian Criminal Law which prohibits the defamation of public officials. Kerrouche was jailed for 18 months and fined 50,000 Algerian Dollars. The UN Human Rights Committee, after examining and considering this complaint, decided that Algeria's Criminal Law should be reviewed and amended because Article 144 of the Law is in violation of Article 19 of the ICCPR.\(^{52}\)

b) Public Order

Public order reasons are allowed to limit freedom of expression. The Siracusa principle defines public order as a number of regulations that ensure the functioning of society or a set of basic principles that underlie the establishment of a society. Respect for human rights is part of public order.\(^{53}\) In interpreting public order, it must be done in the context of the purpose of a right which is being limited on this basis. The body or state official responsible for maintaining public order must be able to be supervised by the exercise of power by the parliament, court or other competent independent body.\(^{54}\)

One can examine reasons for public order for example in criminal proceedings for contempt of court. In order for the limitation to be in accordance with the ICCPR, the judicial process and the sentence imposed must be proven to be guaranteed in the exercise of the court's power to maintain an orderly process. Such judicial processes cannot be used to limit the exercise of the right to self-defense.\(^{55}\) In the case of *Dissanayake v. Sri Lanka*, Dissanayake as a member of parliament stated publicly that he would not accept the Sri Lankan Supreme Court's "embarrassing judgment" in its advisory opinion which was drafted to address the issue of the exercise of defense power between the President and the Minister of Defense.\(^{56}\) Dissanayake was later sentenced to two years in prison on the charges of contempt of court. The Sri Lankan government in this case argued that the conviction of

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\(^{54}\) Ibid., paras. 23-24.


Dissanayake was necessary to maintain the court’s honor and reputation, and to maintain public order and morals. The UN Human Rights Committee does not agree with the Government’s argument and considers that considering that Dissanayake’s statement was not carried out before a court, his imprisonment is a form of arbitrary detention, and this is also an illegal limitation of freedom of expression because the form of punishment is not proportional to the legitimate goal to be achieved.\(^{57}\)

c) National Security

National security reasons can be used to justify measures to limit rights, if done to protect the existence of a nation, territorial integrity or political independence from armed forces or threats. National security can only be used as an excuse for rights restriction when safety nets are in place and effective remedies in the event of arbitrariness are available. Systematic violation of human rights can be considered as a condition endangering national security as well as international security and peace. States that are responsible for systematic human rights violations must not use national security grounds as justification for efforts aimed at suppressing opposition to or criticism against these violations, or to carry out repressive practices against the country’s population.\(^{58}\)

National security cannot be used as a reason for restriction when what is done is to prevent local or relatively isolated threats to order. Therefore, strict or extreme caution should be taken by States to ensure that treason laws and similar regulations relating to national security, such as official secrets or subversion laws are drafted and implemented according to the strict requirements of the restrictions under the ICCPR. Violations of Article 19 paragraph 3 of the ICCPR will occur when laws related to state security are used to suppress or withhold information related to public interests that do not endanger national security, or to prosecute journalists, researchers, environmental activists, human rights defenders, or other people who share such information.

d) Public Morals

The concept of morality originates from many social, philosophical, and religious traditions. Public morals vary over time and from one culture to another. Thus, restrictions to protect morals must be based on principles that do not come from just one tradition.\(^{59}\) On the one hand, a state that imposes restrictions on rights based on public morals has a margin of discretion, but on the other hand, it must show that the restrictions imposed are very important to maintain respect for the basic values of society. The discretionary margin left to the State must still maintain

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57 Ibid., para 8.4.
59 General Comment 34, para 32.
the principle of non-discrimination.  

**e) Public safety/health**

The UN Human Rights Committee’s General Comments do not provide a definition or explanation on public health. However, the Siracusa Principles, which use the term public safety, explains that public health means protection from harm to people’s safety, their lives or their physical integrity or serious damage to their property. The need to protect public safety can justify restrictions provided by law. The Siracusa Principles also stipulate that the International Health Regulations of the World Health Organization (WHO) must be observed.

**3) Necessity and Proportionality**

Restrictions should be exercised when absolutely necessary for legitimate purposes. It is the obligation of the State, when proposing a valid basis for limiting, for example to show the specificity of the situation of the threat, as well as the urgency and proportionality of the measures taken, in particular by showing the direct and indirect relationship between the expression that is considered threatening and the threat.

Johannesburg Principles determine that in order for a restriction on freedom of expression or information can be declared urgent to protect the legitimate interests of national security, the government must demonstrate that:

a. The restricted form of expression or information contains or is a serious threat to the national security interests;

b. The imposed restriction is the minimum possible measure to fulfill said interest; and

c. Restrictions are carried out in accordance with democratic principles.

The UN Human Rights Committee’s jurisprudence deems that in order to show that there is urgency, the State must exhibit the relationship between the expression and the real threat it poses. In the case of *Shin v. Republic of Korea*, South Korean painter Hak-Chul Shin made a painting comparing the conditions of South and North Korea and he was arrested, and his art was confiscated under the National Security Act because it was deemed to express conditions favorable to the enemy. Shin was found guilty by the court after proceeding to appeal and going through retrial as mandated by the South Korean Supreme Court. The UN Human Rights Committee, *Shin v. Republic of Korea*, Communication No. 926/2000, CCPR/C/80/D/926/2000.

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Committee found the painting to be a protected form of artistic expression and in this case, there is no urgency to restrict it. The South Korean government failed to address the specific nature of the threat to national security that necessitates the confiscation of Shin’s art and his criminalization.

4) Online Restrictions
The international community has expressed concern over actions to block internet blocking (internet shutdown or network shutdown, blocking and filtering) being carried out in various countries because these actions violate the right to information. The UN Human Rights Council in Resolution 1 July 2016 strongly condemned any actions that intentionally obstruct or interfere with access or dissemination of information via the internet that are inconsistent with international human rights law.65

Blocking communication networks (known as “kill switches” method) is one of the actions that cannot be justified under international human rights law. 66 UN Special Rapporteur David Kaye in his 2017 report stated that internet blocking undertaken by various governments in general have been disproportionate and failed to meet the standards of necessity, in the sense that such action was not in line with the objectives to be achieved.67

Restrictions on web pages, blogs, or other internet-based or electronic information dissemination systems, including systems that support electronic communication such as internet service providers or search engines, are only permitted if implemented by law, meet the element of urgency and proportionality, to protect the rights or reputations of others, national security, public order, morals or public health. The permissible restrictions must be specific. General restrictions on certain sites or systems are in conflict with ICCPR’s restriction requirements.

2.1.2.4. Effective Remedy Mechanism
The UN Human Rights Committee requires that states must prepare effective measures to protect their citizens from attacks aimed at silencing those who exercise their right to freedom of expression.68 The reasons for limitation cannot be applied to suppress efforts to promote democratic principles and human


rights. Attacks against someone who exercises the right to freedom of opinion or expression can take the form of arbitrary arrest, torture, threats to life, murder. Journalists are also often the object of threats, intimidation and attacks because of their activities. Likewise, the people who collect and analyze information on human rights situations and publish human rights related reports, including judges and lawyers. Any form of attack must be thoroughly investigated without delay, the perpetrators brought to justice, and the victim or their family receiving appropriate remedy. 

In the Siracusa Principle, it is repeatedly stated that the application of restrictions must be accompanied by the availability of an effective safety net and remedies. 

2.1.2.5. Expressions That Are Not Protected

ICCPR guarantees the protection of the freedom of opinion and all forms of expression, and if the State restricts them, they must meet stringent requirements as previously explained. However, there are forms of expression that are not protected; the State is even under the obligation to prohibit them in their respective jurisdictions. This is stated in Article 20 of the ICCPR:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The distinction between the allowable restrictions on freedom of expression from war propaganda and hate speech is that these two acts demand a specific response from the State, namely by prohibiting them by law. Especially for the element of “prohibited by law,” Article 20 ICCPR becomes the lex specialis from Article 19 ICCPR on the right to freedom of opinion and expression.

1) Propaganda for War

Propaganda is intentional influencing measures through various communication channels to spread, in particular, false or exaggerated accusations, including negative or simplistic judgments of something with an intensity similar to provocation, suggestion, incitement. Any medium that can reach large numbers of people can be used for propaganda. Propaganda only includes deliberate actions, thus “acts of propaganda” will be proven when the intention creates or generates the desire to fight, even though there is no concrete goal or threat of war. War propaganda in this context also does not require that the war actually takes place. Thus, not all expressions of an opinion can be categorized as propaganda.

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69 Ibid., para. 22.
The UN Human Rights Committee stressed that this prohibition was only related to "forms of propaganda that threaten or lead to acts of aggression or violate peace that are contrary to the UN Charter". Accordingly, this prohibition does not affect or cover the individual or collective right to self-defense as guaranteed in Article 51 of the UN Charter or other measures consistent with Chapter VII of the Charter or the right of all persons to self-determination or independence. Civil war is not included in the scope of Article 20 of the ICCPR, as long as it does not fall into the category of an international conflict. The definition of war also does not depend on the existence of a declaration of war based on international law, but above all is the actual use of military force against other countries.

The prohibition on war propaganda does not allow for preventive censorship. The state is allowed to regulate this prohibition in criminal and/or civil law and general prohibitions as long as it is in accordance with the principles of restriction as stipulated in Article 19 paragraph (3) of the ICCPR.

2) Hate advocacy
States must prohibit all acts that promote hatred on the basis of nationality, race or religion which constitute incitement to discrimination, hostility or violence. This means incitement is only prohibited when the basis is nationality, race, or religion.

In order to discern the meaning of the various related terms, one can refer to the *Rabat Plan of Action*, which for example defines "hatred" and "hostility" as references to intense emotions and sharp irrational criticism, hostility, and hatred against the target group. The document also determines that the term "incitement" in Article 20 paragraph (2) ICCPR must be understood as requiring the intention to openly promote hatred to the target group. The term "incitement" refers to statements about a national, racial or religious group that creates a risk of discrimination, violence or hostility towards members of that group. Meanwhile, “religion” in the Rabat Plan of Action is described as including both religions and beliefs, as ICCPR protects the right to freedom of both.

Rabat Plan of Action also provides six factors for considering the seriousness of incitement in order to determine whether it is justified to impose a criminal penalty: a. Social and political context at the time the speech was made and disseminated;

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72 Chapter VII of the UN Charter provides for Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression. This chapter authorizes the UN Security Council to assess whether a state action falls into these categories and recommends steps that should be taken to defend international peace and security.

b. The speaker's status, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed;
c. Intent, which means negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for advocacy and incitement rather than the mere distribution or circulation of material;
d. The content and form of the speech, in particular the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;
e. The extent of the speech act, such as the magnitude and size of its audience, including whether it is a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement;
f. The likelihood, including imminence, which means that some degree of risk of harm must be identified, including through a determination (by the court, as suggested in the Plan of Action) of whether there was a reasonable probability that the speech would succeed in inciting actual action against the target group.

With regard to the prohibition of hate speech, the State must enact rules that establish the appropriate sanctions that apply equally to individuals and State entities. In the case of *Ross v. Canada,* Ross Malcom was an adjunct teacher at the school district of New Brunswick, Canada, who wrote several books on abortion, the Jewish-Christian conflict, and his defense of Christianity and had presented his views in interviews. Ross was warned by the School Board not to make any public statements anymore but he ignored them. Ross was later reported and consequently was transferred to a non-teaching position. Ross sued the school in a Canadian court and was not satisfied with the judgement of the Supreme Court of Canada. He then filed a complaint (communication) to the Human Rights Committee.

The Human Rights Committee agreed with the School Board's view, as had been affirmed by the Canadian Supreme Court, that Ross's expression is discriminatory against the people of Jewish descent and faith, vilifies Judaism faith and beliefs, and invites Christians to not only question the truth of Judaism faith and teachings but also considers them to endanger freedom, democracy, and Christian beliefs and values. The UN Human Rights Committee viewed that the restriction in the form of sanctions and position transfer is necessary to protect the rights and reputation of others, namely Jewish descent and Judaism adherents, including the right to receive instruction in public schools that is free from bias, prejudice and intolerance. The school's actions, supported by the State through court judgments, are also in line

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with the principles stipulated in Article 20 paragraph (2) of the ICCPR which requires the State to prohibit advocacy of hatred on the basis of religion, nationality or race which constitute incitement to discrimination, hostility or violence.

The important issue in the prohibition of hate speech is that it concerns people carrying out advocacy which contains incitement to engage in discrimination, hostility or violence. People who advocate minority or even offensive interpretation against religious teachings or historical events or someone who spreads instances of hatred and incitement to report or raise awareness about the matter should not be silenced under Article 20 of the ICCPR. The state must protect the person even when the state disagrees or is offended by what they say.\(^7\)

**2.2. Freedom of Expression in the National Law**

**2.2.1. Regulatory Framework**

**2.2.1.1. The Scope of the Right to Freedom of Opinion and Expression**

The practice of democracy and protection of human rights in Indonesia’s history after its independence in 1945 has continued to ebb and flow. During the Old Order era, the advancement of human rights was slow, marked by the freedom to form political parties, but on the other hand there were many press bans. During the New Order era (1966-1998), human rights experienced a dark period with the centralization of power in the executive, curtailment of freedom of opinion and expression, restrictions on the press, strict censorship policies and various forms of human rights violations, although in this era there were still a number of human rights policies issued and international human rights instruments ratified.\(^7\) The establishment of the National Commission on Human Rights (Komisi Nasional Hak Asasi Manusia- Komnas HAM) also occurred during the New Order era in 1993. During the post 1998 Reformasi period, significant attention to human rights re-emerged as part of reform agendas, including the agenda for protecting human rights and press freedom.

At the beginning of the Reformasi era, various policies and including in the form of laws related to human rights were issued, for example the People’s Consultative Assembly (MPR) Decree Number XVII/MPR/1998 on Human Rights which recognizes human rights values as expressed in various international human rights instruments (including freedom of opinion and expression), the ratification of a

\(^7\) UN General Assembly, *The promotion and protection of the right to freedom of opinion and expression*, A/74/486 (9 Oktober 2019), para. 10.

\(^7\) For example, the ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1984 and the Convention on the Rights of the Child (CRC) in 1990.
number of international human rights, the promulgation of Law no. 39 of 1999 on Human Rights (hereinafter the Human Rights Law) which recognizes various rights and provides a stronger legal basis for Komnas HAM, as well as the enactment of Law no. 40 of 1999 on the Press (Press Law), which recognizes that freedom of the press is a form of people’s sovereignty and a very important element for creating a democratic life of society, nation and state.

In 2000, there was an amendment to the 1945 Constitution which strengthened human rights norms as constitutional rights by adopting human rights norms from international human rights instruments. The newly added articles recognized and guaranteed human rights, including the right to freedom of opinion and expression, as stipulated in:

- Article 28E paragraph (3): “Everyone has the right to freedom of association, assembly and expression of opinion”
- Article 28F paragraph (3): “Everyone has the right to communicate and obtain information for their personal and social environment development, and the right to seek, obtain, own, store, process, and convey information using all available channels.

The recognition and guarantee of the right to freedom of expression in the Constitution strengthened the rights which had previously been outlined in various provisions in Law no. 39 of 1999:

- Article 14 (in the Chapter on Right to Self-Development): “(1) Everyone has the right to communicate and obtain information necessary to develop their personal and social environment; (2) Everyone has the right to seek, obtain, own, store, process and convey information by using all available means. “
- Article 23 (in the Chapter on the Right to Personal Freedom): “Everyone is free to have, issue, and disseminate opinions according to their conscience, verbally and or in writing through print or electronic media with due regard for religious values, decency, order, public interest, and the integrity of the country.

Apart from these two instruments, in 2005 Indonesia has also ratified the ICCPR through Law no. 12 of 2005 on the Ratification of the Covenant on Civil and Political Rights. This means that Indonesia as a State Party has accepted and recognized the rights guaranteed in the ICCPR, including freedom of opinion and expression.

The provisions in the 1945 Constitution, the Human Rights Law and various other legal instruments, including the Press Law and the Law on the Ratification of the ICCPR have generally recognized and guaranteed freedom of opinion and

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77 The international human rights instruments ratified at the beginning of the reform period include the International Convention Against Torture in 1998 dan The International Convention on The Elimination of All Forms of Racial Discrimination, both ratified in 1999.
expression as regulated in international human rights instruments. The construction and paradigm of these regulations are also similar to the recognition of the two dimensions of freedom of expression that have been repeatedly mentioned in the judgments the Inter-American Court of Human Rights, namely: 1) the individual dimension, that is the individual’s right to convey their thoughts or information, and 2) the social dimension, which refers to the right of the community to obtain or know other people’s ideas or information in order for the community to obtain sufficient knowledge.\textsuperscript{78}

In essence, freedom of opinion and expression is recognized as part of human rights, which includes: (i) the right of everyone to have an opinion; (ii) the right to have and express opinions and to seek, obtain, store and disseminate information by using all available means for personal and social environment development. If linked to the Press Law, the guarantee of freedom of expression includes freedom of the press as a means of ensuring the delivery of information, thoughts and opinions. The ratification of the ICCPR then complements and ensures that the scope of the right to freedom of opinion and expression in Indonesia must be in line with international human rights law.

2.2.1.2. Limitation of Freedom of Expression

In line with international human rights instruments, freedom of expression in Indonesian legal construct is also a right that can be limited on the basis of permissible restrictions. These restrictions on freedom of expression often refer to the provisions of Article 28J paragraph (2) of the 1945 Constitution, which states:

“In exercising their rights and freedoms, everyone is obliged to submit to the restrictions established by law with the sole purpose of guaranteeing the recognition and respect to the rights and freedoms of others and to fulfill just demands in accordance with moral, religious values, security and public order considerations in a democratic society.”

For the record, the restrictions stipulated in the 1945 Constitution are slightly different from the ICCPR in terms of the structure of writing and the grounds for restrictions. The restrictions referred to in the 1945 Constitution are not specifically aimed at limiting certain rights, for example only applicable for freedom of expression. The restriction provisions are written in a separate article from those regulating the substance of the rights, thus the limitation norms in Article 28J paragraph (2) are often interpreted to be applicable to restrict all of the constitutional rights. This is different from the ICCPR, which in its structure places provisions on restrictions in

the same article with the specific rights they are applicable to, for example Article 19 defines freedom of expression and regulates the right’s permissible restrictions within the same article.

The restriction norms have several issues: firstly, the limitation provisions in the 1945 Constitution does not distinguish between the norm of derogation and limitation as in the international human rights instruments; second, the 1945 Constitution introduces the basis for restrictions that are not regulated in various international human rights instruments, namely “religious values”. In comparison, the grounds for limitation in the ICCPR can only be carried out by law and for legitimate purposes, namely to respect the rights and reputation of others or to protect national security, public order, public health, or morals.

Other provisions on the grounds for restricting rights can be found in Articles 70 and 73 of the Human Rights Law, and the basis for these restrictions are more in line with the provisions in international human rights instruments. Article 70 of the Human Rights Law stipulates:

“In exercising their rights and freedoms, every person is obliged to comply with the restrictions established by law with the aim of guaranteeing the recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with moral, security, and public order considerations in a democratic society. “

Article 73 of the Human Rights Law further states that:

“The rights and freedoms regulated in this law can only be limited by and based on law, solely to guarantee the recognition and respect for human rights and the basic freedoms of others, decency, public order, and the interests of the nation. “

There are two grounds for restricting rights in Article 73 of the Human Rights Law which are phrased differently from the ICCPR, namely, “decency” or kesusilaan and “the interests of the nation.” The two bases are similar to the bases for restrictions in the ICCPR, namely “public morals” and “national interests”. There is no further explanation regarding “decency”, but on “the interests of the nation” the elucidation explains that it is “for the integrity of the nation and not the interests of the authorities.” There is no explanation regarding the scope of the element of “decency.”

Various problems regarding these grounds for rights’ limitation have consequences in the form of potential inconsistencies and uncertainties for policy makers in determining the objectives of limiting legal rights. For example, when they are
drafting legal instruments, it would be difficult for them to determine what are the acceptable bases for limiting the right to freedom of expression and within what boundaries these objectives can be interpreted. As a result, the legal instruments produced to become the basis for legally limiting expression also tend to use general terminologies that are not descriptive and tend to lead to multiple interpretations. This in turn opens the space for the state, including the government and law enforcement officials, to make different interpretations for each person suspected of violating the relevant legal provisions.

Since international human rights law is the basis for the adoption of human rights norms in national law, the grounds and interpretations of rights restrictions should be in line with the norms and standards in international law. In addition, Indonesia has ratified the ICCPR, which bears the consequence that national laws must be formulated in accordance with the international human rights instrument.

2.2.2. Criminal Provisions on Freedom of Opinion and Expression

Provisions in criminal law, on the one hand, protect recognized and guaranteed rights and on the other hand limit certain rights. However, the position of criminal law in human rights is complementary and harmonious, because there are various principles and values that are the same between the two, for example proportionality, necessity, truth and fairness.79

The recognition and guarantee of freedom of expression, as regulated in international human rights instruments and national law, have special obligations and responsibilities and can be restricted on the basis of permissible limitations. These restrictions are carried out in various forms, including through criminal law provisions. Indonesian law regulates various criminal provisions that are related to and intersect with the right to freedom of expression, for example the provisions on defamation, and so on.

After the 1998 Reformasi, in line with the strengthening of national human rights law, various criminal provisions were then adjusted to human rights principles. Currently, a number of defamation provisions in the Criminal Code have been abolished based on the judgment of the Constitutional Court, including Article 134, Article 136 bis, and Article 137 of the Criminal Code, all of which regulate offences against the President and Vice President,80 as well as Articles 154 and 155 of the Criminal Code which criminalize the expression of hostility, hatred, or contempt to the Indonesian Government.81 The Constitutional Court provides various arguments

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as the basis for the judgment, namely to ensure the protection of human rights, the application of democratic principles, and the principles of the rule of law, as well as to guarantee the protection of freedom of opinion and expression.

A number of important arguments from the Constitutional Court regarding the abolition of these articles are:

- The enforceability of Article 134, Article 136 bis, and Article 137 of the Criminal Code is prone to causing legal uncertainty because it depends on subjective interpretation whether a protest, expression of opinion or thought constitutes a criticism or defamation to the President and / or the Vice President.
- Indonesia is a constitutional state that is democratic and upholds human rights, therefore it is no longer relevant to have legal provisions that negate the principle of equality of law which are present in Article 134, Article 136 bis, and Article 137 of the Criminal Code.
- The qualification of the offense in Article 154 and Article 155 of the Criminal Code is a formal offense, thus it is sufficient to only require the fulfillment of the elements of the prohibited act, without the need to prove the consequence of the act. This formula is susceptible to abuse of power because it can easily be interpreted by the authorities according to their preferences, especially against citizens who intend to express criticism or opinions against the government.

In the current context, in line with the development of information technology and the use of the internet by the public, cases related to online expression continue to occur in various forms. The enactment of the ITE Law in 2008 gave rise to various criminal provisions against acts committed with electronic means, including those related to the prohibition of defamation, decency, and the dissemination of information that cause hostility or hatred.

The regulation of interpersonal relations on the internet in the ITE Law from the beginning was not based on the recognition and guarantee of the right to freedom of opinion and expression as a constitutional right. The application of the ITE Law has created a chilling effect on victims who are charged with articles related to expressions in the ITE Law.\(^{82}\) A number of articles in the ITE Law were submitted to the Constitutional Court several times and faced various problems in their implementation. These led to the Law’s amendment in 2016. The amendment has an important note, namely that the application of the ITE Law, especially the articles regulating the limitation of rights, must be carried out in accordance with the terms of permissible limitations and is solely intended to guarantee the recognition and respect for protected rights.\(^{83}\)

\(^{82}\) Tobias Basuki et al., *op.cit.*, p. 29-31.

\(^{83}\) Except for limitations based on religious values, which in itself are not in line with the grounds for restriction under international human rights law.
Here are the various criminal provisions in the Indonesian legislation pertaining to freedom of opinion and expression, which regulates a wide range of expression in the offline or online domain:

**Criminal Provisions Related to Freedom of Expression**

<table>
<thead>
<tr>
<th>Regulated Spectrum</th>
<th>Law</th>
<th>Provisions</th>
<th>Characteristics</th>
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<tbody>
<tr>
<td>Offline</td>
<td>Criminal Code (<em>Kitab Undang-Undang Hukum Pidana-KUHP</em>)</td>
<td>Article 142, 142a, 143, 144, 154a, 156, 156a, 157, 177, 207, 310, 311, 315, 316, 317, 318, 320, 321</td>
<td>Restriction</td>
</tr>
<tr>
<td></td>
<td>Law no. 24 of 2009 on the National Flag, Language and Coat of Arms as well as the National Anthem (Flag Law)</td>
<td>Articles 66, 67, 68, 69</td>
<td>Restrictions</td>
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<tr>
<td></td>
<td>Law No. 7 of 2017 on General Elections (Election Law)</td>
<td>Article 280 paragraph (1)</td>
<td>Restrictions</td>
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<td></td>
<td>Law No. 40 of 1999 on the Press (Press Law)</td>
<td>Article 4</td>
<td>Guarantee of protection</td>
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<td></td>
<td></td>
<td>Article 5 paragraph (1)</td>
<td>Restrictions</td>
</tr>
<tr>
<td></td>
<td>Law no. 17 of 2013 on Community Organization as amended by Government Regulation in lieu of Law no. 2 of 2017 on the Amendment to Law no. 17 of 2013 on Community Organization (Community Organization Law)</td>
<td>Article 59 paragraph (1), paragraph (3) letter a and letter b, paragraph (4)</td>
<td>Restriction</td>
</tr>
</tbody>
</table>
These provisions can be classified into several categories of forms and domains of expressions and specifically for this study, further elaboration of expressions shall be categorized into: (i) insult / defamation (general); (ii) political and symbolic; (iii) religious; and (iv) hostility and hatred against groups; and (v) a number of expressions in other forms and contexts.

### 2.2.2.1. Defamation

One of the most common forms of freedom of opinion and expression in society is the expression of individuals regarding matters involving other parties or individuals in various forms. These opinions and expressions are then deemed offensive, insulting and even “attacking” other people.

The Criminal Code and the ITE Law regulate several acts which are categorized as crimes of defamation, namely:

1) **Defamation in the Criminal Code**

The Criminal Code regulates defamation in a special chapter (Second Book of Chapter XVI on Defamation), namely in Article 310-Article 321. In addition, there are various other types of defamation in other chapters, including the chapter on crimes against friendly countries and against heads of friendly states and their

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84 This categorization is also aimed to facilitate identification of objectives targeted by the limitation applied in the articles and to group together provisions with similar scope of domain and forms of expressions.
representatives and crimes against public order. The defamation that are regulated in this chapter are specifically those committed by one individual against another (including individuals in public official positions).

**Defamation in the Criminal Code**

<table>
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<tr>
<th>Provisions</th>
<th>Formulation of the Offence</th>
<th>Notes and Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 310 - Slander and libel</td>
<td>Paragraph (1) Regulates slander offences with the elements of: (i) intentionally; (ii) attacking someone's honor or reputation by accusing them of something; (iii) with the intention of making the matter known to the public.</td>
<td>Imprisonment for a maximum of 9 months or a maximum fine of Rp. 300.00.</td>
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<td>Paragraph (2): if the defamation is carried out in writing, this shall constitute the offense of libel</td>
<td>Imprisonment for a maximum of 1 year and 4 months or a maximum fine of Rp. 300.00.</td>
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<td></td>
<td>Paragraph (3): There are exceptions to punishment, namely for acts that fulfill these elements but which purpose is for public interest or for self-defense.</td>
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</table>
| Article 311: Calumny       | Calumny occurs when a person commits a crime of slander or libel and is given the opportunity to prove that the accusation is true, but the person does not prove it or the true facts are contrary to what the person knows. | • Imprisonment for a maximum of 4 years.  
• Article 312 provides further conditions for Article 311. Proving the truth of an accusation can only be done if: 1) the judge views as necessary to examine the truth of the accused's accusation, with the aim of examining whether the act is in the public interest or self-defense; or 2) an official is accused of something when carrying out their duties. |
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<th>Provisions</th>
<th>Formulation of the Offence</th>
<th>Notes and Penalty</th>
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<tr>
<td>Article 315: Minor defamation</td>
<td>1. An insult committed with deliberate intent which does not bear the character of slander or libel; 2. In public, verbally or in writing; or 3. Directly to the person, verbally or by action or by a letter sent or delivered to the person.</td>
<td>Imprisonment for a maximum of 4 months and 2 weeks or a maximum fine of Rp.300.00</td>
</tr>
<tr>
<td>Article 316: Defamation of official on duty</td>
<td>The punishments laid down in the foregoing articles of this chapter may be enchanted with one third, if the defamation is committed against an official during or on the subject of the legal exercise of his office.</td>
<td></td>
</tr>
<tr>
<td>Article 317: Calumnious charge</td>
<td>Submits false complaint or notification against a certain person to the authorities, whereby the honor or reputation of said person is harmed.</td>
<td>Imprisonment for a maximum of 4 years.</td>
</tr>
<tr>
<td>Article 318: Calumnious insinuation</td>
<td>With deliberate intent falsely cast suspicion upon another person of having committed a punishable act.</td>
<td>Imprisonment for a maximum of 4 years.</td>
</tr>
<tr>
<td>Provisions</td>
<td>Formulation of the Offence</td>
<td>Notes and Penalty</td>
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</tr>
<tr>
<td>Article 320: Defamation of a deceased person</td>
<td>In respect of a deceased person commits an act that, if the person were still alive, would have been characterized as slander or libel.</td>
<td>Imprisonment for a maximum of 4 months and 2 weeks or a maximum fine of IDR 300.00.</td>
</tr>
<tr>
<td>Article 321: Defamation of a deceased person.</td>
<td>1. Broadcast, display, or post in public; 2. Writing or illustration; 3. Contains defamatory content against a deceased person; 4. with the intent to be known by the public or to enhance the publicity thereof.</td>
<td>• Similar to Article 320, but with a clearer formulation, • Imprisonment for a maximum of 1 month and 2 weeks or a maximum fine of Rp. 300.00.</td>
</tr>
</tbody>
</table>

All provisions in articles 310 - 321 are complaint offences (i.e., offences that can only be prosecuted on partisan complaints). This is based on Article 319 which states that these acts cannot be prosecuted except upon complaint by the person against whom the crime has been committed. Article 319 of the Criminal Code initially excluded the provisions of Article 316, so that anyone could report any allegations of defaming an official carrying out their duties, but the Constitutional Court's judgment number 31 / PUU-XIII / 2015 stated that the exemption was against the 1945 Constitution and thus declared it null and void. Now the provisions of Article 316 are also a complaint offense.

The Constitutional Court’s judgment emphasized the importance of shifting the paradigm of statehood towards a more democratic or equal social relationship by repositioning the relationship between those who hold state power and the citizens before the law. The Court stated that it was no longer relevant to differentiate between the regulations on defaming members of the public in general, which is a complaint offense, including the potential sanction, and those on defaming a civil servant or state official, which is not a complaint offense, including the potential sanction. This distinction is not in line with the goals of the independence of Indonesia as a nation, which include to achieve an equal and just position for everyone, as stated in the 1945 Constitution, both in its preamble and articles.\(^{35}\)

\(^{35}\) Constitutional Court Judgment Number 31/PUU-XIII/2015, p. 33.
2) Online Defamation

Defamation in the online domain, for which the relevant provisions in the Criminal Code are still applicable, are specifically regulated in Law No. 11 of 2008 on Information and Electronic Transactions as amended by Law no. 19 of 2016 on the Amendments to Law no. 11 of 2008 on Information and Electronic Transactions (ITE Law). Article 27 paragraph (3) of the ITE Law prohibits the dissemination of electronic information or documents that are defamatory. The formulation of Article 27 paragraph (3) is:

“Every person knowingly and without right distributes and / or transmits and / or makes accessible electronic information and / or electronic documents that contain defamatory content.”

The criminal provisions of Article 27 paragraph (3) are regulated in Article 45 paragraph (3), with a penalty of maximum 4 years imprisonment and a fine with the maximum amount of seven hundred and fifty million rupiahs. This criminal sanction is much graver than from the regulation on defamation in the Criminal Code, namely imprisonment for a maximum of 9 months or a fine of maximum Rp. 300.00 (three hundred rupiahs).

The elucidation of Article 27 paragraph (3) provides guidance that the definition and elements of defamation refer to the provisions of slander, libel, and/or calumny as regulated in the Criminal Code. This is in accordance with the Constitutional Court’s judgment which ruled that Article 27 paragraph (3) and Article 45 paragraph (1) of the ITE Law (before the amendment) must be treated the same as the offense of defamation in the Criminal Code, namely as an offense requiring a complaint to be prosecuted in court (complaint offense).\(^{86}\)

A number of phrases in Article 27 paragraph (3) are addressed in the law’s elucidation, but with a fairly broad explanation and can be interpreted differently, namely:

- Distributing: the act of sending and/or distributing electronic information and/or electronic documents to many people or various parties through the electronic system.
- Transmitting: the act of sending electronic information and/or electronic documents addressed to another party via an electronic system.
- Making it accessible: All actions other than distributing and transmitting through electronic systems that make electronic information and/or electronic documents known to other parties or the public.

\(^{86}\) Constitutional Court Judgment Number 50/PUU-VI/2008, p. 110.
One of the problematic explanations is the phrase “making accessible”, which is defined as all actions that make the electronic information or documents be known by the public. This means that all actions, whether intentionally or unintentionally or actions that occur due to ignorance or incomprehension about a certain electronic system, if “to give publicity thereof”, will be deemed to fulfill the element of “making accessible”. This is different from the formulation of Article 310 of the Criminal Code, which contains the phrase “with the intent to give publicity thereof”, therefore requiring the objective to make something known by more than one party.

2.2.2.3. Political and Symbolic Expressions

Indonesian criminal law has provisions on various expressions with political nuances, which often intersect with symbolic expressions. These provisions, among others, criminalize defaming heads of friendly states, representatives of foreign countries, desecrating the state’s coat of arms and insulting the general authorities, as well as makar.

Provisions related to Political and Symbolic Expressions

<table>
<thead>
<tr>
<th>Provisions</th>
<th>Formulation of Offences</th>
<th>Penalty</th>
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</thead>
<tbody>
<tr>
<td>Article 104-107 of the Criminal Code: Makar</td>
<td><strong>Article 104 of the Criminal Code</strong>&lt;br&gt;The attempt undertaken with intent to deprive the President or Vice President of his life or his liberty or to render him unfit to govern.</td>
<td>Death penalty or life imprisonment a maximum imprisonment of 20 years.</td>
</tr>
<tr>
<td>Article 106 of the Criminal Code:</td>
<td><strong>Article 106 of the Criminal Code</strong>&lt;br&gt;The attempt undertaken with intent to bring the territory of the state wholly or partially under foreign domination or to separate part thereof.</td>
<td>Life imprisonment or imprisonment of maximum 20 years.</td>
</tr>
<tr>
<td>Article 110 of the Criminal Code: Criminal conspiracy, preparing or facilitating crimes under Article 104 and 106 of the Criminal Code</td>
<td>Paragraph (1): The conspiracy to commit one of the crimes described in Articles 104, 106, 107 and 108.</td>
<td>Penalties are in accordance with the provisions of the articles mentioned.</td>
</tr>
<tr>
<td>Provisions</td>
<td>Formulation of Offences</td>
<td>Penalty</td>
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</tr>
<tr>
<td>Article 142 of the Criminal Code: Defaming a head of a friendly state</td>
<td>Deliberate defamation against a ruling king or another head of a friendly state.</td>
<td>A maximum imprisonment of five years or a maximum fine of three hundred Rupiahs.</td>
</tr>
<tr>
<td>Paragraph (2): With the intent to prepare or facilitate crimes pursuant to Articles 104, 106, 107 and 108: 1. tries to induce others to commit the crime, to cause others to commit or participate in the commission of the crime, to facilitate the crime or to provide opportunity, means or information relating thereto; 2. tries to provide himself or others with the opportunity, means or information for committing the crime; 3. has in store objects of which he knows that they are destined for committing the crime;; 4. makes plans ready or is in possession of plans for the execution of the crime intended to be made known to other person(s); 5. tries to hinder, to obstruct or to defeat a measure taken by the Government to prevent or to suppress the execution of the crime.</td>
<td>Penalties are in accordance with the provisions of the articles mentioned.</td>
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<tr>
<td>Provisions</td>
<td>Formulation of Offences</td>
<td>Penalty</td>
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<tr>
<td>Article 142a of the Criminal Code: Desecrating the national flag of a friendly country.</td>
<td>Desecrating the national flag of a friendly country.</td>
<td>A maximum imprisonment of four years or a maximum fine of three hundred Rupiahs.</td>
</tr>
<tr>
<td>Articles 143 and 144 of the Criminal Code: Defaming a representative of a foreign power to the Indonesian Government</td>
<td>Article 143: Intentional defamation against a representative of a foreign power to the Indonesian Government in his capacity</td>
<td>A maximum imprisonment of five years or a maximum fine of three hundred Rupiahs.</td>
</tr>
<tr>
<td></td>
<td>Article 144: Disseminates, openly demonstrates or put up a writing or portrait containing a defamation against a ruling king or another head of a friendly state or against a representative of a foreign power to the Indonesian Government his capacity, with intent to make the defaming content public or to enhance the publicity thereof.</td>
<td>A maximum imprisonment of nine months or a maximum fine of three hundred Rupiahs.</td>
</tr>
<tr>
<td>Flag Law: [87] Desecration of the Indonesian national flag</td>
<td>Article 66: damaging, tearing, trampling, burning, or other acts with the intention of desecrating, insulting, or degrading the honor of the National Flag.</td>
<td>The maximum imprisonment is 5 years or a maximum fine of five hundred million rupiah.</td>
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</tbody>
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[87] Law Number 24 Year 2009 on the National Flag, Language and Coat of Arms as well as the National Anthem.
<table>
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<tr>
<th>Provisions</th>
<th>Formulation of Offences</th>
<th>Penalty</th>
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| Article 67:                                                               | ● Letter b: intentionally flying a State Flag that is damaged, torn, faded, wrinkled, or dull.  
   ● Letter c: printing, embroidering, and writing letters, numbers, pictures or other signs and attaching badges or any object on the National Flag.                                                                                                                            | Maximum imprisonment of 1 year or a maximum fine of one hundred million rupiah.                     |
| Article 68:                                                               | Article 68: scribble across, write, paint, or damage the National coat of arms with the intention of desecrating, insulting or degrading the State Coat of Arms                                                                                                                                                                                                                                                                 | Imprisonment of a maximum of 5 years or a maximum fine of five hundred million rupiah.              |
| Article 69 letter a:                                                     | Article 69 letter a: deliberately using a damaged State coat of arms that does not match the shape, color and size ratio                                                                                                                                                                                                                                                                                               | The maximum imprisonment is 1 year or a maximum fine of one hundred million rupiah.                        |
| Article 154a of the Criminal Code: Desecration of the Indonesian national flag | Desecrating the national flag and coat of arms of the Indonesian state.                                                                                                                                                                                                                                                                                                                                              | A maximum imprisonment of four years or a maximum fine of three thousand Rupiahs.                      |
| Articles 207 and 208 of the Criminal Code: Defaming the authorities or public bodies in Indonesia | With deliberate intent in public, orally or in writing, defame an authority or a public body set up in Indonesia,                                                                                                                                                                                                                                                                                                    | A maximum imprisonment of one year and six months or a maximum fine of three hundred Rupiahs.           |
## 2.2.2.4. Religious Expressions

Expressions related to religion are regulated in a number of provisions in the Criminal Code and other laws. In the Criminal Code, there are two different articles, namely Article 156a and Article 177. Article 156a was added to the Criminal Code pursuant to the Law on the Presidential Decree Number 1/PNPS/1965. Other provisions that intersect with religious expressions are those regulating online expressions, specifically Article 28 paragraph (2) of the ITE Law.

### The Criminal Provisions related to Religious Expressions

|------------|-------------------------|--------------------------------|
| Article 156a of the Criminal Code: Blasphemy of Religion | Deliberately in public gives expression to feelings or commits an act:  
   a. which principally have the character of being hostile with, abusing or desecrating a religion adhered to in Indonesia;  
   b. with the intention to prevent a person to adhere to any religion based on the belief of the almighty God. |  
   - The maximum imprisonment is 5 years.  
   - Written or verbal elaborations made in an objective, zakelijk (exact), and scientific manner regarding a religion by avoiding words which are hostile or insulting are not considered crimes. This article is intended to criminalize acts with the intent of being hostile or insulting. |
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<tbody>
<tr>
<td>Article 177 of the Criminal Code: Ridiculing a religious official and</td>
<td>• Ridiculing a religious leader in the lawful observation of the leader’s service;</td>
<td>A maximum imprisonment of four months and two weeks or a maximum fine of one hundred and twenty</td>
</tr>
<tr>
<td>jeering at objects of worship</td>
<td>• Jeering at objects dedicated to a divine worship, where and when the exercise of</td>
<td>Rupiahs</td>
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<tr>
<td></td>
<td>said worship is lawful.</td>
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<tr>
<td>Article 28 paragraph (2) of the ITE Law: inflicting hatred or hostility</td>
<td>Knowingly and without authority disseminates information aimed at inflicting hatred</td>
<td>A maximum imprisonment of 6 years and / or a maximum fine of one billion rupiahs.</td>
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<tr>
<td>against individuals and/or certain community groups based on ethnicity,</td>
<td>or hostility against individuals and/or certain community groups based on ethnicity,</td>
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<td>religion, race, and intergroup (Suku, Agama, Ras, dan Antar Golongan:</td>
<td>religion, race, and intergroup (SARA).</td>
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<td>SARA)</td>
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**2.2.2.5. Hostility and hatred towards groups**

Various expressions often touch or are interpreted as a form of action that triggers hostility or hatred towards certain parties, groups or factions. Indonesian criminal law regulates a number of acts that are categorized as crimes that cause hostility and hatred against (as well as insult) certain individuals and / or groups in the population.
### Criminal Provisions Related to Expressions that Constitute Hostility and Hatred

|------------|------------------------|--------------------------------|
| Article 156 and 157 of the Criminal Code: hostility, hatred or contempt against a group | Article 156: publicly expressing feelings of hostility, hatred or contempt against one or more groups of the population of Indonesia | ● A maximum imprisonment of four years or a maximum fine of three hundred Rupiahs  
● This article uses the term “golongan” which is translated to group. The term refers to people who belong to different races, countries of origin, religions, places of origin, descent, nationalities, or positions according to administrative law. |
| Article 157 (1) the Criminal Code: Disseminate, openly demonstrate or put up a writing or portrait where feelings of hostility, hatred or contempt against or among groups of the population of Indonesia are expressed, with the intent to give publicity to the contents or to enhance the publicity thereof | A maximum imprisonment of two years and six months or a maximum fine of three hundred Rupiahs |
|-----------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------|
| Article 28 paragraph (2) of the ITE Law: inflicting hatred or hostility against individuals and/or certain community groups based on ethnic group, religion, race, and intergroups (SARA) online | Knowingly and without authority disseminates information aimed at inflicting hatred or hostility against individuals and/or certain community groups based on ethnic group, religion, race, and intergroups (SARA). | A maximum imprisonment of 6 years and / or a maximum fine of one billion Rupiahs (Article 25A paragraph (2)) |
| Article 4 of the Law on the Elimination of Racial and Ethnic Discrimination: 89 Hate Speech                           | 1. Making writing or pictures to be placed, posted, or disseminated in public places or other places that can be seen or read by others.  
2. Making a speech, expressing, or uttering certain words in a public place or other places that can be heard by other people; or  
3. Wearing something on the person’s self objects, words, or pictures in public places or other places that can be read by other people. | A maximum imprisonment of 5 years and / or a maximum fine of 500 million Rupiahs                                           |

89 Law Number 40 of 2008 on the Elimination of Racial and Ethnic Discrimination.
2.2.2.6. Expressions in Other Forms and Contexts

Apart from the various provisions above, there are various other criminal law provisions that pertain to freedom of expression, including expressions related to “moral” issues, for example the crimes of indecency, hoax, and insult in a number of contexts (for example defamation in the election campaign period).

The examples of provisions below are those which application is often problematic because they are formulated quite broadly and cause multiple interpretations. This results in the punishment of protected expressions. An example is the phrase “nudity” as stipulated in the Pornography Law or “content that violates decency”, which targets a number of legitimate expressions, such as artistic expressions or in the medium of art.

Relevant Provisions in Other Forms and Contexts

<table>
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<tbody>
<tr>
<td>Article 4</td>
<td>To produce, create, reproduce, copy, distribute, broadcast, import, export, offer, trade, lease, or provide pornography that explicitly contains among others nudity or displays that suggest nudity.</td>
<td>Imprisonment for a minimum of 6 months and a maximum of 12 years and/or a fine of at least two hundred and fifty million rupiah and a maximum of six billion rupiahs.</td>
</tr>
<tr>
<td>paragraph (1) of Pornography Law: Pornography</td>
<td>Note: Decency is also regulated in the Criminal Code</td>
<td></td>
</tr>
<tr>
<td>Article 27 (1) of the ITE Law: Decency</td>
<td>Intentionally and without right to distribute and/or transmit and/or make accessible electronic information and/or electronic documents that have contents that violate decency.</td>
<td>The maximum imprisonment is 6 years and/or a maximum fine of one billion rupiahs.</td>
</tr>
<tr>
<td>Article 28 paragraph (1) of the ITE Law: Hoax</td>
<td>The spread of false and misleading news, but the action must result in consumer losses in electronic transactions.</td>
<td>The maximum imprisonment is 6 years and/or a maximum fine of one billion rupiah.</td>
</tr>
<tr>
<td>Article 14 of the Criminal Law Regulation Law: Hoax that causes disorder</td>
<td>Intentionally broadcasting false news or announcements, deliberately inciting disorder among the people.</td>
<td>Imprisonment of up to 10 years.</td>
</tr>
</tbody>
</table>
### Legal Framework of Freedom of Expression and Opinion

<table>
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<tbody>
<tr>
<td>• Broadcasting news or issuing an announcement that can incite disorder</td>
<td><strong>Imprisonment of up to 3 years.</strong></td>
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<tr>
<td>among the people, while the person should reasonably know that the news</td>
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<td>or notification is false.</td>
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<tr>
<td>Article 280 paragraph (1) letter c of the Election Law,³ Defamation during</td>
<td>• Prohibition of organizers, participants, and campaign teams from defaming a person, religion, ethnicity, race, group, candidate and/or other election participants.</td>
<td><strong>Imprisonment of maximum 2 years and a maximum fine of 24 million rupiah (Article 521 of the</strong></td>
</tr>
<tr>
<td>the campaign period</td>
<td>• There is no further explanation on the elements of the article. The penalty for the violations of these articles is included in Article 521 of the Election Law which states that such acts are punishable by a maximum imprisonment of 2 years and a maximum fine of twenty-four million rupiah.</td>
<td><strong>Election Law).</strong></td>
</tr>
</tbody>
</table>
CHAPTER III

FREEDOM OF EXPRESSION AND DEFAMATION
This chapter outlines the intersection between defamation and protection of the right to freedom of expression by examining court judgment in defamation cases. Analysis of court judgments is then identified in order to understand the offense of defamation in relation to the right to freedom of expression. Various important issues in the analysis are clarified from the perspective of criminal law and the human rights framework.

This chapter begins by providing an overview of the relationship between the protection of the right to freedom of expression and the criminal offense of defamation and outlines the defamation provisions in Indonesian laws and regulations. This chapter also outlines the developmental trends on defamation cases and their relation to the protection of freedom of expression. The final section of this chapter provides various recommendations.

3.1. Defamation in the Human Rights Framework

Article 19 of the ICCPR provides a robust foundation for the protection of freedom of opinion and expression as one of the fundamental freedoms. Freedom of expression or opinion, including the freedom to adhere to that opinion, is a non-derogable right.93

Specifically for freedom of expression, according to Article 19 paragraph (3) of the ICCPR, freedom of expression can be limited, but only with legitimate restrictions and with the legitimate aim, one of which is to respect the rights or reputation of others.94 UN Human Rights Committee General Comment No. 34 provides an explanation of the term “rights” and the scope of “rights” in this context are human rights that are recognized in the ICCPR and which are generally recognized in international human rights law.95 While the term “reputation” has been given guidance on its meaning and scope, including the limits of restricting expression with the aim of respecting the reputation of others. Referring to the Siracusa Principles, limiting human rights based on someone else’s reputation shall not be used to protect the state and its apparatus from public opinion and criticism.96

In addition to limitation that must be aimed for certain legitimate purposes, Article 19 paragraph (3) of the ICCPR also stipulates that such limitation shall be regulated

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94 UN General Assembly ... ICCPR..., Op. Cit., Article 19 paragraph (3) letter a.
95 UN Human Rights Committee, General Comment No. 34 ICCPR..., Op. Cit., para. 28.
by law. The state is given the authority to limit certain rights but must go through legal norms in the form of laws. A law that regulates defamation, can be declared as not fulfilling the test for legitimate purposes, among others in terms of:

- Aimed to protect the “reputation” of objects, such as flags, or state or religious symbols
- Aimed at protecting the country’s “reputation”.
- Aimed at protecting subjective feelings and ideas, such as sense of “honor”
- Aimed at preventing criticism of officials or public bodies.97

Laws and regulations on defamation also could not be categorized as legitimate limitation of freedom of expression with the aim to protect reputation of: (i) public institution; (ii) political party; (iii) state-owned company. Furthermore, public officials including head of state and government officials are also not eligible to special protection under defamation law.98

The Siracusa Principles which address the section “rights and freedoms of others” or “rights or reputation of others” state that in the event of a conflict between rights protected and rights not protected by the ICCPR, recognition and consideration should be given to the fact that the ICCPR tries to protect the most fundamental rights and freedoms so that the main emphasis should be given to rights that are not subject to restrictions in the ICCPR.99

The Indonesian Constitution, as described in Chapter II, strongly guarantees the right to freedom of opinion and expression so that these rights receive high legal recognition and protection. On the other hand, Indonesian law still regulates criminal defamation, including in the Criminal Code and the ITE Law. The formulation of criminal acts of defamation in the Criminal Code and the ITE Law also formulates “reputation” in various narratives, for example Article 310 paragraph (1) of the Criminal Code has the element “...attacking someone’s honor or good name...” as one of the elements of an act that prohibited and penalized. Another example is the provisions of Article 317 of the Criminal Code, which some of the elements read “false complaint or notification...about a person so that his/her honor or good name is attacked...”,100 The context of the same act is also found in other articles under Chapter XVI on Defamation in the Criminal Code.

100 The meaning of “honor” in these offences, according to the interpretation of R. Soesilo, is a good name. Thus, the formulation of the criminal elements shows that certain act is prohibited with the intention to protect the reputation of others.
addition, the Criminal Code also regulates defamations which targets or directed against different subject of reputations, including against ordinary individuals, public authorities and public officials including the president.

In line with developments of human rights protection in the Indonesian Constitution and various other laws and regulations including the Human Rights Law, the provisions on defamations have also undergone contestation and correction, especially in their excessive application and many violations of freedom of expression, with among others the abolition of articles on defaming the president and revisions of defamation provisions in the ITE Law (Article 27 paragraph (3)). The defamation articles in the Criminal Code involve the context of protecting the reputation of government officials and public bodies whilst do not provide an adequate threshold between defamations 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 protection of expression and protection of reputation. Various court judgments regarding defamation have been widely criticized and have become one of the reasons for the decline in protection of basic freedoms and freedom of expression. Often, court judgments, as will be described below, did not sufficiently consider the aspect of protecting expression and only focus on proving the actions committed by the defendant, whether it is true that the defendant made the speech charged either in writing or verbally, and whether the words were defaming or not. Court considerations rarely consider whether the actions committed by the defendant constitute part of the right to expression, and especially to what extent the rights to the reputation of the party who feels insulted will actually be violated so that convicting the defendant is the right choice of law. Especially in cases where the defamation in question is directed against a state official or institution, there is very little consideration by the court regarding the extent to which the defendant’s actions will actually disturb state security, public order, and public morals. In fact, human rights norms for the protection of freedom of expression are already available, aside from the need to apply the three-past test, also in the event of a conflict between rights, recognition and consideration should be given to the protection of the most basic rights and freedoms.

At the global level, an important discourse related to defamation as offence and protection of human rights is the need to abolish criminal provisions on defamations since they are in contrary to international human rights standards and often fail to meet the necessity standard based on a three-part test.\textsuperscript{101}

3.2. Articles Criminalizing Freedom of Expression

Prior to elaborating articles on defamations as crimes, it is important to understand the context and scope of the criminal defamation. **Defamation is an umbrella term for a variety of different crimes regulated in the Criminal Code.** In the Criminal Code, the term “defamation” is the title of Chapter XVI (sixteen) in which there are criminal acts of slander (Article 310 (1) of the Criminal Code), libel (Article 310 (2) of the Criminal Code), calumny (Article 311 of the Criminal Code), minor defamation (Article 315 of the Criminal Code), calumnious charge (Article 317 of the Criminal Code), calumnious insinuation (Article 318 of the Criminal Code), defamation of the dead (Article 320 of the Criminal Code), and spreading of defamation of the deceased (Article 321 of the Criminal Code). When viewed from its elements, all of these crimes have the same nature, which is an accusation regarding something stated by the perpetrator about the victim, except in the case of minor defamation where the accusation is not part of the act. In general, defamation is an act that attacks the honor or reputation of another person.

Prohibited acts within the context of defamation in the Criminal Code are also regulated outside Chapter XVI. The term “defamation” or “defaming” as an element of a criminal act can at least be found in Article 142 of the Criminal Code (defamation of the king or head of friendly countries), Article 144 of the Criminal Code (disseminating defamation of king or head of friendly countries), Article 207 of the Criminal Code (defaming authorities or public bodies), and Article 208 of the Criminal Code (disseminating defamation against authorities or public bodies).

Therefore, this section mentions specifically when referring to certain criminal acts, for example slander, libel, calumny, and so on, which are contained in the defamation chapter. Whenever the term “defamation” is mentioned, this generally refers to the chapter on defamation and other acts of defamations in the Criminal Code.

As elaborated above, the crime of defamation consist of different types of criminal acts, both those listed in Chapter XVI of the Criminal Code and outside of this chapter, including in the ITE Law. The criminal act of defamation is regulated in Article 310 of the Criminal Code, Article 311 of the Criminal Code, and Article 27 paragraph (3) of the ITE Law as a type of defamation related to the “reputation” of another person. Meanwhile, Article 207 of the Criminal Code regulates defaming authorities or public bodies. The context of defamation in Article 207 of the Criminal Code is similar to Article 310 and Article 311 of the Criminal Code, namely threats to an individual’s “reputation” but the subject in Article 207 of the Criminal Code is different, namely the authorities or public bodies.
3.3. Trend of Expressions Prosecuted for Slander, Libel, or Calumny in the Criminal Code and ITE Law

In general, the constitution and laws and regulations in Indonesia have recognized the guarantee of freedom of expression, but this guarantee has not been able to fully protect the society from being prosecuted for legitimate opinions or expressions. On the one hand, there has been a positive development, with the existence of provisions that are in accordance with human rights principles or interpreted by the Constitutional Court so that they are clearer or stricter. However, on the other hand, there are still various problematic provisions, due to the formulation of the regulations that are quite broad, flexible and multi-interpretable, which often easily used by ordinary civilians to state apparatus to prosecute various legitimate and protected expressions. As a result, there is a high risk of restrictions on the right to freedom of expression that are inconsistent with the principles of human rights law.

Cases of slander, libel, and calumny in the context of the Criminal Code ensnare almost all categories of individuals, including civil society who work as human rights activists, anti-corruption activists and journalists. One of the cases that has received public attention was the case of Khoe Seng Seng in 2006, who wrote letters to the newspapers Kompas and Suara Pembaruan to complain about the unclear status of a land that he bought for his shop from a developer, PT Duta Pertiwi at ITC Mangga Dua Jakarta. Khoe Seng Seng was reported to the police and later found guilty by the court for defaming the company.102

The other cases involved Ronny Maryanto Romadji, an anti-corruption activist from the Investigative Committee for the Eradication of Corruption, Collusion and Nepotism (KP2KKN), who was convicted of defamation against a politician, Fadli Zon. Ronny was convicted for his comment in the mass media and the complaint he made to the Semarang City Election Supervisory Committee on Fadli Zon's alleged money politics during a campaign at Pasar Bulu, Semarang.103 Another case in 2009 Emerson Yuntho and Illian Deta Sari, anti-corruption activists from the Indonesia Corruption Watch (ICW), were named suspects for allegedly defaming the Attorney General's Office. Both of them issued criticisms quoted in the Rakyat Merdeka daily regarding the amount of money returned from corruption claimed to have been saved by the prosecutor's office and suspected that there was a discrepancy between the amount claimed by the prosecutor’s office and the data they had from the Supreme Audit Agency (BPK).104

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<table>
<thead>
<tr>
<th>Article 310 of the Criminal Code</th>
<th>Article 311 of the Criminal Code</th>
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<tbody>
<tr>
<td>Providing information to journalists containing allegations of unlawful acts by a company (see Mahkamah Agung Judgment No 772 K/PID/2017)</td>
<td>Accusing another person verbally in front of many people that the person has committed an unlawful act or violated social norms (see Mahkamah Agung Judgment No 963 K/PID/2017)</td>
</tr>
<tr>
<td>Delivering speeches at demonstrations containing harsh words against government officials being protested (see Mahkamah Agung Judgment No 899 K/Pid/2014)</td>
<td>Writing and distributing or sending to many people (civilians and/or government officials) writings or letters containing accusations that other people have committed acts that violate the law or violate social norms (see among others Mahkamah Agung Judgment No 2331 K/PID/2007 and Mahkamah Agung Judgment No 1082 K/PID/2015)</td>
</tr>
<tr>
<td>Accusing another person verbally in front of many people or in a public place that the person has committed an unlawful act or violated social norms (see among others Mahkamah Agung Judgments No 1680 K/PID/2015 and No 425 K/Pid/2015)</td>
<td>Writing news articles for newspapers alleging unlawful acts by public officials (See Mahkamah Agung Judgment Nomor 2331 K/PID/2006)</td>
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<tr>
<td>Accusing other people by uploading a status on personal social media accounts that the accused has committed an unlawful act (see Mahkamah Agung Judgment No. 848 K/Pid/2017)</td>
<td>Writing complaint letters on violations of workers’ rights by a company that he experienced himself and sent it to government officials (see Mahkamah Agung Judgment No. 2205 K/Pid/2006)</td>
</tr>
<tr>
<td>Providing accusation information to journalists on other individual violating the law or violating social norms, accompanied by harsh words against that person (see Mahkamah Agung Judgment No. 2003 K/Pid/2004)</td>
<td>Making a report to the police that another individual committed an unlawful act in which the report was later found to have insufficient evidence (see Mahkamah Agung Judgment No. 2155 K/Pid/2010)</td>
</tr>
<tr>
<td>Example of Expressions Convicted for Slander, Libel, or Calumny under Article 310 and Article 311 of the Criminal Code</td>
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<tr>
<td>Writing and distributing negative accusations related to the personal nature of public officials (see Mahkamah Agung Nomor Judgment No. 2309 K/Pid/2007)</td>
<td>Providing information to journalists containing allegations of unlawful acts by government officials (see Mahkamah Agung Judgment No. 1562 K/PID/2011)</td>
</tr>
<tr>
<td>Verbally insulting other harshly in front of many people or in public place (see among others Mahkamah Agung Judgment No. 1186 K/Pid/2004 and Judgment No. 1186 K/Pid/2009)</td>
<td>Writing and distributing or sending to many people (civilians and/or government officials) writings or letters containing accusations that a government official has committed an unlawful act (see among others Mahkamah Agung Judgment No. 1898 K/Pid/2003 and Judgment No. 2417 K/Pid/2007)</td>
</tr>
<tr>
<td>Telling more than one person verbally that another individual committed an act that violates the law or social norm (see among others Mahkamah Agung Judgments No. 1844 K/Pid/2011 and No. 1782 K/Pid/2003)</td>
<td>During a meeting, alleging an individual abusing his/her authority (see Mahkamah Agung Judgment No. 1387 K/Pid/2009)</td>
</tr>
<tr>
<td>Writing news articles for newspapers alleging unlawful acts by public officials (see Mahkamah Agung Judgment No. 1111 K/Pid/2005)</td>
<td>Writing and sending reader letter to a newspaper accusing a government official of committing an unlawful act (see Mahkamah Agung Judgment No. 369 K/Pid/2003)</td>
</tr>
<tr>
<td>Writing and distributing an article containing accusations to other people that the person has committed an act that violates the law or violates social norms (see among others Mahkamah Agung Judgments No. 1002 K/Pid/2005 and Mahkamah Agung Judgment No. 2490 K/Pid/2006)</td>
<td>Writing and distributing or sending to many people (civilians) electronic mail containing accusations that another individual has committed acts that violate the law or violate social norms (see Mahkamah Agung Judgment No. 1234 K/PID/2008)</td>
</tr>
<tr>
<td>Make a report to the police and provide information to journalists that a government official has committed an unlawful act (see Mahkamah Agung Judgment No. 162/Pid.B/2012/PN-Lsm)</td>
<td>Providing information to journalists containing allegations of unlawful acts by a company (see Mahkamah Agung Judgment No. 1212 K/Pid/2006)</td>
</tr>
</tbody>
</table>
Example of Expressions Convicted for Slander, Libel, or Calumny under Article 310 and Article 311 of the Criminal Code

<table>
<thead>
<tr>
<th>Providing information to journalists containing accusations of unlawful acts by government officials (see Mahkamah Agung Judgment No. 1417 K/Pid/2012)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accusing another individual verbally in front of many people or in a public place and accompanied by harsh words that the person committed an act that violates the law or violates social norms (see Mahkamah Agung Judgment No. 689 K/PID/2016 and Mahkamah Agung Judgment No. 440 K/PID/2015)</td>
</tr>
</tbody>
</table>

From the table above it can be seen that the characteristics of the expressions or actions that are prosecuted as fulfilling all the elements of defamation are quite diverse. The type of action that occurs quite often is the act of accusing other people, both fellow citizens and government officials, of committing an act that violates the law or violates social norms, both verbally and in writing via electronic media or print media. Some of these types of actions are accompanied by harsh words in them. However, there are also acts where the defendant only uttered harsh words to other individual without being accompanied by certain accusations. Beside those, another interesting thing is that there are cases where the party claiming as the victim are companies.

The trend towards punishment for expression increased when the ITE Law adopted added with the widespread use of online defamation articles under Article 27 paragraph (3) of the ITE Law. Various data, the number of which is difficult to ascertain due to limited sources of information, shows the number of cases reaching dozens every year, with the number of reports reaching hundreds of cases since 2008. During 2019, as much as 22% of the total number of reports on the application of the ITE Law were cases of defamation using Article 27 paragraph (3).\(^{105}\) Referring to Safenet's report, during 2021, out of 38 people who were...
reported to the law enforcement officials with charges of violating the ITE Law, 23 people were charged with Article 27 paragraph (3) of the ITE Law or Article 45 paragraph (3) of the ITE Law. The background of the parties reported included activists (10 people), victims of violence or their representative (8 people), and citizens (7 people).

The application of Article 27 paragraph (3) of the ITE Law often results in criminalization of opinion and expression, so that in the public’s view it is considered to have “muzzled” freedom of expression or “had an adverse impact” on the protection of these rights. Various examples of cases that have been charged with Article 27 paragraph (3) include criticism of public officials, whether in the form of statements at events, opinions on social media, or articles by journalists. A number of cases, some of which are described below, related to criticism of police officials, statements regarding violations of the law and human rights, and statements about legal irregularities within companies. During 2019, for example, 1 media company and 7 journalists were reported to the authority with allegations of violating Article 27 paragraph (3) of the ITE Law.

Example of Expressions Prosecuted as Slander, Libel or Calumny under Article 27 para. (3) of the ITE Law

| Had private conversations with another individual through an online messenger and accusing the other individual committing an act that violates social norms (see Mahkamah Agung Judgment No. 373 K/Pid.Sus/2018) |
| Uploaded Facebook status in the personal account and/or a Facebook group that contained negative accusation on personal character of a public official (see Mahkamah Agung Judgment No. 364 K/Pid.Sus/2015) |

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106 The further details are, 17 individuals were charged under Article 27 paragraph (3) of the ITE Law and 6 individuals charged under Article 45 paragraph (3) of the ITE Law. Both articles are actually related to each other. Article 27 paragraph (3) of the ITE Law provides prohibited conduct while Article 45 paragraph (3) stipulates criminal sanction for those who commits the offence provided in Article 27 paragraph (3). See SAFEnet, *Laporan Situasi Hak-hak Digital Indonesia 2021 Pandemi Memang Terkendali Tapi Represi Digital Terus Berlanjut* (Denpasar: SAFEnet, 2022), p. 32.

107 Ibid., p. 29.


Uploaded Facebook status in the personal account that contained negative accusation on another individual's personal character (see Mahkamah Agung Judgment No. 2874 K/Pid.Sus/2017)

Had private conversations with another individual through an online messenger where the defendant wrote harsh words against the other individual (see Mahkamah Agung Judgment No. 2908 K/PID.SUS/2015)

Wrote a comment in another individual's Facebook account requesting him/her to return an item that does not belong to the individual (see Mahkamah Agung Judgment No. 1753 K/PID.SUS/2018)

Wrote a comment in another individual's Facebook account that contained negative accusation on his/her personal character (see Mahkamah Agung Judgment No. 370 K/PID.SUS/2016)

Wrote a reply to another individual's comment on a post on Facebook and mentioned an accusation that the management of an organization has committed an unlawful act (see Mahkamah Agung Judgment No. 1466 K/PID.SUS/2016)

Wrote and sent a text message through a short message service (SMS) to a city official with the accusation that a public official at the village level abused his/her authority and committed an unlawful act (see Mahkamah Agung Judgment No. 2671 K/Pid.Sus/2015)

Wrote and sent an email to a supervisor in a company and few other individuals on the accusation of an employee committing an unlawful act (see Mahkamah Agung Judgment No. 1498 K/PID.SUS/2015)

Uploaded a picture completed with a writing on personal Facebook account with an accusation of another individual committing an unlawful act (see Mahkamah Agung Judgment No. 2043 K/PID.SUS/2017)

Uploaded a status on a personal Facebook account in a few different times that contained harsh words without mentioning any specific target (see Mahkamah Agung Judgment No. 2172 K/Pid.Sus/2015)

Wrote and sent an email using a fake account to numerous individuals that contained vulgar photos with another individual, accompanied by a writing as if it was written by the other individual (see Mahkamah Agung Judgment No. 1041 K/Pid.Sus/2011)

Out of several defamation cases based on the ITE Law, the majority were found guilty and convicted, but there were also a number of cases which were finally acquitted by the courts. The basis for the acquittal is generally because the elements of the criminal act of slander, libel, or calumny were not fulfilled, for example when the information conveyed was important for the public (public interest issues), the information is not made public (private), the information contains truth (facts) and
information that disseminated is a criticism of public officials. By reading the judgment of these cases, for example in the case of Prita Mulyasari (a housewife) and Erick Limar (a private employee), the acquittal is inseparable from the depth of analysis of the facts and application of law from the panel of judges and the function of the Supreme Court who has the authority to correct judgments of the first instance and appellate courts, especially in ensuring that statements, opinions, complaints, criticisms and dissemination of certain information, all of which are within the scope of freedom of expression, are protected expressions.

In 2021, amid pressure from civil society to revise various provisions in the ITE Law, the Government through the Ministry of Communication and Informatics, the Attorney General’s Office and the Police issued a guideline for the interpretation of a number of articles in the ITE Law in the form of a Joint Decree (SKB). This guideline provides guidance on the interpretation of a few articles often criticized by the public, one of which is Article 27 paragraph (3) of the ITE Law. Even so, the existence of this Joint Decree cannot be separated from criticism from civil society, mainly because of the Government’s reluctance to change legal norms through revisions of laws instead of publishing a Joint Decree whose legal power is questionable.

In the midst of various developments and the lack of clarity regarding various criminal provisions and ensuring the protection of the right to freedom of expression, the application of provisions in court judgments is a crucial issue. Courts in their judgments are expected to provide robust, rational arguments and in line with human rights principles, including the protection of the right to freedom of expression and opinion.

3.4. Court Consideration in Deciding Cases with Freedom of Expression Dimension

3.4.1. Court Consideration in Deciding Slander, Libel, or Calumny Cases based on the Criminal Code and ITE Law

Prior to analysing court considerations in slander, libel, or calumny cases, samples of judgments which applied the elements of crimes of slander, libel, and calumny will initially be mentioned, both based on the Criminal Code and the ITE Law.
Law. The elements of Article 310 and 311 of the Criminal Code are indeed not singular. However, this sub-chapter’s discussion will focus on the application of the main element of the defamation (in terms of slander or libel) offence, which is “attacking the honor or good name of an individual by accusing something.”

The other elements of the Articles will be discussed in the general analysis in the next sub-chapter. The following table will give a general preview of how the courts interpret the elements of crime “attacking the honor or good name of an individual by accusing something” and how the courts connect the interpretation of the elements and the defendant’s conduct in these cases. The sample judgments are:

1) Judgment of Denpasar District Court No. 732/Pid.B/2013/PN Dps;
2) Judgment of Luwuk District Court No. 238/Pid.B/2014/PN Lwk;
3) Judgment of Sanggau District Court No. 336/Pid.B/2016/PN Sag;
4) Judgment of Pati District Court No. 224/Pid.B/2014/PN Pti.;
5) Judgment of Simalungun District Court No. 43/Pid.B/2017/PN.Sim *juncto* Judgment of the Supreme Court No. 963 K/Pid/2017;\(^{113}\)
6) Judgment of Cilacap District Court No. 276/Pid.B/2010/PN.Clp.;
7) Judgment of Kualasimpang District Court No. 288/Pid.B/2010/PN.Ksp.;
8) Judgment of Palembang District Court No. 1345/Pid.B/2014/PN.Plg.;
9) Judgment of Langsa District Court No. 12/Pid.B/2014/PN.Lgs.;
10) Judgment of Manado District Court No. 300/Pid.B/2013/PN.Mdo.;

\(^{113}\) In this case, the judgment of PN Simalungun was annulled at the cassation by the Supreme Court.
Judges' Interpretation of the Element “attacking the honor or good name of an individual by accusing something” in Article 310 and 311 of the Criminal Code and Consideration of the Defendant's Action

<table>
<thead>
<tr>
<th>Judgment</th>
<th>Interpretation</th>
<th>Consideration of the Defendant's Conduct</th>
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<tbody>
<tr>
<td>732/Pid.B/2013/PN Dps</td>
<td>Defaming is attacking someone's honor and good name, and those who are attacked are usually ashamed</td>
<td>Whereas the words: &quot;Criminal and civil acts have been done as a follow-up due to fraud, slander, forgery and theft&quot;, does not include defamation or attacks on honor or good name due to reporting criminal acts and civil lawsuits to court, it is the right of every person if there is legal interest harmed. In fact, the defendant was right to report the alleged fraud, forgery and theft to the Badung Police.</td>
</tr>
<tr>
<td>238/Pid.B/2014/PN Lwk</td>
<td>Saying words that contain violations of the honor or good name of others. A good name is defined as an honor given by the general public to a person either because of his/her actions or position</td>
<td>Since the defendant stated that witness Ade Banun alias Ko Ade is a thief, while in fact witness Ade Banun alias Ko Ade is a hajj instead of a thief therefore the defendant attacked the good name of witness Ade Banun alias Ko Ade as a hajj.</td>
</tr>
<tr>
<td>336/Pid.B/2016/PN Sag</td>
<td>Attacking is not in the sense of attacking with physical force, but in the sense of violating. A good name is intended as an honor given by the society to a person either because of his actions or position. To accuse is to name and say that someone did not do well.</td>
<td>The defendant attacked the good name of PT Bintang Harapan Desa (BHD) by accusing them of illegally taking community land and having a backing and at trial the defendant could not prove his accusation. The defendant's actions caused a negative image for PT BHD because they was accused of wrongdoing.</td>
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<tr>
<td>Judgment</td>
<td>Interpretation</td>
<td>Consideration of the Defendant’s Conduct</td>
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<tr>
<td>224/Pid.B/2014/PN Pti.</td>
<td>The meaning of attacked honor is limited to honor of good name instead of honor in the sexual sphere.</td>
<td>The defendant’s words addressed to witness SUTAM bin SUNGKONO, “kowe ngentekno duit deso” (you spent the village’s fund) caused shame and feeling of insulted to witness SUTAM bin SUNGKONO since the witness did not aware of spending the village’s fund. The defendant’s speech contains meaning that s/he accused witness SUTAM bin SUNGKONO spent village’s fund and this was not completed with evidences.</td>
</tr>
<tr>
<td>43/Pid.B/2017/PN.Sim juncto 963 K/Pid/2017</td>
<td>Accusing someone of having done a certain act, with the intention of the accusation being published (known to the public). The accused act does not need to be a punishable act, just an ordinary act, certainly a shameful act</td>
<td>The defendants, in the middle of a forum which was attended by a large number of people, used a loudspeaker and pointed at the victims, accused the victims of raising the begu ganjang (bad spirit of Batakene tribe) that killed the families of the defendants. This accusation was not based on evidence and caused the defamed reputation of the victim's family, and the victim was expelled from the association organization in the village.</td>
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<tr>
<td>Judgment</td>
<td>Interpretation</td>
<td>Consideration of the Defendant’s Conduct</td>
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<tr>
<td>276/Pid.B/2010/PN.Clp.</td>
<td>Good name is meant as a general good judgment about a person in terms of morality, while honor is the demand for treatment as respectable citizens in social life as a result of that judgment. An accusation is fulfilled if from the words it can be concluded logically, that what is meant is notification of an act that appears to have been committed by the accused.</td>
<td>The Defendant met with the witness Daryanto, a journalist, at the Defendant’s house, where the Defendant explained in essence that Puji Waluyo, SE, as the Secretary of Nusawungu Village received a grant from the Village by &quot;selling&quot; 4 bau (one bau = approx. 0.7-0.8 hectare) of bengkok land (village communal farming land) for Rp.40,000,000.- (Forty million rupiah), and upon the Defendant's exposure Daryanto published his story in the Radar Banyumas newspaper. The impact of the news in the newspaper was that the community became noisy and the witness Puji Waluyo, SE felt ashamed because the news was not true and Puji was summoned by the Village Government regarding the news.</td>
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<tr>
<td>288/Pid.B/2010/PN.Ksp.</td>
<td>The word blasphemy (menista) comes from the word 'nista'. In the Indonesian Dictionary, the word 'nista' is defined as, among others, contemptible, lowly, unpleasant to hear, disgraceful, reproached, stain. To be referred to as &quot;blaspheming with writing&quot; is if it is done with writing that is broadcasted, shown in public or posted</td>
<td>The defendant sent the complaint letter to the Aceh Police Chief, as the superior of the witness IRWAN MY, as an internal oversight of the upholding of the police code of ethics, because previously the defendant had also complained about witness IRWAN MY to the Head of the Aceh Tamiang Provos on 10 October 2008, however the complaint was ignored without any explanation. In addition, the complaint letter made by the defendant was not spread in the mass media or in the community.</td>
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<tr>
<td>Judgment</td>
<td>Interpretation</td>
<td>Consideration of the Defendant’s Conduct</td>
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<td>1345/Pid.B/2014/PN.Plg.</td>
<td>The court did not explain the interpretation of the elements mentioned above, but only interpreted the meaning of the word written in the defendant's letter that became the merit in this judgment, namely the word &quot;arrogant.&quot;</td>
<td>The defendant wrote a letter that was sent to the Mayor of Palembang and a copy of it to the Lurah Demang Lebar Daun around January 2014 which contained a protest against the new Head of Neighbourhood Association (RT) 37 and his accomplices’ arrogant behavior, which according to the Panel of Judges had sufficiently attacked the honor or reputation of the victim witness. It is true that every member of the public has the right to criticize the performance of public services, but it must be within the corridors of applicable law by conveying substantial information about poor public services, not by accusing a crime that can defame other people, worse if this is not accompanied by sufficient evidence.</td>
</tr>
<tr>
<td>12/Pid.B/2014/PN Lgs.</td>
<td>The court did not explain the interpretation of the elements mentioned above.</td>
<td>The defendant wrote an article and sent it to the Citra Aceh newspaper to be published. The defendant knew that many people would read the article and would surely make the victim's family and victim witness (Safrina) feel ashamed and the defendant knew that what was meant by the Broken Home family was a family that was broken up and often fought.</td>
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<tr>
<td>Judgment</td>
<td>Interpretation</td>
<td>Consideration of the Defendant’s Conduct</td>
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<td>300/Pid.B/2013/PN.Mdo.</td>
<td>The crime of slander or libel means a vicious act that causes (makes) defame or vilify a person's name in a written way.</td>
<td>The Defendant's act of saying &quot;VICKY IS GARONG&quot; since it has negative connotation as explained by the expert, which means that Ir. VICKY LUMENTUT Msi.MM., (victim witness) as the Mayor of Manado is a robber, thieves, and looters, based on the legal facts at the trial of the victim witness Ir. VICKY G. S LUMENTUT, Msi. MM., has not been declared guilty through a court judgment that is final and legally binding.</td>
</tr>
<tr>
<td>464/Pid.B/2017/PN.Tjk.</td>
<td>Done by accusing someone of having committed certain actions with the intention that the accusation be publicized (known by many people). The alleged act does not need to be an act that can be punished such as stealing, embezzlement, adultery and so on, just an ordinary act so long as it is shameful; in other words, for the act accused the person being attacked or accused feels &quot;shame&quot;</td>
<td>The defendant stated words/sentences, &quot;witness Wilson as a land broker for the interests of Ronald Wijaya, and markus (Makelar Kasus/Case Broker) who acted as if he were an Advocate and Lawyer who went in and out of the Police Office and the District Court Office&quot; had attacked the honor and good name of Wilson; and for those words/sentences the witness Wilson felt &quot;ashamed&quot;. The actions of the defendant as an advocate in defending his client in accordance with his profession can be justified by sending letters to various law enforcement agencies, but the contents of the letter are not justified to slander other people or parties.</td>
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</tbody>
</table>
Referring to these judgments, it can be concluded that the courts have different ways of interpreting the element of “attacking someone’s honor or good name by accusing something.” Some judgments revealed:

- partial interpretation are made for elements of “good name” or “honor”;
- the terms “defaming” or “defamation” were interpreted grammatically, one of which is by referring to the Big Indonesian Dictionary;
- instead of explaining specific interpretation, the court directly describes the relationship between the elements and the conduct of the defendant;
- following the interpretation of criminal law experts, one of whom is R. Soesilo.

From these various ways of interpreting, it appears that there is uniformity in aspects such as accusations from the perpetrator and impact on the victim (shame). However, this is problematic because the measure used by the court to see whether or not a defamation has occurred will tend to focus on the impact of the shame felt by the victim. As a result, all forms of action tend to be punished with the offense of defamation or slander as long as it causes embarrassment to others.

Next, a general description of how the court interpreted the criminal element “content of defamation” in Article 27 paragraph (3) of the ITE Law will be described and how the court connected the interpretation of this element to the defendant’s actions in the cases being tried. The sample judgments are as follows:

1) Judgment of Yogyakarta District Court No. 382/Pid.Sus/2014/PN.Yyk;
2) Judgment of Cianjur District Court No. 182/ PID.Sus /2015/PN.Cjr;
3) Judgment of Poso District Court No. 262/Pid.Sus/2017/PN Pso;
4) Judgment of Sukoharjo District Court No. 87/Pid.Sus/2019/PN Skh;
5) Judgment of Kebumen District Court No. 223/Pid.Sus/2018/PN Kbm;
Judges' Interpretation of the element “content of defamation” in Article 27 para. (3) of the ITE Law and consideration on the defendant's action

<table>
<thead>
<tr>
<th>Judgment number</th>
<th>Interpretation</th>
<th>Consideration on the defendant's act</th>
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<tbody>
<tr>
<td>382/Pid. Sus/2014/PN.Yyk</td>
<td>The formulation of Article 27 paragraph (3) of Law Number 11 Year 2008 does not regulate new legal norms, but only affirms defamation in the Criminal Code with the addition of being carried out in the internet domain. The essence of defamation in Law Number 11 Year 2008 and the Criminal Code is an act of attacking the honor or good name of another person with the intention of making it known to the public. The offense in Article 27 paragraph (3) of Law Number 11 Year 2008 is subjective. That is, the feeling that the good name or honor has been attacked is the full right of the victim. It is the victim who can determine which part of the information or electronic document attacks his honor or reputation.</td>
<td>Judging from the lexical meaning, the word &quot;tolol&quot; means very stupid (spoken), the word &quot;miskin&quot; means wealthless, deprived (very low income), the words &quot;tak berbudaya&quot; means no culture, no advanced mind and reason, the word &quot;bangsat&quot; means a person with an evil character (spoken). Whereas in terms of the image of the contents of the Defendant's Path, at least Jogja is being harmed. The word Jogja is &quot;poor&quot;, in fact not all of Jogja is poor. The word &quot;dumb&quot; means low level, even though Jogja is a student city. The word Jogja is &quot;uncultured&quot;, while since the past Jogja has been known as a city of culture. From the testimony of the witness Fajar Riyanto, Feryan Harto Nugroho and Mardiyono felt that they felt humiliated and the witnesses' reputation was defamed, because the status made by Florence had been widely spread as an act of anarchy and contains discrimination element, offensive and tended to be provocative.</td>
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<tr>
<td>Judgment number</td>
<td>Interpretation</td>
<td>Consideration on the defendant’s act</td>
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<td>182/PID. Sus/2015/PN.Cjr</td>
<td>Based on the Judgment of the Constitutional Court Number 50/PUU/VI/2008 in its consideration stating the applicability and interpretation of Article 27 paragraph (3) of Law Number 11 Year 2008 on Information Transactions and Electronic Transactions (ITE) cannot be separated from the main legal norms in Article 310 of the Criminal Code and Article 311 of the Criminal Code as a <em>genus delict</em>.</td>
<td>To judge that a circular letter contains elements of insult or defamation, it must be seen contextually with the background events and the purpose not solely from the contents of the circular letter made, if examined carefully the substance of the circular letter is not intended to insult or defame the good name of a person including witness Nyoman Yudi Saputra but solely written by the Defendant in order to gain customer confidence about the existence of the Defendant as Director I (Marketing) of PT. Yong Kharisma Utama based on the results of the Extraordinary Shareholders Meeting because so far all customers of PT. Yong Kharisma Utama Jaya made purchase transaction for the bodywork industry only with witness Nyoman Yudi Saputra and besides that witness Nyoman Yudi Saputra created a company similar to PT. Yong Kharisma Utama Jaya within the car body industry.</td>
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<td>262/Pid. Sus/2017/PN Pso</td>
<td>Defamation is a noun that conveys the meaning of process, method, act of contempt; blasphemy: the insults hurled at him were simply outrageous. Referring to Article 310 paragraph (1) of the Criminal Code, slander or libel is defined as an act of attacking someone's honor or good name by accusing something with clear intentions to give publicity thereof.</td>
<td>These words imply that the Defendant, in his capacity as an anti-corruption activist, a member of the Touna Corruption Watch (TCW) and serves as the Regional Coordinator of Tojo Una Una, is conducting an investigation regarding an unproven information about a project in which there was allegation on the involvement of the Head of Tojo Una Una Police Resort which has not confirmed. The meaning of these words does not contain accusations against the Head of Tojo Una Una Police Resort regarding his/her involvement in a particular project or in other words that the Defendant's post does not contain defamation.</td>
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<td>87/Pid. Sus/2019/PN Skh</td>
<td>Referring to the Constitutional Court Judgment No. 50/PUUVI/2008 which states that the interpretation of the norms contained in Article 27 paragraph (3) of the Law a quo regarding defamation cannot be separated from the norms of criminal law contained in Chapter XVI concerning Defamation contained in Article 310 and Article 311 of the Criminal Code, so that the constitutionality of Article 27 paragraph (3) of the ITE Law must be linked to Articles 310 and 311 of the Criminal Code. In the Criminal Code, R. Soesilo provided explanation on defamation, namely attacking a person’s honor and good name, the honor in question is about a good name, so that those who are attacked feel ashamed;</td>
<td>In the sentence &quot;A lecturer who can also be said to be a teacher... and the teacher in Javanese is a role model (responsible and followed) but it turns out that he cannot educate his children... A Gunawan Wibisono clearly has a wife and 2 children (Ici and her sibling) but being allowed to do despicable things&quot;, in the opinion of the Panel of Judges, these sentences have humiliated Prof. Dr. Mary Astuti, MS who was considered incapable to educate her child who had committed a disgraceful act. The word &quot;disgraceful&quot; according to the Big Indonesian Dictionary is derived from the word dishonor, stain and disgrace itself which means it is inappropriate, so in the opinion of the Panel of Judges doing disgraceful things is meant to do things that are inappropriate which is a dishonor. As a result of the defendant’s actions, although not materially detrimental, according to witness testimony Prof. Dr. Mary Astuti, the witness felt that her life was disrupted and insulted by the Defendant's words that the witness as a lecturer felt she could not educate her children so they did things that were inappropriate.</td>
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<td>223/Pid. Sus/2018/ PN Kbm</td>
<td>In his plea the defense lawyer explained that through judgment Number 50/PUU-VI/2008 the interpretation of Article 27 paragraph (3) of the ITE Law cannot be separated from the main legal norms in Article 310 and Article 311 of the Criminal Code as a <em>genus delict</em>. Andi Hamzah gave an explanation of Article 310 of the Criminal Code by stating that there are at least 4 important elements of Article 310 paragraph (1), namely: (1) intentionally, (2) attacking someone's honor or good name, (3) by accusing something, (4) intentionally to give publicity, then these four elements must absolutely exist so that a person can be subject to the offense of defamation.</td>
<td>The sentences in the defendant's post on the Cipul L Facebook account contain elements of defamation aimed at attacking the honor, good name of the POLRI institution and caused immaterial harm, namely in the form of honor or the institution's good name by replacing the term POLRI as a pest &quot;wereng cokelat&quot; and as a dog animal in the word “asu”, and the defendant committed this act due to his dislike to the police.</td>
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<tr>
<td>259/Pid. Sus/2019/ PN Pkl.</td>
<td>Having content of defamation in its essence is attacking someone's honor or good name for public knowledge by accusing something.</td>
<td>As a result of the defendant's post, witness EKO YULI SETIARDI and witness MARDIYONO felt insulted and defamed. The witness even felt uncomfortable, including the witnesses' wife and children, both in the official service and in society because their good name was tarnished.</td>
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Consideration on the defendant’s act

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<th>Judgment number</th>
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<tr>
<td>84/ PID. Sus/2019/PN.Jkt.Pst.</td>
<td>The court did not explain the interpretation of the elements mentioned above.</td>
<td>The court only repeated the chronology of the case and the legal facts obtained from the trial and did not explain which part of the defendant’s actions were deemed to fulfill the elements of “content of defamation.”</td>
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Most of the sample judgments above in interpreting “content of defamation” have linked their interpretation to the slander, libel or calumny articles in the Criminal Code as a *genus delict* and affirmed that defamation in the ITE Law is the same as attacking the honor or reputation of another person by accusing something. However, as was the case with the sample of slander, libel, or calumny cases charged under the Criminal Code, the courts’ interpretation tend to focus on the existence of the accusation and the impact of shame on the victim in determining whether the defendant’s actions constituted slander, libel or calumny.

### 3.4.2. Court Consideration in Deciding Cases on Defamation to Authority or Public Institution

Article 207 of the Criminal Code does not explicitly have the element of “attacking someone’s honor or good name by accusing something”, however R. Soesilo explained that “defaming” in the element “defaming verbally or in writing” is the same as the offense of slander or libel under Article 310 of the Criminal Code, namely attacking the good name and honor. Therefore, the discussion on the application of the article will also be focused on the element of “defaming verbally or in writing” similar to the focus of discussion in the previous section which emphasized attacking honor or reputation.

Sample judgments in this section are:
1) Judgment of Rote Ndao District Court No. 36/Pid.B/2008/PN.RND;
2) Judgment of Marisa District Court No. 20/PID.B/2014/PN.MARISA;
3) Judgment of Muaro District Court No. 32/Pid.B/2016/PN Mrj;
4) Judgment of Gorontalo District Court No. 199/Pid.B/2013/PN.Gtlo;
5) Judgment of Mataram District Court No. 393/Pid.B/2018/PN Mtr;
Judgment of West Jakarta District Court No. 1302/Pid.SUS/2019/PN.JKT.BRT.
Judges Interpretation on the element of “defame” or “defaming” in Article 207 of the Criminal Code and Consideration on the Defendant’s Action

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<th>Consideration on the defendant’s act</th>
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<tr>
<td>36/Pid.B/2008/PN.RND.</td>
<td>Attacking honor and good name of someone</td>
<td>The defendant stated that, “The sub-district head is barbaric, the regent is insolent” in an interview with journalists and ordered the journalists to write down his statement so that his words were published in the Timor Express daily and the Rote Barat Laut Sub-District Head and the Rote Ndao Regent were then embarrassed and felt insulted by the defendant's statement</td>
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<tr>
<td>20/PID.B/2014/PN.MARISA</td>
<td>An action committed by him/her that causes to attack the good name and honor of others through words or writing</td>
<td>The defendant was proven to have uttered the words &quot;Chief of the District Court Marisa is a pig, sorry that your mother gave birth to you, ran like a thief, only able to steal people's money, you do not act as a law enforcer.&quot; The defendant stated these words to the Chief of the Marisa District Court and not personally to Lucky R. Kalalo (name of the District Court Chief), and at that time the Marisa District Court Chief was on duty.</td>
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<td>Judgment number</td>
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<td>32/Pid.B/2016/PN Mrj</td>
<td>Attacking the good name and honor by words or in writing/written</td>
<td>In the trial of the Syafrital case, when the Defendant was asked by the President Judge to confront the Minutes of Examination of the inquiry against the Defendant, he uttered the words &quot;pantek ma, mananyo-nanyo se&quot; ([female genitalia], why do you ask) to the Panel of Judges because the Defendant was emotional. The word pantek itself in Minangkabau in general, and in Sijunjung in particular, means female genitalia. According to the Panel of Judges, this means that the Defendant has equated the Panel of Judges hearing the trial of the Syafrital case with the meaning of the word pantek.</td>
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<td>199/ Pid.B/2013/ PN.Gtlo</td>
<td>The act of attacking someone's honor or reputation by accusing something with a clear intention so that it becomes public knowledge</td>
<td>In the offense of defamation, the legal subject who is the victim must be clear and concrete and cannot be generalized. After the Panel of Judges examined the words uploaded by the defendant, namely “in the city of Gorontalo there has been an irregularity in DPID funds amounting to Rp. 9,604,776,073 for the 2010 Fiscal Year”, the Panel of Judges is of the opinion that these words in no way indicate the existence of a legal subject clearly or concretely intended, the words &quot;in the city of Gorontalo&quot; did not directly indicate the City Government which at that time was led by Mayor Adhan Dambea, but had a plural meaning, that is, it could mean anyone in the city of Gorontalo, both individuals and organizations. Apart from that, the words &quot;irregularity&quot; as uploaded by the defendant are indeed contained in the examination report of the Audit Board of Indonesia and the defendant explicitly stated the source of his writing.</td>
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<td>Judgment number</td>
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<td>393/ Pid.B/2018/ PN Mtr</td>
<td>The court did not explain the interpretation of the elements mentioned above.</td>
<td>The comment written by the Defendant by mentioning &quot;Jokowi tai (Jokowi is shit)&quot; is a negative assessment because it undermines social appreciation to President Jokowi both personally and as the ruler/head of the State and the Defendant did not annul and did not revoke his sentence as a mistake. The Defendant even ordered group members who commented contrary to convey the message to President Jokowi to meet the Defendant: &quot;Yes, why do you object! Where are you! Tell your Jokowi to meet me and you&quot;</td>
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<tr>
<td>1302/Pid. SUS/2019/ PN.JKT.BRT.</td>
<td>The court did not explain the interpretation of the elements mentioned above.</td>
<td>The court only repeated the chronology of the case and the legal facts obtained from the trial and did not explain which part of the defendant’s actions were deemed to fulfill the elements of &quot;defaming&quot;.</td>
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Similar to judgments on defamation cases under the ITE Law, most of the sample judgments related to defamations against authorities or public bodies interpreted “defaming” element in Article 207 of the Criminal Code equally as the slander or libel articles in Article 310 of the Criminal Code. However, in general it can be concluded that the courts above cases tended to focus on the content or nature of the speech, many of them were harsh and inappropriate. In fact, there are court judgments that did not elaborate their considerations, but only repeat the chronology of cases and legal facts. Practices like this can pose a danger to the protection of the right to freedom of expression because the court immediately concluded that the defendant’s expression must be restricted (or in other words be punished) without providing comprehensive reasons why such expression legitimate to be limited.
3.5. Understanding Defamation in Indonesian Criminal Law and Human Rights Law

This section will describe in a more fundamental and in-depth manner the norms for defamation offenses, particularly Article 310 of the Criminal Code, Article 311 of the Criminal Code, Article 27 paragraph (3) of the ITE Law, and Article 207 of the Criminal Code. The explanation will focus on the principles and standards that apply in national legal instruments, international human rights law, and the opinions of experts.

3.5.1. Defining Slander, Libel, or Calumny

As explained in the previous chapter, the right to freedom of expression is one of the human rights guaranteed by the constitution through Article 28E paragraph (3) and Article 28F of the 1945 Constitution. As the highest law, the 1945 Constitution is a guideline for establishing legal norms for lower laws. The Human Rights Law also regulates the guarantee of the right to freedom of expression in Article 14 and Article 23, in line with the norms of the 1945 Constitution. It has also been explained previously that the right to freedom of expression is a human right that can be limited. However, because freedom of expression is a human right that is guaranteed by constitutional norms, limitation on this right must be strict to prevent violations of citizens’ constitutional rights. Therefore, the limitations must be in accordance with the provisions of international and national human rights law. In this case, the application of defamation offenses as a limitation on the right to freedom of expression also means that it must comply with these human rights law standards.\textsuperscript{114}

As previously mentioned, slander and libel offenses have been regulated in Article 310 of the Criminal Code. Referring to R. Soesilo's opinion, the definition of various elements of defamation in Article 310 of the Criminal Code are:\textsuperscript{115}

1. “Defaming” is attacking someone's honor and good name and those who are attacked usually feel ashamed.
2. “Honor” which is the object of attack is only related to good name, not “honor” in a sexual context.
3. The object of defamation must be a human or an individual, not a government agency or administrator of an association or a group of citizens or other qualifications. There are already arrangements for these objects in other articles.

\textsuperscript{114} See UN Human Rights Committee, ICCPR General Comment 34..., \textit{Op. Cit.}, para. 22.

As explained in the previous chapter, human rights legal standards in limiting the right to freedom of expression require 3 (three) aspects that must be met, namely: 1) restrictions must be regulated by law; 2) restrictions may only be made with the aim of protecting the interests listed in Article 19 paragraph (3) of the ICCPR; and 3) restrictions must fulfil the proportionality and necessity tests.

4. Regarding the element of “accusing something”, it doesn’t have to be an accusation of an act that can be punished, but rather an act that is shameful in nature.

5. Slander or libel does not need to be done in public. It is sufficient to say that this act is proven if the perpetrator intends to broadcast the accusations he conveys.

In order to deepen understanding of these provisions, it is also important to look at the treatise on the discussion of the Dutch Criminal Code which is the reference for the current Indonesian Criminal Code. The equivalent of defamation offense in the Indonesian Criminal Code is Article 261-Article 271 of the Dutch Criminal Code. The treatise on the discussion of the Dutch Criminal Code or commonly referred to as Memorie van Toelichting (MvT) explains that there are three main principles that must be considered in defamation cases, namely: (i) no defamation (beleediging) without intention to defame; (ii) there is no calumny (laster) without being proven that there was intention regarding the untruth/lies of the allegations made (opzettelijke onwaarheid der betigting); and (iii) There is no examination of truth or lies except in matters (cases) specified in the law. This rationale was adopted when the Dutch East Indies Government drafted the Criminal Code for the Dutch East Indies colonies (which was later legalized to become the Indonesian Criminal Code after Indonesia’s independence).

Article 310 of the Criminal Code in paragraph (3) also provides an “exculpatory clause” for slander or libel for anyone who is suspected of committing slander or libel should not be punished as long as his/her actions were carried out “in the public interest” or as a compulsion to defend him/herself. Referring to Sianturi’s opinion, the phrase “in the public interest” is interpreted to mean that the purpose of the perpetrator accusing something is so that the public is aware of the person who is “defamed”.

Based on various afore-mentioned elaborations, a number of important understanding in interpreting slander and libel in Article 310 of the Criminal Code are:

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116 The Criminal Code of Indonesia is adopted from Dutch East Indies Criminal Code (WvS Ned. Indies) that applied during the colonial era of Dutch East Indies. The Dutch East Indies Criminal Code was a modification of the Dutch Criminal Code (Wetboek van Strafrecht) which only applied in the jurisdiction of the Kingdom of the Netherlands at that time and most of its substance was still the same as what was regulated in the Dutch Criminal Code. Thus, it is very relevant to refer to the minutes of discussion of the Dutch Criminal Code at that time to see the meaning of various provisions in the Dutch-Indies Criminal Code. See Arsil (Ed.), Terjemahan Beberapa Bagian Risalah Pembahasan Wetboek van Strafrecht dan Wetboek van Strafrecht voor Nederlandsche Indië (KUHP Belanda dan KUHP Indonesia), (Jakarta: ICJR, 2021), pp. 7-9.


1. There is no clear enough definition of the element of “attacking honor”. R. Soesilo views in the context of habits, the impact that is usually caused is shame for the person who is the victim of the act.
2. An act is not classified as slander or libel if it is committed in the public interest or in the context of self-defense.
3. In examining cases of slander or libel, the element of intent, in the sense of intention to offend or defame, must be proven.
4. Slander and libel can only be prosecuted if it is clear that there are parties who feel harmed by the act of defamation.
5. The object of slander or libel is an individual, so actions that are considered slander or libel against an organization or corporation cannot be convicted under Article 310 paragraph (1) or paragraph (2) of the Criminal Code.
6. The act of slander or libel does not have to take place in a public place but rather emphasizes the intentions of the perpetrator to make what is alleged as public knowledge.

Regarding calumny, based on the formulation of the regulation, the essence of the prohibited acts in Article 311 paragraph (1) of the Criminal Code are the same acts as stipulated in Article 310 paragraphs (1) and paragraph (2) of the Criminal Code, namely slander or libel with accusation nature. This crime has a distinguishing element so that it is referred to as calumny, due to an additional element. The additional element is if the person who committed the offense is given the opportunity to prove his accusation, but cannot prove that his/her accusation is true and also committed the accusation even though s/he knew that his/her accusation is not true. Regarding this element, the MvT of the Dutch Criminal Code provides a comprehensive explanation:

“Someone who states the truth or feels they are speaking/conveying the truth can only defame (beleedigen), but they cannot possibly be seen as (guilty of) calumny (lasteren). Only those who – contrary to their good judgment/consideration or common sense (tegen beter weten; against his/her own better judgment) – accuse another person, with the intention of defaming him/her, with false/incorrect facts, so that his/her good name or honor is attacked – can be said to be calumnious”

The discussion on Article 311 paragraph (1) of the Criminal Code will not go deep into the additional element because the main characteristics of the act being punished remain the same as the crime of slander and libel in Article 310 of the Criminal Code: “attacking someone’s honor or reputation by accusing something.”

Regarding the crime of defamation in the ITE Law as stipulated in Article 27 paragraph (3), almost all phrases that are important parts of the elements of

119 Arsil (Ed.)..., Loc. Cit.
a crime have been given an explanation, even though the explanation is not restrictive. A number of other phrases were not given an explanation, namely the phrases “intentionally” and “without right.”

Phrases that have been defined in the ITE Law are:
1. Distributing is sending and/or distributing electronic information and/or electronic documents to many people or various parties through electronic systems.
2. Transmitting, is sending electronic information and/or electronic documents addressed to another party through the electronic system.
3. Make accessible, are all actions other than distributing and transmitting through electronic systems that cause electronic information and/or electronic documents to be known by other parties or the public.
4. Content of defamation, it is explained that the meaning of the phrase “content of defamation” refers to the provisions for slander, libel, and/or calumny regulated in the Criminal Code (KUHP). Provisions of the Criminal Code relating to slander, libel, and/or calumny are regulated in Article 310 and Article 311, so that the elements of the crimes in regards to “content of defamation” refer to these provisions.

In its development, Article 27 paragraph (3) has an additional interpretation support through the Joint Decree of the Minister of Communication and Information of the Republic of Indonesia No. 229 Year 2021, Attorney General of the Republic of Indonesia No. 154 Year 2021, and the Head of the Indonesian National Police No. KB/2/VI/2021 on Implementation Guidelines for Certain Articles in Law Number 11 Year 2008 on Information and Electronic Transactions as amended by Law Number 19 Year 2016 (hereinafter referred to as “SKB UU ITE”), which explains the guiding principles for the application of this Article are as follows:

1. In accordance with the consideration of the Constitutional Court Judgment No. 50/PUU-VI/2008 of 2008, and the elucidation of Article 27 paragraph (3) of the ITE Law, the definition of defamation refers to and cannot be separated from the provisions of Article 310 and Article 311 of the Criminal Code. Article 310 is an offense against someone’s honor by accusing something to make it public. Whereas Article 311 relates to the act of accusing someone with accusations that were known to be untrue by the perpetrator.
2. With the consideration of Constitutional Court Judgment No. 50/PUU-VI/2008, Article 310 of the Criminal Code defines defamation as an act of accusing something to make it public. The provisions of Article 311 of the Criminal Code relate to the act of accusing someone with accusations that were known to be untrue by the perpetrator.

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120 Surat Keputusan Bersama Menteri Komunikasi dan Informatika Republik Indonesia Nomor 229 Tahun 2021, Jaksagung Republik Indonesia, Nomor 154 Tahun 2021, dan Kepala Kepolisian Negara Republik Indonesia Nomor KB/2/VI/2021 tentang Pedoman Implementasi atas Pasal Tertentu dalam Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik sebagaimana telah diubah dengan Undang-Undang Nomor 19 Tahun 2016 (hereby SKB UU ITE), Lampiran, pp. 9-14.
VI/2008, it can be concluded, it is not a criminal offense that violates Article 27 paragraph (3) of the ITE Law if the content that is transmitted, distributed, and/or made accessible is in the form of defamations which are categorized as curse, ridicule, and/or inappropriate words. Instead, such acts could be qualified as minor defamation as referred to in Article 315 of the Criminal Code which, according to the elucidation of Law No. 19 Year 2016 concerning Amendments to Law no. 11 of 2008 and the Constitutional Court Judgment, are not included in the references in Article 27 (3) of the ITE Law.

3. Not an offense related to defamation, if the content that is transmitted, distributed, and/or made accessible is in the form of an assessment, opinion, evaluation or a fact.

4. In the event that the alleged fact is an act that is being prosecuted, the truth must be initially proven before law enforcement officials could process complaints regarding defamation under the ITE Law.

5. The criminal offense of Article 27 paragraph (3) of the ITE Law is an absolute complaint offense as referred to in Article 45 paragraph (5) of the ITE Law. As an absolute complaint offense, it must be the victim himself who complains to law enforcement officials, except in cases where the victim is underage or in guardianship.

6. Victims as complainants must be individuals with specific identities, and not institutions, corporations, professions or positions.

7. The focus of the punishment of Article 27 paragraph (3) of the ITE Law is not focused on the feelings of the victim, but on the deliberate actions of the perpetrators (dolus) with the intention of distributing/transmitting/making accessible any content that attacks an individual’s honor by accusing something so that it becomes public knowledge (Article 310 of the Criminal Code).

8. The element “to give publicity thereof” (in the context of transmission/distribution, and/or making it accessible) must be fulfilled in the main elements (klacht delict) of Article 310 and Article 311 of the Criminal Code are the references of Article 27 paragraph (3) of the ITE Law.

9. The criterion “to give publicity thereof” can be equated with “so that it can be known by the public”. General or public itself can be interpreted as a collection of many people who mostly do not know each other.

10. The criteria for “public knowledge” can be in the form of uploading to social media accounts with public settings, uploading content or broadcasting something on group chat applications with open group setting where anyone can join the conversation group, as well as no content or information traffic control, anyone can upload and share outside, or in other words without any moderation (open group).

11. It is not an offense of defamation when the content is distributed through closed or limited chat group facilities, such as family conversation groups,
close friendship groups, professional groups, office groups, campus or educational institution groups.

12. For reporting on the internet carried out by press institutions, which is journalistic work in accordance with the provisions of Law no. 40 Year 1999 on Press, the mechanism used shall follow Law No. 40 Year 1999 on Press as a *lex specialis*, instead of Article 27 paragraph (3) of the ITE Law. For cases related to the press, it is necessary to involve the Press Council. When journalists personally upload their personal writings on social media or the internet, the ITE Law including its Article 27 paragraph (3), will still apply.

3.5.2. Understanding the Element of Intentionally in Slander, Libel, or Calumny

Article 310 and Article 311 of the Criminal Code and Article 27 (3) all explicitly mention the element “intentionally attacking honor or reputation” as one of the elements. Thus, this element becomes one of the things that must be proven from the actions of a defendant. Referring to the MvT regarding the Defamation chapter in the Dutch Criminal Code, one of the principles in assessing whether an act is a defamation is there is no defamation without intention (*opzet*) to defame\(^{121}\), so the will of the perpetrator should be the biggest factor influencing the judge’s judgement. The MvT of the Dutch Criminal Code also explains that the main requirement for defamation is the presence of *animus injuriandi* or the intention to damage the honor of another (*eergevoel te krenken*) or to degrade an individual before others.\(^ {122}\) The explanation in the MvT of the Dutch Criminal Code is in accordance with the principles in Ancient Roman law, namely the need for *animus injuriandi*, which is simply interpreted as an intention to defame (injure honor or reputation).\(^ {123}\)

Historically, this doctrine, which originated in ancient Roman law, was used in enforcing laws relating to defamations. The *animus injuriandi* is a key element because it has the evil nature of defamation. Ancient Roman law did not require an element of truth or fact to judge whether a word or expression was a defamation, because words or expressions that contain facts can still be malicious. One cannot easily defend him/herself that the words or expressions s/he conveyed contain the truth to be acquitted from accusations of defaming. Words, writings, pictures or expressions that contain facts or the truth can still be punished as defamations if it is proven that in the actions of the perpetrator there was an intention to degrade

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\(^{121}\) Arsil (Ed.),... *Loc. Cit.*

\(^{122}\) *Ibid.*

another person.\textsuperscript{124}

This approach is similar to the legal approach in Indonesia towards defamation offenses which is described in the formulation of Article 310 paragraph (1) and paragraph (2) of the Criminal Code (slander and libel). These articles do not include the existences of truth or fact in the allegations as part of the elements. In fact, these articles include the element of “intentionally attacking honor or good name” which must be proven by the court. Intentional acts of defamation are fully described as \textit{animus injuriandi} when it is associated with elements of acts of injuring the honor of others by accusing something and with the intention of making it public. This whole series of elements shows that in fact Article 310 paragraph (1) and paragraph (2) of the Criminal Code as a slander or libel offense actually requires the existence of \textit{animus injuriandi} or intention to attack honor. So, it is inappropriate if the principle of \textit{animus injuriandi} is ignored in the examination of evidence. This view is also similar to the regulation of defamation offenses in the Dutch Criminal Code as explained in the previous paragraphs.

International human rights law standards regarding the right to freedom of expression do indeed allow for defense of truth.\textsuperscript{125} In the context of national law, proving the truth is accommodated in Article 311 paragraph (1) of the Criminal Code, but it is not an element of Article 310 of the Criminal Code. Article 311 paragraph (1) of the Criminal Code provide an opportunity for a slander or libel defendant to prove that what he was accusing is true. This article cannot be separated from Article 312 of the Criminal Code which specifically explains that proving the truth of the accusation is only permissible in two circumstances: 1) when the judges deem it necessary to check the truth of the defendant’s statement that his/her actions were carried out in the public interest or because s/he was forced to self-defense; or 2) if an official is accused of something in carrying out his duties. Proving the truth related to public interest or the compulsion to defend oneself is also included in Article 310 paragraph (3) of the Criminal Code which is the exculpatory for defendant of slander or libel under Article 310 of the Criminal Code. Based on the analysis of Article 310, Article 311 and Article 312 of the Criminal Code it can be concluded that the Criminal Code has also regulated and allowed defense of truth, with the emphasize that such defense must be based on the objective to protect the public interest or for self-defence.

When the judges see that there is truth in the defendant’s accusation regarding the two prerequisites, they can acquit the defendant from the charge. However, if the judges do not find any truth in the allegations made by the defendant, only then

\\textsuperscript{124} Ibid., pp. 4-8.
\textsuperscript{125} UN Human Rights Committee, ICCPR General Comment 34..., Op. Cit., para. 47.
they could punish the perpetrator’s actions, in this case as an act of calumny.\footnote{R. Soesilo..., \textit{Op. Cit.}, p. 226.} In other words, when it is proven that there is truth in the accused’s accusation relating to one of the two prerequisites, then it shall be considered that there was no evil nature of the act committed.

However, in the context of calumny, in declaring the defendant’s guilt another element in Article 311 paragraph (1) of the Criminal Code must also be fulfilled, that the accusations were made contrary to what the defendant knew. In other words, there is an intention to accuse something untrue even though the defendant already knew other facts that were different from what s/he accused the person who was calumniated.

The confirmation regarding \textit{animus injuriandi} in slander, libel, or calumny is also included in the SKB UU ITE. As previously mentioned, in the guidelines for the implementation of Article 27 paragraph (3), the Joint Decree on the ITE Law explains that the penalization focus of Article 27 paragraph (3) is not the feelings of the victim, but on the actions of the perpetrators that carried out intentionally (\textit{dolus}).\footnote{SKB UU ITE..., \textit{Op. Cit.}, Lampiran (Annex -eng) p. 12.} This explanation is consistent with the existence of the element “intentionally” in Article 310 of the Criminal Code.

The next question is what kind of “intention” are included as criminal acts of defamation. Courts in various judgments recognize intentional forms in three types, namely: 1) purposeful intent; 2) intentionality with awareness of certainty; and 3) intentionality with awareness of possibility. By referring to the history of \textit{animus injuriandi} and the explanation in the MVT of the Dutch Criminal Code which has been presented in the previous paragraph, it can be concluded that in the crime of defamation the evil nature of the act is attached to the purpose of the perpetrator’s actions, which is to degrade others. Thus, acts of defamation must have one and only one purpose, namely to degrade or damage the reputation of others and not for other purposes. So, the right form of intention to be considered to prove the intentional element in the slander or libel offense is purposeful intent and that purpose is to attack the honor of another person.

3.5.3. Understanding the Element “With the Intention to Give Publicity Thereof” and “In Public”

Another element that also needs to be deepened in the discussion is regarding the element “with the intention to give publicity thereof”. The elements contained in Article 310 paragraph (1) of the Criminal Code are different from the phrase “in public” in Article 310 paragraph (2) of the Criminal Code and several other offenses (Article 154, Article 156a, and Article 207 of the Criminal Code). Criminal experts
have different opinions regarding the phrase “in public”. R. Soesilo said that an act can be said to be committed in public if it can be seen and visited by many people (in a public place). Another criminal law expert, J. M. van Bemmelen also expressed a similar opinion, that “in public” includes acts committed in public places or in places that can be seen from public places.

A different opinion from Lamintang, who stated that the element of “in public” does not always have to mean that an act is committed in a public place, but sufficient as long as the action can be heard or seen by the public. While Wirjono Prodjodikoro is of the opinion that this does not mean that an act must be committed in an open public space, but as long as the act is not carried out in secret or at least can be seen by other people, then the element of “in public” can be considered fulfilled.

The element “with the intention to give publicity thereof” is clearly different from the element “in public” because there is an element “with the intention” which describes the specific purpose and intention of making a matter “publicly known”. As a consequence, what needs to be proven is: 1) is it true that the perpetrator who accused something to another person wanted this matter to be publicly known; and 2) is it true that many people have come to know about this because of the perpetrator’s actions.

The same understanding needs to be applied to defamation provided by the ITE Law. The ITE Law does not explicitly mention the element “with the intention to give publicity thereof”, but only the element “distributing and/or transmitting and/or making it accessible”. However, the SKB UU ITE has explained that in examining the element “distributing and/or transmitting and/or making it accessible” the element “to give publicity thereof” must also be fulfilled as in the main elements of Article 310 and Article 311 of the Criminal Code which are the references to Article 27 (3) ITE Law.

Logically, this formulation makes it unnecessary for the act of slander or libel to consider whether the act was committed in an open location or near a highway or other public place, as long as many other people or the public who previously did not know became aware of the allegations made by the perpetrator. Therefore, even though it was not committed in an open space, an act of slander or libel can still be punished as long as all elements are proven. This is also in line with R. Soesilo’s view that this element has been fulfilled if it is proven that the perpetrator

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130 SKB UU ITE..., Loc. Cit.
intended to publish or spread the accusation, there is no need to do it in an open space.

The element “with the intention to give publicity thereof” is contained in Article 310 paragraph (1) of the Criminal Code which outlines the main offenses of the criminal act of defamation. The aggravating offense of this article is then contained in Article 310 paragraph (2) of the Criminal Code (defamation in writing/libel), which regulates similar act expressed in writing or images that are broadcasted, shown or posted in public. It is in Article 310 paragraph (2) of the Criminal Code that the element “in public” must be considered. So, in the process of proving Article 310 paragraph (1) of the Criminal Code, it is sufficient to consider the element “with the intention to give publicity thereof.” However, when dealing with Article 310 paragraph (2) of the Criminal Code, in addition to the element “with the intention to give publicity thereof” must be proven, the element “in public” must also be proven so that all elements of the act can be said to be fulfilled. This becomes logical when connected with the element that precedes “in public” in Article 310 paragraph (2) of the Criminal Code, which is the element “writing or image that is broadcasted, shown or posted” because to post or display writing or pictures usually requires a place. The same logic of thinking must also be applied to the evidence of Article 311 paragraph (1) of the Criminal Code. It's just that in dealing with Article 311 paragraph (1) of the Criminal Code, it is necessary to clarify in advance the qualifications of the alleged act, whether it was an act of slander (verbal defamation) or libel (written defamation).

The element “with the intention to give publicity thereof” needs to be linked to a legitimate limitation purpose, which is to protect the rights and reputation of others. This element must be interpreted as protecting a person’s honor in public from statements in oral or written that are degrading and specifically addressed to the public or made in public. This means that private and personal communication cannot be the object of punishment in this provision. Fulfillment of the element “in public” or “with the intention to give publicity thereof” in the slander, libel, or calumny provisions requires an act of publication or broadcasting. However, on the other hand, not all forms of statements or opinions that can ultimately be publicly known can be considered to fulfill the element “with the intention to give publicity thereof” because this really depends on the intention of the speaker or author to publish or broadcast such statement or opinion.

3.5.4. Understanding the Subject of Defamation in Slander, Libel, or Calumny

Article 19 paragraph (3) of the ICCPR explains that one of the legitimate purposes of limiting the right to freedom of expression is to protect the rights or reputation of “others”. General Comment No. 34 then explains further about the meaning of
“others” in that article, namely other individuals or as members of a community identified on the basis of religion or ethnicity. In the context of the reputation of “others” as members of a community, the UN Human Rights Committee refers to a case in Canada where a teacher was removed from his position at a school because he was proven to have issued statements that attacked the honor and discriminated against Jews through his various writings. In addition, an explanation regarding the protection of reputation can also be seen in Article 17 of the ICCPR which is then explained in more detail through General Comment No. 16. In the General Comment the UN Human Rights Committee uses the term “personal honor and reputation” as a right that must be protected by the state.

Thus, it can be concluded that the human rights legal framework attaches the right to protection of reputation to individuals and not to corporations. Individuals as members of a community that is defined on the basis of religion or ethnicity are also included in this protection but what should be noted in this context is that reputation remains attached to the individuals, not to their religion or ethnicity.

Furthermore, to deepen the historical explanation regarding the elements of Article 310 paragraph (1) of the Criminal Code, it is also important to refer to the discussion treatise from Wetboek van Strafrecht (Dutch Criminal Code) which was in effect when the Dutch East Indies colonial government colonized Indonesian territory. In the report by Tweede Kamer (Lower House) of the Kingdom of the Netherlands at that time regarding the chapter on defamation in Book II of the Dutch Criminal Code, it was mentioned that there were questions on whether the act of defaming personae morales (corporations or legal entities) or aimed at groups of people who, for example, adhered to or supporting the ideology of liberalism and so on can be subject to criminal penalties. The answer from the drafter of the Dutch Criminal Code at that time was negative, in the sense that this form of action could not be criminally punished because it was not included in the act of defaming an individual.

The explanation from the drafter of the Dutch Criminal Code reinforces the view that the current offense of defamation in the Indonesian Criminal Code is only meant to regulate defamation to individuals (natural persons) and is not at all intended to punish acts of defamation directed at corporations or legal entities. This is also in line with the international human rights law standards described in the previous paragraph, namely that reputation is attached to individuals. Thus,

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131 UN Human Rights Committee, ICCPR General Comment 34..., Op. Cit., par. 28.
134 Ibid., p. 408.
the application of defamation offenses should be interpreted as a defamation to individuals and not to corporations or legal entities. When the state restricts the right to freedom of expression with the aim of protecting reputation, it means that what can be protected is the honor or reputation of the individual.

3.5.5. Understanding Defamation against Authority or Public Institution
In accordance with the explanation in the previous paragraphs, defamations to authorities or public bodies regulated in Article 207 of the Criminal Code are the same defamations as regulated in Article 310 of the Criminal Code. Thus, various interpretations and standards of criminal law and human rights law related to slander, libel, or calumny must also apply to the application of Article 207 of the Criminal Code.

Various authoritative international human rights law references and the views of experts are in the same view that protection against criticism from the general public as a form of the right to freedom of expression should receive heavier weight when in conflict with the interest of protecting the reputation of a public figure. Therefore, the application of criminal defamation articles as a form of limiting the right to freedom of expression cannot be easily applied as a justification for protecting the reputation of public officials.

General Comment No. 34 explains that various types of expressions or statements that arise as public discourse that are closely related to issues of politics and government as well as public figures, including politicians and public officials, receive wider protection in the context of human rights law. Furthermore, the fact that the form of expression or statement made by someone turns out to be offensive or attacks the honor or reputation of a public official is not sufficient reason to punish that person. The UN Human Rights Committee also emphasizes that it is legal to criticize and be in opposition to heads of state and heads of government.

Nihal Jayawickrama, by referring to various court judgments in various countries, explained that someone who is involved in social and political activities naturally understands that there is greater attention from the public and the media towards him. A politician's reputation can still be protected, but the limits on the criticism he deserves must be wider than what the average person can accept. This is

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136 Ibid.
137 Ibid.
139 Ibid. See also Catalina Botero Marino..., Op. Cit., p. 16.
due to the reason that people who have influence or are involved in issues of public interest have voluntarily opened themselves up to strict scrutiny from the public and it is very natural that various kinds of criticism arise because their activities infiltrate private boundaries so that it is included in the public domain for debate. According to Jayawickrama, criticism of a politician can be considered as an attack if the criticism has caused extreme hatred towards targeted politician’s character and good name.

Referring to the various explanations above, the application of defamation provision in the context of Indonesian law for acts that are alleged as defamation to politicians or other public figures must be limited and strict. Limited in the sense that not all actions that defame public figures must be punished, and even very offensive public criticism does not necessarily mean that it is a defamation. Strict in the sense that the judge must examine carefully the fulfillment of the elements and the degree of seriousness of the impact of the defendant’s actions on the character of the public figure in the eyes of the general public.

Article 207 of the Criminal Code criminalizes acts of defaming authorities, who are included in the category of public figures within understanding of human rights law, or public bodies/institution. Initially, the provisions of Article 207 of the Criminal Code did not have an equivalent in the Dutch Criminal Code. Andi Hamzah stated that it can be assumed that this article was originally created specifically in the Dutch East Indies to maintain the authority of colonial officials. The regulatory substance of Article 207 of the Criminal Code categorized as the types of regulations that have received criticism from the UN Human Rights Committee, such as *lèse-majesté*, defaming the head of state, insulting flags or other symbols, because their application often poses a threat to democracy. In fact, Indonesia also had criminal articles that regulated defamation to the head of state in Article 134, Article 136 bis, and Article 137 of the Criminal Code which were later revoked by the Constitutional Court (MK). However, Article 207 of the Criminal Code, which is substantially similar to those articles, is still in effect.

The Constitutional Court, in examining Article 134, Article 136 bis, and Article 137

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142 The Netherlands include similar offense to Article 207 of the Criminal Code in 1978 *through Staatblad 1978,155*, by revising Article 267 WvS which previously include defamation against public officials that is regulated by Article 316 of the Criminal Code.
143 Andi Hamzah, *Delik-Delik Tertentu (Speciale Delicten) dalam KUHP*, (Jakarta: Sinar Grafika, 2015), p. 189
144 *Lèse-majesté* simply means crimes against honor of the head of state or sovereign authority. Originated from French, it literally means injuring the monarch. See [https://www.merriam-webster.com/dictionary/lèse-majesté](https://www.merriam-webster.com/dictionary/lèse-majesté).
145 UN Human Rights Committee, ICCPR General Comment 34..., *Loc. Cit.*
of the Criminal Code, gave their considerations that these articles: (i) may cause legal uncertainty because they are very vulnerable to interpretation whether a protest, statement of opinion or thought constitutes criticism or defamation to the President and/or Vice President; (ii) has the opportunity to impede the right to freedom of expression of thoughts verbally, in writing and to express attitudes when the three criminal articles in question are always used by law enforcement against protest; (iii) can become an obstacle and/or challenge to the possibility of clarifying whether the President and/or Vice President has committed a violation as referred to in Article 7A of the 1945 Constitution. The Constitutional Court also stated that the Criminal Code still contains provisions such as Article 134, Article 136 bis, and Article 137 which negates the principle of equality before the law, restrict freedom of expression of thoughts and opinions, freedom of information, and the principle of legal certainty.

The Constitutional Court is of the view that articles of lèse-majesté in the form of defaming the President and/or Vice President should apply Article 310 - Article 321 of the Criminal Code when the defamation is aimed at personal qualities and Article 207 of the Criminal Code shall apply in terms of defaming the President and/or Vice President as officials. Furthermore, in its considerations the Constitutional Court stated “in the event that an act is suspected of being a defamation to the President, Vice President, authorities or other public bodies (gestelde macht of openbaar lichaam), then the prosecutions under Article 207 of the Criminal Code must be carried out on the basis of a complaint (bij klacht).”

In reviewing Article 207 of the Criminal Code at the Constitutional Court, which was reviewed together with Article 310 paragraph (1) and paragraph (2) of the Criminal Code, Article 311 paragraph (1) of the Criminal Code, and Article 316 of the Criminal Code, through Judgment Number 14/PUU-VI/2008, the Constitutional Court stated that these articles need to remain in place in order to protect the constitutional rights of citizens, namely the right to honor and dignity, and all the issues raised by applicants of the judicial review. The problem in Article 207 of the Criminal Code is also considered a problem of application instead of the constitutionality of norms. In this judgment, the Constitutional Court reiterated its considerations in the previous decision (Judgment Number 013-022/PUU-IV/2006), that prosecution under Article 207 of the Criminal Code must be based on a complaint and in the future requires adjustments that are in line with the opinion of the Constitutional Court on Article 134, Article 136 bis, and Article 137 of the Criminal Code. The

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147 Ibid., p. 60.
148 Ibid.
149 What meant by the requirement here is through legislation instead of judicial review at the Constitutional Court. See Ibid., p. 61.
opinion of the Constitutional Court is a recommendation indicating the need for an evaluation of Article 207 of the Criminal Code.

3.6. Protection of Reputation in Human Rights Law and its Relation to Slander, Libel, or Calumny

The provisions regarding defamations are closely related to the norms of restriction of freedom of expression in international human rights law as stipulated in Article 19 paragraph (3) of the ICCPR, which explains that restrictions on the right to freedom of expression can be enforced if it is aimed at several reasons, one of which is to respect the rights or reputation others. In national law, contempt articles as stipulated in Article 310 paragraph (1) and paragraph (2) of the Criminal Code, Article 311 paragraph (1) of the Criminal Code and Article 27 (3) of the ITE Law are closely related to protecting the rights of others, namely the right to the honor and reputation of others.

To understand the protection of reputation we can refer to a number of interpretations that already become an international consensus. In simple terms, reputation is defined as an action or other that causes a person to get a good name or respect from others. ARTICLE 19 in its report explains that reputation can be damaged through various actions, for example by degrading someone, causing someone to be humiliated or hated in public, or by making someone shunned or avoided. Furthermore, the Syracuse Principles describe standards of necessity to limit the exercise of a right, namely only if the limitation:

a. Conducted based on one of the limitation requirements as regulated in the ICCPR;
b. to respond to urgent public or social needs;
c. aims to protect legitimate interests in accordance to the ICCPR;
d. proportional to the interests to be protected.

The explanation in the Siracusa Principle reflects that limitations on freedom of expression to protect reputation must be seen more broadly than just the embarrassment experienced by victims so that limitations on the right to freedom of expression, for example by criminalising, can be considered valid in accordance with applicable human rights law.

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152 The report titled Defining Defamation: Principles on Freedom of Expression and Protection of Reputation developed by ARTICLE 19 through a lengthy process of consultation and analysis on the law and international standards as well as the development of practices in various countries on the protection of reputation. This report explains principles need to be applied in balancing clashes between right to freedom of expression and protection of reputation. See ARTICLE 19, Defining Defamation..., Op. Cit., p. 1.
153 Ibid., hal. 5.
Protection of reputation also cannot be applied instantly to everything. ARTICLE 19 explains that limitation on freedom of expression for the purpose of protecting reputation cannot be justified in certain matters such as:

1) prevent legitimate criticism of public officials or disclosure of unlawful acts by public officials;
2) protect the “reputation” of objects, for example symbols, flags or symbols related to the state or religion;
3) protect the “reputation” of the state;
4) provide space for someone to sue on behalf of an individual who has died; or
5) provide space for someone to sue on behalf of a certain group that does not have the right to sue.

ARTICLE 19 emphasizes that when talking about the protection of reputation, it must be interpreted specifically since not everything can be considered as having a reputation. Inanimate objects and symbols cannot be considered reputable. Therefore, in relation to the use of defamations prohibition against acts that are considered “insulting” state symbols, religious symbols, or even the state itself, the court cannot justify that the application of defamations is to protect reputation.

Meanwhile, specifically for protecting the reputation of officials or public figures, there are certain principles that must be observed. From the various explanations above, it can be concluded that great tolerance must be given to criticism by general public to public officials, even though public officials also have a reputation that must be protected. In line with ARTICLE 19, the Siracusa Principle explains that limitations on freedom of expression to protect reputation cannot be used to protect the state or its officials from opinions or criticism by the general public. As a consequence, criminal provisions on defamation as a form of limiting the right to freedom of expression, cannot be immediately applied as a justification to protect the reputation of public officials if the action alleged as defamation is committed by the general public as part of criticism or opinion.

Another principle is related to the purpose of using defamatory provisions in the context of limiting rights. The use of defamation articles can only be used with the aim of respecting the reputation of other people and not for other purposes, for example to protect national security, public order or good relations with neighboring countries. This principle reflects that the application of defamation articles on acts that allegedly humiliate public officials must also be carried out solely in the context of respecting the reputation of others, not to protect state
security, public order, or other interests. Thus, in the event that an act is suspected of being a defamation to an official or a public figure, the relevant human rights standards to consider are only related to the protection of another person’s reputation as an interest that can limit the right to freedom of expression.

Another thing to consider when adjudicating slander, libel, or calumny cases is the need to measure threats to one’s reputation. This approach was taken by the Inter-American Commission on Human Rights and also the Inter-American Court of Human Rights. Regarding specific cases where there is a conflict between the right to freedom of expression and protection of reputation, the two institutions are of the view that in determining whether an act is punishable or not, it is necessary to prove that there is a real threat or damage to another person’s reputation. This approach can also be adopted by the courts in Indonesia. In the various cases described in the previous chapter, judges often base their interpretation on the element of “attacking the honor or reputation of another person” simply by seeing that the victim in such case feels ashamed as the result of the actions or statements of the defendant. The problem that arises from this view is that there is an element of subjectivity that cannot be measured objectively and affects the determination of guilt or innocence of the defendant. Thus, the judge needs to look more deeply and objectively at the impact of the defendant’s actions on the honor and reputation of the victim in the evidence examination process of witnesses and other evidences to check whether the honor or reputation of the victim has been negatively affected by the defendant’s actions.

3.6.1. Understanding the Protection of Reputation in Regional Human Rights Court Practices
In order to enrich the view on the protection of the right to freedom of expression when it conflicts with the protection of the reputation of others, it is also necessary to look at how regional human rights courts examine and adjudicate cases related to defamation brought to their respective jurisdictions. Case examples taken in the description below are cases that occurred in Europe, America and Africa. However, it should be noted that these courts do not examine and adjudicate facts to prove defamation but only regarding the legitimacy of state’s limitation measures against the right to freedom of expression in protecting the reputation of others by referring to applicable human rights legal standards. The legal approach and opinions put forward by regional human rights courts can also be adopted by courts at the national level in considering whether or not a person’s actions should be punished for alleged slander, libel, or calumny.

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3.6.1.1. GRA Stiftung Gegen Rassismus und Antisemitismus v. Switzerland Case

This case was examined and tried before the European Court of Human Rights. The parties to the lawsuit are the GRA Stiftung Gegen Rassismus und Antisemitismus as the applicant and the Swiss state as the respondent. The GRA Stiftung is a non-governmental organization that promotes tolerance and fights against all forms of discrimination based on race.

The GRA Stiftung was found guilty and sentenced by the Swiss Federal Supreme Court because on its website it had categorized the speech of a person with the initials B.K. as verbal racism. The Supreme Court was of the opinion that the categorization of B.K. into verbal racism by the GRA Stiftung is more than just an opinion (mixed value judgment) because racism has a certain definition and scope, so there is a substantive core that must be proven. It is a violation of a person's honor because it has categorized the person's actions as an act that should be reproached by society. The GRA Stiftung was also ordered to withdraw the written report from its website and replace it with a description of the court judgment.

The GRA Stiftung then brought this matter to the European Court of Human Rights. The European Court of Human Rights is of the opinion:

− The judgment of the Swiss court against the GRA Stiftung constituted restrictions on the right to freedom of expression;
− That the said restriction has been regulated based on the applicable law;
− The said restriction aims to protect one of the legitimate interests, namely the reputation of another person;
− In order to determine whether such restrictions was necessary in a democratic society, it is necessary to examine whether the domestic authorities have made a balanced decision between the interests of protecting the right to freedom of expression and protecting the reputation of others;
− To test whether the domestic authorities have weighed the two interests in a balanced way, there are several criteria that must be measured, namely the contribution to the discourse on the public interest; the degree of fame of the person affected by their reputation and the subject matter of the related statement; as well as the content, form, and consequences of related

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160 The GRA Stiftung argued that the policy initiative to ban the construction of minarets in Switzerland had generated heated debate among the public and various experts and organizations viewed the initiative as a form of racism or at least related to racism. The GRA Stiftung is also of the view that, by considering the position of B.K. as a young politician, it was only natural that B.K. subjected to greater criticism than ordinary civilians. Meanwhile, the Swiss government was of the view that the categorization of B.K. into the form of verbal racism was a mixed value judgment so that the GRA Stiftung must have a factual basis in determining the categorization. The words of B.K. cannot be classified as racism. Furthermore, the Swiss government was of the opinion that the gradation of tolerance in freedom of expression towards the actions of B.K. cannot be equated with public figures in general because B.K. very young and only at the beginning of his political career.
Regarding contributions to the discourse on public interest, the European Court of Human Rights saw that the oration of B.K. as well as written reports on the GRA Stiftung's website related to the public debate regarding the initiative to ban the construction of minarets in Switzerland which have been widely covered by national and international media;

− Regarding the degree of fame of the individual whose reputation was affected and the subject matter of the relevant statement, the European Court of Human Rights is of the opinion that B.K. is a politician from a major political party in Switzerland and his speeches were clearly political in nature in order to support the goals of the party he was promoting. B.K. had consciously opened himself up to public scrutiny with his speech so that he must have greater tolerance for criticism of his statements from individuals and organizations with opposing views;

− With regard to the content, form, and consequences of related publications, the European Court of Human Rights is of the opinion that there is a need for a standard distinction between statements of fact and value judgments. Statements about facts require proof of truth, but an opinion cannot be proven true or not. However, in conveying an opinion it is necessary to have sufficient factual basis. In this case, the European Court of Human Rights viewed the categorization of B.K. as verbal racism by the GRA Stiftung has sufficient factual basis as an opinion due to the views of various experts and other organizations which also identify with B.K. with discrimination and racism. Additionally, this categorization cannot be construed as a careless personal attack on B.K. because there was no statement that discussed B.K.'s personal or family life, but only related to the understanding of B.K.'s political speeches. Thus, the categorization of B.K.'s oration as verbal racism cannot be construed as having harmful consequences on B.K.'s personal or professional life;

− Whereas the sanctions imposed by the Swiss domestic authorities against the GRA Stiftung, even though they are relatively light, can cause a chilling effect on the right to freedom of expression of the GRA Stiftung because these sanctions can create fear for the organization in achieving its organizational goals or in criticizing future policies and political statements.

Based on these considerations, the European Court of Human Rights is of the view that Swiss domestic courts have not carefully weighed the principles and criteria in balancing the right to freedom of expression and protection of reputation. Thus, in this case there has been a violation of the right to freedom of expression by the GRA Stiftung.
3.6.1.2. Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina Case

In this case, the state government of Bosnia and Herzegovina faced lawsuits from an Islamic organization in Brčko District (hereinafter referred to as BD) and three non-governmental organizations from ethnic Bosnians in BD before the European Court of Human Rights. Initially, the applicants sent a letter to the highest authority in BD complaining about the process of appointing a director at a government-owned multi-ethnic radio station in BD. In the letter, the four organizations also wrote some information regarding the disgraceful behavior of M.S., the individual who will be appointed as the director. Not long after the letter was sent, it was published in three different newspapers.

M.S. then filed a civil lawsuit against the four organizations alleging defamations that damaged her reputation. Ultimately the four organizations were found guilty of defaming M.S. The four organizations were punished to inform the highest authorities in BD that they revoke the letter of complaint they sent, and in case of failure to comply the four organizations would have to pay a fine of EUR 1,280 jointly.

The four organizations then filed a lawsuit to the European Court of Human Rights against the government of the state of Bosnia and Herzegovina. In this case, the European Court of Human Rights held the following opinion:

- The judgment of domestic court in Bosnia and Herzegovina constituted a limitation on the right to freedom of expression;
- That these restrictions have been regulated based on applicable laws, and that these arrangements have been made with precision;
- The said restriction aims to protect one of the legitimate interests, namely the reputation of another person;
- In order to determine whether such restrictions need to be made in a democratic society, it is necessary to examine whether the domestic authorities have made a balanced decision between the interests of protecting the right to freedom of expression and protecting the reputation of others;
- The responsibility of the four organizations for the defamations they committed.

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162 In their arguments, the four organizations stated that their complaint letters had been sent through closed and confidential channels to the competent authorities dealing with the issues they complained about. The contents of the letter were also related to the appointment of a director at a government-owned radio station in BD so that the issues complained of are closely related to the public interest and greater tolerance should be given in the context of the right to freedom of expression. Furthermore, according to the four organizations, the letter did not contain a statement of facts. Meanwhile, the government of the state of Bosnia and Herzegovina argued that the letter contained very serious accusations against M.S. and the four related organizations should make efforts to verify the veracity of the allegations.
must be reviewed only from the act of sending a letter of complaint to the relevant authorities and not from the publication of the letter in the newspaper because there is no evidence indicating that the four organizations published it;

• The subject of discussion regarding the balance in ethnic representation in public institutions is an important topic and related to public interest;

• Civil servants acting in an official capacity are subject to a greater tolerance of criticism than ordinary individuals. M.S. who ran to become directors of the government-owned radio must be deemed to have knowingly entered the public domain and exposed herself to inherent scrutiny of her actions;

• The use of words in the related complaint letter plays a very important role. The four organizations in their letter conveyed that they had direct access to information regarding the bad behavior of M.S. and they do not act as a conduit for information from other parties. The letter also did not make a request to the highest authorities to investigate or verify the allegations, so it is not clear whether the letter was only to accuse M.S. or indeed to inform the relevant authorities regarding alleged unlawful conduct by M.S.;

• The alleged behavior of M.S. was inappropriate from both a moral and social standpoint so that it places M.S. in a very negative context, namely as someone who disrespects and looks down on Muslims and ethnic Bosnians. In this regard, the European Court of Human Rights is of the view that the contents of the accusations by the four organizations damaged the reputation of M.S.;

• That the fact that the complaint letter was only sent to a limited party through a private channel did not rule out the possible negative impact of the accusation on M.S.’s career as a civil servant and her professional reputation as a journalist;

• The four related organizations as “social watchdogs” have a responsibility like a press agency to test or verify the truth of the information they receive. What’s more, the accusations in the letter were conveyed in the context of a statement of facts instead of an opinion (value judgment). The European Court of Human Rights considered that efforts to verify information by the four organizations before disseminating it to other parties would not require large resources, but the four organizations concerned even recklessly included these accusations in their letter;

• The punishment handed down by the domestic court was proportionate because the imposition of financial fines was applied if the four organizations did not expressly withdraw their complaint letter.

Based on these considerations, the European Court of Human Rights is of the view that the restrictions made by the domestic courts of Bosnia and Herzegovina have been supported with sufficient reasons and have paid attention to the balance between the right to freedom of expression and the protection of reputation. Thus, in this case there was no violation of the rights to freedom of expression of the four related organizations.
3.6.1.3. Tešić v. Serbia Case\footnote{See European Human Rights Court Judgment Eropa, Tešić v. Serbia, (Applications nos. 4678/07 and 50591/12), 11 February 2014.}

In this case Tešić, a Serbian national, was convicted and sued for defaming her former lawyer. The sequence of events in brief is as follows:

- In December 2002, a journalist with the initials SN published a story in the Dnevnik newspaper about Tešić’s former lawyer, NB, who was suspected of deliberately failing to provide her with proper legal assistance. The article explained that the Novi Sad police also confirmed the alleged act by NB. The information in the article is direct information provided by Tešić.

- Since May 2002, the Novi Sad City police have been processing the report against NB, but in July 2002, the Novi Sad City Prosecutor’s Office stopped the process on the grounds that it was overdue. Tešić attempted to initiate legal action herself and the process continued until the court rejected this attempt in September 2004.

- In April 2005, the Novi Sad Municipal Court found Tešić and SN guilty on charges of defaming NB and sentenced each to six months’ imprisonment with probation for two years.

- In December 2006, NB filed a civil suit against Tešić on the grounds that he had been under great mental stress following the publication of the article. In January 2007, NB won this lawsuit and the court ordered Tešić to pay damages of approximately EUR 4,900.

- In September 2006, the Novi Sad Municipal Court also ruled in favor of NB in a civil lawsuit against the SN newspaper Dnevnik, and the founder of the newspaper over articles defaming him. The court ordered SN, Dnevnik and the founder of Dnevnik to pay compensation to NB.

- In July 2009, NB filed an application for the execution of the January 2007 court judgment. Then, the court issued an order that two-thirds of Tešić’s pension must be transferred to the NB account each month until the amount of damages imposed was repaid by Tešić.

- As of May 2012, Tešić’s monthly pension was EUR 170. With the obligation to pay compensation, Tešić only had EUR 60 per month left to live on.

- Tešić had health complications and spends at least EUR 44 per month on medical expenses. However, with the obligation to pay compensation, Tešić could no longer afford to pay for her treatment.
The case was then brought to the European Court of Human Rights by Tešić.\textsuperscript{164} In this case, the European Court of Human Rights decided at least as follows:

- The judgment for compensation in the civil case against Tešić and the order for her execution were a form of limitation on the right to freedom of expression;
- The said judgment and its execution procedure were decided based on the applicable law;
- The restriction was made with a legitimate purpose, namely to protect the reputation of others;
- That the amount of compensation that must be paid by Tešić reached more than 60% of the amount of pension that Tešić received every month. The amount of damages were also almost equal to the amount to be paid by Dnevnik and the founders of Dnevnik, provided that these parties are legal entities that are more financially established;
- That Tešić’s statement regarding NB cannot necessarily be considered as a gratuitous personal attack against NB because at least the Novi Sad City police themselves had initiated criminal proceedings against NB, although this was later stopped by the prosecutor’s office. This process continued until September 2004, which was a very long time since the publication of the relevant article, due to Tešić’s legal efforts;
- That the amount of compensation that Tešić had to pay by deducting her pension was such that Tešić could no longer afford to pay for her own treatment, while she was suffering from serious complications, was a dangerous condition for Tešić;

Based on these considerations, the European Court of Human Rights is of the opinion that the restriction on Tešić’s right to freedom of expression did not meet the criteria of being proportional and necessary in a democratic society. Thus, there has been a violation of Tešić’s right to freedom of expression.

\textbf{3.6.1.4. Herrera Ulloa v. Costa Rica Case}\textsuperscript{165}

Mauricio Herrera Ulloa is a journalist at the newspaper La Nacion. In May 1995, Herrera Ulloa wrote several articles alleging that Felix Przedborski had committed several unlawful acts. Part of the contents of his writings also quoted and reproduced articles by several other international media regarding the same allegations. In December 1995, Herrera Ulloa wrote several articles in La Nacion

\textsuperscript{164} Before the court, the Serbian government argued that the restriction on Tešić’s right to freedom of expression had been carried out based on the existing law and was aimed at protecting the reputation of others. Tešić’s allegation that NB failed to properly represent her in past cases was a statement of facts that was not supported by credible evidence. Meanwhile, Tešić argued that the news article should be the responsibility of SN as a journalist because he himself had never seen the article before it was published, although it is true that Tešić provided the information in the article to SN. In addition, the compensation imposed in a civil case against her is considered a disproportionate restriction on her freedom of expression.

about Felix. Prior to writing these articles, Herrera Ulloa conducted fact checks and on one occasion contacted Felix’s lawyers to clarify various international media reports.

Felix is an honorary diplomat appointed by the Ministry of Foreign Affairs of the Costa Rican government to become the country’s representative at the International Atomic Energy Agency. Against these two series of articles, Felix made a report of libel and calumny and filed a civil lawsuit against Herrera Ulloa and La Nacion. In November 1999, a Costa Rican court found Herrera Ulloa guilty of blasphemy because of the articles he had written and ordered him to pay a fine. In addition, the court also granted Felix’s civil lawsuit.

The Inter-American Court of Human Rights had the following views:

- The task of the Inter-American Court of Human Rights is not to judge whether Herrera Ulloa’s article fulfills the criminal element in Costa Rican law but whether the sentence handed down to Herrera Ulloa has violated the right to freedom of expression;
- Journalism must receive protection in order to carry out its function maximally in providing information to the public so that the discourse in society becomes more comprehensive;
- With reference also to the judgment of the European Court of Human Rights, the concept of limitation must be applied more loosely if the expression or statement relates to a public figure, including politicians, rather than an ordinary individual. This is because politicians and public officials with functions attached to them consciously and inevitably have to open themselves up to criticism and comments from the public, including journalists;
- Herrera Ulloa basically only reproduced published news regarding the actions of a public official abroad who was suspected of having committed an illegal act;
- The Costa Rican court convicted and rejected Herrera Ulloa’s defense on the grounds that he could not prove the truth of the allegations of unlawful acts committed by Felix which were reported by various newspapers in the European region. The Inter-American Court of Human Rights views the standard of evidence requested by the court was a form of excessive restriction on freedom of expression and inconsistent with Article 13 (2) of the American Convention on Human Rights;
- The standard of proof hindered and created chilling and inhibiting effects for journalism work and ultimately hinders public discourse on issues related to public interest;

Based on these considerations, the Inter-American Court of Human Rights
concluded that there had been a violation of the right to freedom of expression because the restrictions imposed by the government of Costa Rica were inconsistent with the principles contained in Article 13 of the American Human Rights Convention.

3.6.1.5. Uson Ramirez v. Venezuela Case

The summary of the chronology of this case is as follows:

- Uson Ramirez is a member of the military with the rank of Brigadier General and has served in various public positions. In April 2002, while he was serving as Minister of Finance, Ramirez had disagreements with the Venezuelan government and top military officials, so he resigned from the position. Ramirez retired in 2003.
- In April and May 2004, Ramirez was invited to a television show which discussed the use of a flamethrower to punish several members of the military in a cell fire incident in Fuerte Mara in March 2004. At the event, Ramirez was consulted as an expert and he stated that “judging by the operation and installation of the flamethrower device, indicates that the fire was premeditated” and that the condition “would be very serious if it did occur”.
- A military court in Venezuela then sentenced Ramirez to 5 years and 6 months in prison for this statement because he was deemed to have committed slander against the Venezuelan national army as stipulated in military criminal law. The court also considered Ramirez’s actions a threat to national security. The verdict does not change until it was final and binding.

In this case, the Inter-American Court of Human Rights gave the following views:

- The Inter-American Court of Human Rights considered that in drafting a criminal code it is important to use clear and firm terminology that clearly describes prohibited acts so as to fulfill the principle of legality;
- Article 505 of the military penal code used to convict Ramirez does not specify what elements of the act are considered to meet the classification of defaming, calumniating or demeaning the Venezuelan national army and whether or not a statement of fact is necessary or it is sufficient to simply make demeaning or defaming opinions. The article contains elements that are vague and ambiguous which lead to interpretations that are too broad. This can lead to abuse of power by the competent authorities;
- Intervention or restriction on freedom of expression through criminal law should be used very limitedly and only when it is absolutely necessary to protect basic things from attacks that can damage it because the nature of criminal law is as an *ultima ratio* (last resort);

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Based on these considerations, the Inter-American Court of Human Rights stated that the criminal law provisions used to limit Uson Ramirez’s right to freedom of expression were not in accordance with the standards for restricting the right to freedom of expression in Article 13 of the American Human Rights Convention and the use of criminal penalties in this case by Venezuela was “cruel and unnecessary” to protect reputation. Thus, the Inter-American Human Rights Court concluded that there had been a violation of Uson Ramirez’ right to freedom of expression.

3.6.1.6. Lohe Issa Konate v. Burkina Faso Case

This case was examined and tried by the African Court of Human Rights. In summary, the series of events in this case are as follows:

- Nikiema then reported them for alleged defamation and contempt of court which resulted in a 12-month prison sentence and a fine of USD 3000. The Ouagadougou High Court also ordered them to pay compensation of USD 9000 and court costs of USD 500, as well as halted publication of L’Ouragan Weekly for six months.

In this case, the African Human Rights Court considered in essence the following:

- The criminal provisions used to limit Konate’s freedom of expression are articles that are part of the Criminal Code and the Information Law in Burkina Faso so that these restrictions were based on law;
- The restrictions imposed on Konate have a legitimate purpose, namely to protect the honor and reputation of a person or a profession (as stipulated in the Information Law) and to protect the honor and reputation of judges, juries and assessors in carrying out their duties (as stipulated in the Burkina Faso Penal Code);
- the prosecutor’s position is that of a public figure and restrictions on freedom of expression should be looser when it comes to public discourse on public figures or public officials;
- the government of Burkina Faso could not prove why imprisonment is a necessary form of sanction to protect the rights and reputation of law enforcement. With reference to the judgments of the European Court of Human Rights and the Inter-American Court of Human Rights and the explanations of the UN Human

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Rights Committee, violations of laws relating to freedom of expression and freedom of the press cannot be sanctioned by deprivation of liberty. Thus, the punishment against Konate is classified as disproportionate and excessively restricts freedom of expression.

Based on these considerations, the African Court of Human Rights is of the opinion that the government of Burkina Faso has violated Loha Issa Konate’s right to freedom of expression.

3.6.1.7. Ingabire Victoire Umuhoza v. Rwanda Case

The sequence of events in this case is briefly as follows:

- In 2000 until the time the case was filed, Ingabire Victoire Umuhoza was the founder and leader of a political party called Forces Democratiques Unifees (FDU Inkingi). Since 1994, when the genocide occurred in Rwanda, he was living in the Netherlands to continue his education.
- Umuhoza only decided to return to Rwanda in 2010 to officially register his political party in preparation for elections. However, he was later arrested on suspicion of involvement in terrorism and spreading genocidal ideology. The charges were based on allegations that Umuhoza communicated with fugitives from the Rwandan FDLR group with the intention of forming the military wing of his FDU party.
- In addition, Umuhoza was also accused of belittling genocide in a speech at the Kigali Genocide Memorial. In his speech, Umuhoza said that apart from the genocide against the Tutsis, there were also crimes against humanity against the Hutu, and the state was still in debt to acknowledge and memorialize their suffering.
- After going through the judicial process from the first to the last level, Umuhoza was sentenced to 15 years in prison for being guilty of conspiracy to overthrow the legitimate government through terrorism, war or other means of violence, trivializing genocide, or spreading rumors that sparked people’s resistance to the government.

In this case, the African Human Rights Court considered the following:

- In response to Umuhoza’s argument that the laws used against him were vague and unclear, the acts prohibited by the Rwandan law are difficult to define with precision. In addition, Rwanda has a margin of appreciation in defining and prohibiting a criminal act in its national law. So, the law used to convict Umuhoza has provided sufficient explanation for someone to adjust his/her actions to stay within the law. Thus, restrictions on Umuhoza’s freedom of expression are in accordance with the law;

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• The criminal act that was accused of Umuhoza was very serious in nature which had very dangerous consequences for state security and public order. Thus, restrictions on Umuhoza’s freedom of expression served a legitimate purpose;
• Genocide is a sensitive issue for any country that has experienced it. However, Umuhoza’s speech did not contain sentences that belittle the genocide against the Tutsi tribe or implicitly state it;
• Umuhoza’s speech clearly acknowledged the existence of a genocide against the Tutsis, but never claimed that there was a genocide against the Hutu. So, the accusation that he conveyed the theory of “double genocide” is not true. Because the expressions he conveyed were quite clear, thus it is imposing criminal penalties on expressions that are misinterpreted was not justified because it would create an atmosphere of fear in society;
• Criminal penalties against Umuhoza are unnecessary in a democratic society. Moreover, even if the African Court of Human Rights agreed that expression should be limited, the sentence handed down by Rwanda was not commensurate with the objectives that the sentence was intended to achieve.

Based on these considerations, the African Court on Human and Peoples’ Rights was of the opinion that the Rwandan government had violated Umuhoza’s right to freedom of expression which had also been regulated for protection in Article 9 (2) of the African Charter on Human and Peoples’ Rights and Article 19 of the ICCPR.

3.6.2. Conclusion Based on Considerations of Regional Human Rights Court Judgments

From the various samples of cases examined by regional human rights courts in Europe, America and Africa, it can be concluded that several important things were considered in assessing whether an exercise of the right to freedom of expression can be limited with the aim of respecting the reputation of others, as follows:

1) There are several criteria that can be used as benchmarks:\(^{169}\)

- **Contribution to discourse on the public interest.** In this case, if an expression is indeed closely related to the debate on the public interest then the protection of freedom of expression must be prioritized. To determine whether an expression is related to the public interest really depends on the context of the case that occurred. As an illustration, in the jurisdiction of the European Court of Human Rights, for example, aspects of public interest are not only found in political or criminal issues, but also in issues related to...
sports and the performing arts\(^{170}\);

- **The affected individual’s role and function in the public sphere and the subject matter of the related statement.** In this case, if an individual is a politician or a public official, the protection for that person’s reputation is not as strictly as for ordinary people, so that the space for protecting the right to freedom of expression becomes wider. It is also necessary to pay attention to the distinction between the subject matter of the expression or statement in question. For example, the delivery of expressions that can contribute to discourse in a democratic society regarding the behavior of a politician in his/her official capacity is of course closely related to aspects of the public interest. Meanwhile, the delivery of expressions regarding the private life of an ordinary civilian who has no duties and authorities in the public sector has absolutely nothing to do with the public interest\(^{171}\);

- **The content, form and consequences of related publications.** In this case, there are two types of expression that can be identified, namely whether the expression includes a statement of facts or an opinion (value judgment). Statements of facts must be proven true. Opinion does not require proof of its truth, but must have sufficient factual basis to be called an opinion. If an expression is claimed to be a statement of facts or value judgment, but do not fulfil the character of the type of expression claimed, then the protection of reputation will prevail. In addition, the consequences of an expression on the personal life of people who feel their reputation has been violated also need to be examined. If it is not proven that there are harmful consequences for an individual, then the right to freedom of expression must prevail;

2) Journalistic institutions and organizations that are considered to have the role of “social watchdog” are charged with the responsibility to verify the truth of reports from external parties regarding alleged illegal acts by other people. However, this also depends on the capacity of the organization’s resources, so “verification capability” must be viewed casuistically. It is also important to measure whether a statement (in the form of a particular report or publication) from the organization is indeed a statement of facts or value judgment;

3) **The severity or lightness of the sanction** is a substantial matter in assessing the existence of violation to the right to freedom of expression. In essence, when the exercise of the right to freedom of expression considered as appropriate to be restricted in order to respect the reputation of others, the sanctions imposed must still be proportional to the context of the act and the personal condition of the perpetrator. If the sanctions imposed are disproportionate, then a violation of the right to freedom of expression has occurred;

4) Guarantees for the right to freedom of expression, especially for journalistic

\(^{170}\) Ibid., pp. 34-35.

\(^{171}\) Ibid., p. 35.
work related to the dissemination of information that is in the public interest, must be prioritized. Restrictions that are not in accordance with human rights legal standards have the opportunity to create a chilling effect for journalists which will then have an impact on hampering public discourse on important issues in society;
5) Restrictions on freedom of expression by means of criminal law should be used very limitedly and only when absolutely necessary to protect the fundamentals from damaging attacks;
6) The exercise of the right to freedom of expression and freedom of the press which is proven to damage the reputation of others cannot be subject to deprivation of liberty sanction;
7) It is important to check the context of an expression. It is not justified to impose criminal penalties on a misinterpreted expression.

3.7. Analysis on Defamation Judgments
In the previous sub-chapters, various examples of cases from court judgments related to defamations, especially slander, libel, or calumny, in the Criminal Code and the ITE Law as well as defamations to authorities have been presented. In addition, various principles and standards of criminal law and human rights law have been described regarding defamations and restrictions on the right to freedom of expression with the aim of respecting the reputation of others. Therefore, this section will analyze court judgment samples based on the principles and standards that have been elaborated. In general, several problems identified will be described in the following paragraphs.

3.7.1. The Courts Did Not Consistently Examine the Element of Intent and Ignored the *Animus Injuriandi* Doctrine
From various samples of judgment, the courts have various ways of interpreting the element “intentionally”. First, the element “intentionally” with the form of intent as a goal (*oogmerk*). In the Sanggau District Court Judgment No. 336/Pid.B/2016/PN Sag, the court referred to MvT and Satochid Kartanegara’s opinion which defines intention as knowing and willing/aware of an action and its consequences.\(^\text{172}\) This interpretation is correct, compatible with the background of regulation and principles of defamation in the Dutch Criminal Code as explained in the previous paragraphs.

The second approach is that there is no need for *animus injuriandi* or deliberate or intent to defame, as long as the perpetrator knew and aware of his/her actions. For example, in the Luwuk District Court Judgment No. 238/Pid.B/2014/PN Lwk, it is described that:\(^\text{173}\)

\(^{172}\) Sanggau District Court Judgment No. 336/Pid.B/2016/PN Sag, pp. 32-33.
\(^{173}\) Luwuk District Court Judgment No. 238/Pid.B/2014/PN Lwk, pp. 9-10.
“Intentionally is a subjective element, which is applicable to action, meaning that the perpetrator knows his/her actions, in this case, the perpetrator was aware of expressing his/her words which contain a violation of the honor or reputation of another person. Does the perpetrator intend to blaspheme, is not an element of “intentional”. Intentional means not so distant since “further meaning” is not needed. So, there is no need for animus injuriandi, namely the intention to defame, as in the jurisprudence based on the Judgment of the Supreme Court of the Republic of Indonesia Number: 37 K/Kr/1958 dated 21 December 1957.”

However, this interpretation has confused the existence “intentionally” element in slander, libel, and calumny. The court only considered that intent had been proven when the perpetrator realized s/he had “spoken words that contained a violation of the honor or reputation of another person”. The problem that arises from this interpretation is, in the context of slander, when a person uttered words spontaneously and has a negative connotation without the intention to damage the reputation of another person, then his/her actions are deemed to have fulfilled the element of “intentionally” and can be held criminally responsible. Apart from that, it is also possible that there are writings or pictures that were made without the intention of defaming other people, but in fact made other people feel their honor was violated and reported the creator to the police. In other words, if the court neglects to prove the element of intent to harm the reputation of another person, then there is the potential that all expressions that cause offense to the feelings, honor or good name of another person can be reported and punished as slander, libel, or calumny. Such interpretation should no longer be practiced in cases of slander, libel, and other criminal acts that make slander genus delict.

As previously explained, the element “deliberately” in the formulation of slander, libel, or calumny offense must be interpreted as the intention of the perpetrator to demean other (eergevoel te krenken) or to degrade a person’s pride before others. The explanation outlined by the SKB UU ITE also emphasizes that the focus of punishment of Article 27 paragraph (3) of the ITE Law (which also regulates slander, libel, and calumny) is on the actions of the perpetrators that carried out intentionally with a purpose. In other words, intent that must be proven in a slander, libel, or calumny offense is intentional with a purpose (opzet als oogmerk). Thus, the intentional element in slander, libel, or calumny should be interpreted as the perpetrator’s actions were deliberately aimed at damaging the victim’s reputation. Therefore, proof of intent is not merely looking at the fact

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that the perpetrator realized that s/he had said words that contained a violation of honor, but s/he also had to have the intention to damage the honor of others when s/he said those words. The existence of slander, libel, and calumny should be positioned in accordance to its historical value, which was to target acts that are purely evil in nature to damage people’s reputations.

3.7.2. The Courts Do Not Have Uniformity of View in Assessing the Elements of “With the Intent to Give Publicity Thereof” in the Criminal Code and the ITE Law

Several examples of judgments in cases of slander, libel, or calumny under the Criminal Code show the stability of the court’s view of the element “with the intention to give publicity thereof”. One example can be seen in the Denpasar District Court Judgment No. 732/Pid.B/2013/PN Dps. In this judgment the court interpreted the element “with the intention to give publicity thereof” strictly. Taking into account the means used to deliver the information and the limited number of people who were informed by the defendant, the court referred to the fact that James’ e-mails were sent only to certain people: apart from the victims, there were also two other witnesses who received the e-mails. The e-mail was not sent to the public, as the term “public” is defined in the Big Indonesian Dictionary, therefore the court considered that the defendant’s actions did not fulfill the element “with the intention to give publicity thereof”. From this judgment it can be concluded that an accusation cannot be classified as meant to be given publicity or broadcasted in public if it is only directed at specific or certain parties.

Kualasimpang District Court Judgment 288/Pid.B/2010/PN.Ksp. provides another example of quite good consideration in assessing whether the crime of libel has been established. The court considered that the defendant’s complaint letter which contained accusations against another person was not meant to be made public because the letter he sent was addressed to certain parties only.

Another judgment that deserves appreciation is the Simalungun District Court Judgment No. 43/Pid.B/2017/PN.Sim juncto MA Judgment No. 963K/Pid/2017. The Simalungun District Court as the court of first instance decided to acquit the defendants, but the Supreme Court at the cassation level overturned the judgment. The Supreme Court saw that the actions of the defendants who in a village meeting forum which was attended by many people accused the victim of using witchcraft to kill other residents was enough to show the criminal act of slander by the defendants. The Supreme Court explained that the accusations of the defendants were not supported by any evidence and that the victim’s injury

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176 Denpasar District Court Judgment No. 732/Pid.B/2013/PN Dps, p. 34.
in this case was not only defamed reputation but also expelled from the village.\textsuperscript{178}

From aforementioned judgments, it is understood that the court examined the existence of the defendants’ intent to make their accusations public based on the means used by the defendants to convey the accusations and the number of people who were informed of the allegations. If the means of delivery used could only be accessed by certain people and the number of people to whom the delivery was intended is also small, then it is deemed not to fulfill the element “with the intention to give publicity thereof”.

Doubt was found in cases of defamation under the ITE Law examined by the courts. In Article 27 paragraph (3) of the ITE Law there is indeed no element “with the intention to give publicity thereof”, but rather an element of “distributing and/or transmitting and/or making electronic information and/or electronic documents accessible”. This element is quite complex, but has the same context as the element “with the intention to give publicity thereof” in Article 310 of the Criminal Code because both describe similar condition where the perpetrator’s accusations known by many people.

In the verdict on the defamation case under the ITE Law with the defendant Erick Limar, a private employee who was prosecuted for sending electronic mail to someone about company information, the Panel of Judges stated that sending electronic mail to someone does not include fulfilling the elements of “distributing and/or transmitting and/or making accessible”, with the following considerations:

“Considering, that in addition to the above, this sub-element requires that content containing defamation must be openly accessible to the general public, such as media mailing lists or websites;

Considering, that factually in the present case although the contents of the circular letter are addressed to all customers of PT. Yong Kharisma Utama Jaya but the circular letter was sent to a limited circle of people, only to Miswanto Alias Iwan’s email account, not to the general public. This is evidenced by the email not spreading to a number of websites or mailing lists, but to certain accounts, including Miswanto’s email address (iwan.afta@ yahoo.co.id and marketing.aftajkt@yahoo.co.id) which can only be opened using a certain user name and password owned by the account owner, namely Miswanto Alias Iwan. E-mail is a private, closed and confidential communication medium where not everyone can access or open, read all the information contained in an e-mail address that belongs to someone, as evidenced by the necessity of having a password by the owner of that email address. Everyone’s user name and password are not

\textsuperscript{178} Supreme Court Judgment No. 963 K/Pid/2017, p. 8-9.
the same so that they cannot be known by the general public and to be able to access the combination of the user name and password must be synchronized. It's another case if what is discussed is a mailing list where people who are members and the general public can access to view the discussions in it. Thus, the element without the right to distribute and/or transmit and/or make accessible electronic information and/or electronic documents that contain defamation are not met in the present case.”

The judgment of the Supreme Court in Erick Limar case agreed with the Panel of Judges of the first level court and stated that their considerations were correct. This means that there are forms of dissemination of information through electronic means that can be accessed which cannot be considered as spreading information “distributing and/or transmitting and/or making it accessible”.

However, in other cases there are different perspectives, particularly regarding the element of “making accessible”. This element is quite broad in meaning because it includes deliberation factor. In the event that the defendant was not deliberate, but s/he conveyed an accusation using electronic means and there is a “way” or “possibility” that other people can access the accusation, then his/her actions can be considered to fulfill the existence of “intention” to make the accusation known by public, because of the inner attitude and s/he wanted and knowing. This is explained in the judgment of Erliawati case as follows:

“... while what is meant by accessible is that it can be seen/opened either accidentally or unintentionally, while deliberate intent is a person’s inner attitude that wants something and knows something. Emphasizes the inner attitude of the will. This theory is then called the doctrine or theory of will (wiltstheorie). Second, emphasizing the inner attitude of knowledge or regarding what is known is called the theory of knowledge is a theory developed by Von Listz (Germany) and Van Hamel (Netherlands).”

The problem that often arises in the context of defamations regulated by the ITE Law is that the definition of the element of “distributing” or “transmitting” or “making accessible” will very easily target forms of communication or statements in private conversations and group chats with limited participants. In contrast to statements made offline where it is clear who is likely hear a statement, in online sphere it is often difficult to assess the extent to which a statement will become public knowledge. Moreover, with the existence of technological devices that enable easy dissemination of information, what was initially private information could quickly become public information, which resulted in private communication

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179 Cianjur District Court Judgment No. 182/ PID.Sus /2015/PN.Cjr, pp. 128-129.
180 Kualasimpang District Court Judgment No. 380/Pid.Sus/2018/PN.Ksp., p. 27.
and correspondence fulfilling the element “with the intention to give publicity thereof”.

A number of cases showed how private communication easily considered to have “transmitted” information containing defamations and is considered accessible to public, as in Sukoharjo District Court Judgment No. 87/Pid.Sus/2019/PN Skh which detailed as follows:

“Considering, that what was sent by the Defendant via Whatsapp application from a telephone number...to a number...was a collection of electronic data...so that the defendant’s act of sending messages to...was an act of transmitting electronic information”

“Considering that in the sentence a lecturer can also be considered as a teacher...but in fact he cannot educate her children...let them do despicable things, according to the Panel of Judges in these sentences it has degraded the dignity... considered cannot educate her children who have committed despicable acts”

“This it can be concluded that intentionally and without rights distributing and/or transmitting and/or making accessible electronic information that has defamatory content has been fulfilled legally according to law.”

One of the cases that discussed the relationship between private and public statements was found in the court judgment with the Defendant Florence Sihombing, who stated in her defense that an upload on her Path account were private. The Panel of Judges agreed that there are social media platforms that are limited in nature and used massively, in this case, the act of pressing the “enter” button on the Path platform is sufficient to be considered as an agreement to make private information public, with the formulation of the following arguments:

“... it is necessary to consider the definition of private which tends to be known by the public/many people:

Considering that the mitigating expert... explained that there are social media that used limitedly and others that used massively. Path is one example of social media. Sending a message in Path by default is private, if the settings are not changed, everyone can read it;

Whereas even though the standard provisions in the social media group apply the default provisions as in the group, but with the approval of the writer by pressing enter (okay) then the uploaded status which initially was private can be read by other people. Moreover, there is an agreement from
the status writer to spread it to other people and can be read by other people. So that the privacy nature turns into public.”

The main problem of the argument that a private information being public information is to which extent the impact that such information is known to the public. The defendant Florence Sihombing defended that what was uploaded was limited, but other people then distributed it. Against this argument, the Panel of Judges, instead of analyzing the rate at which information becomes public and seeking who should be responsible for making this information known to the public, they focused on the words or content uploaded and denied that any other party should be held responsible, by stating “... so that it is also inappropriate and unfounded to attract other parties who are responsible for disseminating (spreading) this information.”

The case of Florence Sihombing shows the vulnerability of expressions on social media or other electronic means, because it is unclear whether certain expressions in limited media are protected. The formulation in Article 27 paragraph (3) about “dissemination” or “making it accessible” contributes to the absence of specific rules regarding the private and public spheres. As a result, a number of other cases occurred, for example in the case of the Saiful Mahdi, a lecturer at a university in Aceh who made comments in a Whatsapp group with limited members, who was also charged with Article 27 paragraph (3) of the ITE Law.

Legal developments then prompted the government to compile a more detailed explanation of the implementation of the ITE Law, including Article 27 paragraph (3), through the SKB UU ITE. This study in a number of aspects agrees with the implementation guidelines for the element “transmitting, distributing and/or making it accessible” by equating with the element “to give publicity thereof” in the SKB UU ITE. Thus, courts must consistently refer to and use SKB UU ITE on the implementation of Article 27 paragraph (3) of the ITE Law in adjudicating defamation cases charged with the ITE Law, particularly regarding the following points:

1. The element “to give publicity thereof” (in the context of transmission/distribution, and/or making it accessible) that must be fulfilled as the main elements (klacht delict) of Article 310 and Article 311 of the Criminal Code which are the references to Article 27 (3) of the ITE Law that must be fulfilled.
2. The criterion “to give publicity” can be equated with “so that it can be known by the public”. The public itself can be interpreted as a collection of many people.

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182 Ibid.
who mostly do not know each other.

3. The criteria for “public knowledge” can be in the form of uploading on social media accounts with settings that can be accessed by the public, uploading content or broadcasting something on a chat group application with an open group nature where anyone can join the conversation group, and no one can control content or information traffic, anyone can upload and share outside, or in other words without any moderation.

4. It is not an offense of defamation in the event that the content is distributed through closed or limited chat group facilities, such as family conversation groups, close friendship groups, professional groups, office groups, campus groups or educational institutions.

3.7.3. Misunderstanding on the Subject of Slander, Libel, or Calumny

In the various examples of judgments previously described, there are cases where the party that became the victim of defamation was corporation, such as in a case decided by Sanggau District Court Judgment No. 336/Pid.B/2016/PN Sag. The judgment interpreted that PT BHD (a corporation) can be included as an object whose honor is attacked because, as part of the development of criminal law and in various other laws and regulations corporations are classified as legal subjects by exemplifying the provisions in Law Number 18 Year 2013 on Prevention and Eradication of Forest Destruction.\textsuperscript{184} According to the court, although in various laws and regulations the context is corporation as the perpetrator of a crime, but it also encompasses a legal entity whose rights must be protected, as stated as follows:\textsuperscript{185}

“…the essence is that a Legal Entity or Company can also be a Victim, in other words, the Legal Entity is a legal subject whose rights must be protected by law since any action committed against the Legal Entity will impact persons or individuals within…”

The extensive interpretation of the court judgment is not in line with the history of slander and libel regulation in the Indonesian Criminal Code and the international human rights law standards that have been described previously. The court in this case even seemed to force the regulatory context of laws outside the Criminal Code to the regulatory context of the Criminal Code.

In addition, in considering this aspect, the court referred to the Supreme Court Jurisprudence Number 68/K/Kr/1973 dated 16 December 1976 which interpreted in Sanggau District Court Judgment that a legal entity could become a victim of defamation. Judgment Number 68/K/Kr/1973 is basically a judgment at the

\textsuperscript{184} Sanggau District Court Judgment No. 336/Pid.B/2016/PN Sag., p. 33.

\textsuperscript{185} Ibid., pp. 33-34.
cassation level at the Supreme Court in a case where the defendant, Koesnin Faqih B.A., found guilty of committing a crime regulated in Article 315 of the Criminal Code (minor defamation). Koesnin’s action that were prosecuted in this case was sending letters to various parties who have relationship with the complainant, Achmad Nasri, the contents of which were186:

“PT Tjahaja Negeri has been dissolved by the defendant, and if you wish to witness the death of PT Tjahaja Negeri, please come, and also state if there are items lent by PT Bank Gemary or any surety items owed by PT Tjahaja Negeri must be transported immediately for the safety of the goods …”

The main issue in this case is Koesnan’s statement which called the complainant witness Achmad Nasri as the “defendant.” In one of his points of objection at the cassation level, Koesnan stated that the words he used in his letter, “accused” had been changed to “defendant” (however the author could not explore further how this could have happened). In this case, Koesnan was found guilty at both the district court level and the Supreme Court cassation level. The legal norm that serve as jurisprudence in this case are not related to the existence of corporations as victims or object of defamation. The rule of law in jurisprudence is actually as follows187:

1. The Court’s judgment must be based on accusations, which in this case are based on Article 315 of the Criminal Code, even though the words contained in the indictment were aimed more at Article 310 of the Criminal Code.
2. Based on the accusations among others, “That PT Tjahaja Negeri has been dissolved by the defendant, and if you want to witness the death of PT Tjahaja Negeri, please come, also state if there are items lent by PT Bank Gemary or any surety items owed by PT Tjahaja Negeri must be transported immediately for the safety of the goods …”, the defendant was found guilty of committing the crime of Article 315 of the Criminal Code, even though these words were more aimed at Article 310 of the Criminal Code.”

From these quotes, it can be concluded that the issue which has become a legal norm is the determination of the article used to convict the accused Koesnan. The Supreme Court is of the opinion that the judgment must be in accordance with the defamation article charged in the indictment, even though the actual act is more accurately fulfill the elements of another article in the defamation chapter.

There is no statement in the jurisprudence that states either explicitly or implicitly that corporations can complain as victims of criminal acts of defamation, because indeed in that case the subject of the victim of defamation was not PT Tjahja Negeri, but Achmad Nasri, who was accused by Koesnan as the “defendant” and has dissolved PT Tjahja Negeri.

Various interpretations of the “an individual” element in the defamation chapter that deviate from the drafting intention and objectives of the Criminal Code as explained above will make it more difficult to achieve legal certainty. In addition, judges’ understanding of the Supreme Court Jurisprudence Judgment Number 68/K/Kr/19 also needs to be corrected so that there are no more misunderstandings regarding the context and legal norm of said jurisprudence.

The meaning and interpretation in Article 27 (3) of the ITE Law must also be in line with the objective of protecting the reputation of others as contained in Articles 310 and 311 of the Criminal Code. One of the main problems in the implementation of Article 27 paragraph (3) of the ITE Law is also the expansion of the object of defamation which does not only include individuals or persons, but also legal entities and state institutions. The existence of a definition of “person” in the ITE Law which includes legal entities, causes an expansion of objects or parties who feel defamed. This means that complaints about slander, libel, and/or calumny not only could be made by individuals, but also by legal entities, including complaints about slander, libel, or calumny made by state institutions or legal entities such as companies.

In a number of cases, the Defendant’s Legal Counsel had conveyed about parties who could become objects of slander or libel. In the Kebumen District Court Judgment No. 223/Pid.Sus/2018/PN Kbm, the Defendant’s Legal Counsel argued that the object of the crime of slander or libel was an individual and did not include a legal entity, however in contrary the Judgment (as explained in the earlier section) considered that the object of defamation includes legal entities, with the following arguments:

“Considering that to answer this question an extensive interpretation can be used, namely expanding the meaning of the subject of honor not only to an individual but also to legal entities or state institutions, and this is in line if it is connected with Article 1 Number 21 of Law Number 11 Year 2008 as has been amended by Law Number 19 Year 2016 on Amendments to Law Number 11 of 2008 on Electronic Information and Transactions which provides the definition that people are individuals or legal entities and the Supreme Court in Judgment Number 183 K/Pid/2010 stated that legal entities can become the object of defamation. Based on these
considerations, according to the Panel of Judges, legal entities and state institutions can become objects of defamation;”\(^{188}\)

Another judgment that affirms that complaints can be made by individuals or legal entities is in the case with the Defendant Mohammad Aksa Patundu:

“Considering, that in Law Number 19 Year 2016 of the Republic of Indonesia on Amendments to Law No.11 Year 2008 on Electronic Information and Transactions Article 1 Number 21 states that person is “Individual, both Indonesian citizen, foreign national, or legal entity”; Considering, that apart from that, by referring to the provisions of Article 2 of the Criminal Code it is explained that “The criminal provisions in Indonesian law apply to everyone who in Indonesia commits an act that may be punished (criminal incident)”; everyone means anyone, both Indonesian citizens and foreign citizens, as the perpetrator of a criminal event according to the Criminal Code must be a human being except in Economic Crimes (the Criminal Code and its comments, R. Soesilo p: 29, Politeia Bogor). Considering, that thus the element of “everyone” refers to legal subjects, both people and legal entities as supporters of rights and obligations, which can be held criminally responsible if later all the elements in the indictment are fulfilled;”\(^{189}\)

Legal entities such as companies then use the precedent regarding the object of defamation to complain on defamation against their company. For example, in the case experienced by Saidah Saleh Syamlan, who was reported by the President Director of PT Pismatex Textile Industry and PT Pisma Putra Textile. The judgment of this case stated that the defendant’s actions could damage or defame the good name of the Pismatex company, with the explanation in the judgment as follows:

“That written messages sent via the Defendant’s Whats App Account could damage or defame the good name of the Pismatex company.”\(^{190}\)

Expansion of the subject of “defamation” which then punished the Defendant for defaming legal entities or state institutions was experienced by several defendants, including Augie Fantinus Wiyana who was considered as defaming the police institution and members of the police. This expansion creates a chilling effect for citizens to submit complaints, grievance, criticisms, or opinions to public bodies and private institutions, especially with the loose interpretation of various elements of crime in Article 27 paragraph (3) of the ITE Law. Cases with this character also

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\(^{188}\) Kebumen District Court Judgment No. 223/Pid.Sus/2018/PN Kbm, p. 41
\(^{189}\) Poso District Court Judgment No. 262/Pid.Sus/2017/PN Pso, p. 26
\(^{190}\) Surabaya District Court Judgment No. 3120/Pid.Sus/2018/PN Sby.
continue to emerge, for example in the case of Saiful Mahdi, a university lecturer who expressed his opinion on a lecturer’s Whatsapp group without mentioning the name of a particular person, was considered to have committed a defamation and was prosecuted and indicted under Article 27 paragraph (3) of the ITE Law.

Based on historical investigations of the editorial use of “a person” in the Criminal Code and human rights law standards regarding restrictions on freedom of expression with the aim of protecting the reputation of others, the interpretation of reputation protection in Article 27 (3) of the ITE Law must be similar to that regulated in the Criminal Code. This study agrees on the guidelines in the SKB UU ITE which states that “Victims as complainants must be individuals with specific identities, and not institutions, corporations, professions or positions”.\(^{191}\) This would mean, the understanding that attacking honor in an act of slander, libel, or calumny can be committed against an institution, corporation, profession or position as so far has been applied in various cases alleged to have violated Article 27 (3) of the ITE Law, has no justification. The existence of an explanation through SKB UU ITE in this aspect is in line with the standards for limiting the right to freedom of expression in the ICCPR and General Comment No. 34, namely that restrictions regulated by law must be formulated with great precision and must contain sufficient guidance for law enforcers to identify which actions or expressions can be restricted and not.

3.7.4. The Court Ignore the Context of Expression in Determining the Occurrance of Slander, Libel, or Calumny

Acts of slander, libel, and calumny are often analyzed only through the grammatical meaning of the expressions or statements made by the defendant. This can be found in Luwuk District Court Judgment No. 238/Pid.B/2014/PN Lwk, Pati District Court Judgment Number 224/Pid.B/2014/PN Pti., Sanggau District Court Judgment Np. 336/Pid.B/2016/PN Sag, Simalungun District Court Court Judgment No. 43/Pid.B/2017/PN.Sim jucto Supreme Court Judgment No. 963 K/Pid/2017, and Manado District Court Judgment No. 300/Pid.B/2013/PN.Mdo.

For example, in the Luwuk District Court Judgment No. 238/Pid.B/2014/PN Lwk the defendant, who in the chronology of the case referred to another person as a thief, testified that the s/he “uttered these words because the defendant was emotional, because on his/her land a house foundation was built and the sub-district head has said that no buildings should be built on the land, but they will continue to build.”\(^{192}\) From the explanation of the defendant it can be seen that the defendant and the person he accused as “thief” were actually in a conflict regarding land ownership. So, it is only natural that the defendant actually knows that the person

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\(^{192}\) Luwuk District Court Judgment No. 238/Pid.B/2014/PN Lwk., pp. 7-8.
he was accusing was not actually committed the crime of theft. However, the court considered the context of the word “thief” that the defendant said in this case using grammatical context of the word “thief” without examining and considering the context of “thief” that the defendant said. The court did not consider the context of the defendant who felt that his land was being used arbitrarily by another person which then made the defendant uttered this terminology.

The same thing happened in the Sanggau District Court Judgment No. 336/Pid.B/2016/PN Sag. In this case, the defendant was found guilty of defaming PT Bintang Harapan Desa by accusing the company of stealing community land and having a backing (other parties who have strong influence who protect the company). The defendant explained in court:

“That the defendant did not know who backed PT. BHD. His/her statement conveyed to the Pilar Newspaper Editorial Team was only to vent his frustration with the company over the land that the defendant had handed over as Potential Farmer Participant while until present the defendant has not received land or compensation. The defendant had tried to get his/her right but never responded by the Company PT. BHD (Bintang Harapan Desa).”

The court, in its legal considerations, also quoted the defendant’s statement, but later maintained that the element of “attacking someone’s honor or reputation by accusing something” had been proven because the defendant could not prove his accusation and PT BHD’s image became negative. In its consideration the court also did not describe how far the image of PT BHD would be damaged or had been damaged by the defendant's statement in order to measure the balance between the protection of the defendant’s right to expression and the protection of PT BHD’s rights. This is especially important considering that the subject of defamation in this case is not a natural person but a legal entity.

In the context of acts of slander, libel, or calumny, the statements by the defendants in each of these cases must be seen in the context of the conflict that occurred between the defendants and the “victims” in each case. The issue of the context of the statement became one of the things considered by the African Court on Human and Peoples’ Rights in the case of Ingabire Victoire Umuhoro v. Rwanda where the regional human rights court stated clearly that it was inappropriate to impose criminal penalties for expressions whose context is misinterpreted.

The context of the statement was well considered in another case, namely in the Kualasimpang District Court Judgment No. 288/Pid.B/2010/PN.Ksp. In this case, the
defendant wrote a letter of complaint alleging that a police officer had accepted a bribe from another person. Then, the court acquitted the defendant by taking into account the context of the defendant's statement and because the complaint letter that the defendant wrote and sent containing the accusations was part of the search for justice and internal supervision of the enforcement of the police code of ethics.

Similar matter also found in the Cianjur District Court Judgment No. 182/PID.Sus/2015/PN.Cjr. In this case, the defendant distributed a circular letter via electronic mail which contained information about a person's employment status. The court explained explicitly in its judgment that in order to assess whether a circular letter containing elements of libel must be seen contextually with the background events and the purpose of the circular letter being made, not solely from the contents of the circular letter made.

Different considerations can be seen in another case which have similar characteristics to the cases above regarding the existence of a complaint letter containing accusations about another person. In the Palembang District Court Judgment No. 1345/Pid.B/2014/PN.Plg., the defendant was found guilty of the complaint letter he wrote and sent. The Court is of the view:

“... it is true that every member of the public has the right to criticize the performance of public services, but it must be within the corridors of applicable law by conveying substantial information about poor public services, not by accusing a crime that can defame other people, even if it is not accompanied by sufficient evidence.

In this case, the complaint letter from the defendant contained accusations that a head of neighborhood association behaved arrogantly.

The issue of context is also closely related to placing a statement as a statement of facts or opinion (value judgment). This is relevant, for example, in a case that was decided by Sanggau District Court Judgment No. 336/Pid.B/2016/PN Sag. The defendant told the editorial team of the Pilar newspaper that PT BHD stole community land and backed by powerful party. In considering the judgment, the Sanggau District Court did not examine in depth whether the defendant's statement was considered a statement of facts or a value judgment.

In the context of Indonesian law, the difference between an opinion and a statement of facts becomes relevant when it is connected with the Article 312 of the Criminal Code which allows proving the truth, although it is limited in a number of conditions, one of which is in a condition where the judge deems it
necessary to consider whether the defendant’s actions were carried out in the interests of public or out of necessity of self-defence. The reasons “in the public interest” and “self-defense” have been regulated in Article 310 paragraph (3) of the Criminal Code, so that acts of slander, libel, or calumny committed for these reasons cannot be punished. This is in line with international human rights law standards regarding freedom of expression in General Comment No. 34 which explains that the defense of truth must be accommodated in the arrangements regarding offenses of defamation.194

For online slander, libel, or calumny, the same thing is also explained in the SKB UU ITE. In the guidelines for the implementation of Article 27 paragraph (3) of the ITE Law, in letter c it is explained that195:

“No an offense related to defamation in Article 27 paragraph (3) of the ITE Law, if the content transmitted, distributed, and/or made accessible is in the form of an assessment, opinion, evaluation result, or a fact.”

This explanation is in line with the standards for the protection of freedom of expression set out in General Comment No. 34, namely that opinions cannot be subject to restrictions.196 Various regional human rights courts have also consistently stated that opinions cannot be requested to verify the truth, indeed the main nature of opinions is not about the truth or falsity of the contents of statements and thus is irrelevant when subjected to slander, libel, or calumny crime.

Thus, in examining cases of alleged slander, libel, or calumny along with other crimes that make slander, libel, or calumny a genus delict, the court should examine the context of the defendant’s expression, not only looking at the contents of the statement from a grammatical point of view. This is in order to ensure that the standard of protection for the right to freedom of expression is applied consistently with the national criminal law as well as human rights law that applies both internationally and nationally. By applying articles that are consistent with criminal and human rights law standards, the courts can guarantee that criminalizing defamation is only carried out in cases where it is true that the defendant’s actions were malicious.

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194 UN Human Rights Committee, General Comment No. 34 ICCPR..., Op. Cit., para. 47.
3.7.5. Courts Did Not Apply Standards of Criminal and Human Rights Law in Deciding Cases of Defamation to Government or Public Institution

Most of the court’s interpretations of the element “defame verbally or in writing” in Article 207 of the Criminal Code are correct and uniform as the context of defamation in Article 310 of the Criminal Code, which is actions taken to attack the good name and honor of other individual with words or writing. This interpretation is also in line with R. Soesilo’s explanation, that contempt in Article 207 of the Criminal Code is the same as defamation in Article 310 of the Criminal Code, namely the word “defaming” is interpreted in the same way as attacking honor or reputation.

However, from the sample judgments that imposed Article 207 of the Criminal Code above, none of the judgments included the element of “accusing something” in the interpretation of “defaming.” One of the judgments that adequately describes this condition is contained in the Muaro District Court Judgment No. 32/Pid.B/2016/PN Mrj. The defendant in this case uttered the words “pantek ma, mananyo-nanyo se” which were then deemed to fulfill the element of “defamation” because in the Minangkabau area in general the word “pantek” means female genitalia and the defendant was considered to equate the panel of judges presiding the case as genital. The formulation of Article 310 of the Criminal Code clearly stipulates that in order to be called slander or libel, an act of attacking honor must be accompanied by an accusation of something. In this case, it is not clear what accusations the defendant made, but it is clear that the defendant said harsh words to another person. If this is also not considered in the context of Article 207 of the Criminal Code, it will be difficult to distinguish defamations against authorities or public bodies from minor defamations regulated in Article 315 of the Criminal Code.

Another judgment that also considered the contents of the defendant’s statement was the Rote Ndao District Court Judgment No. 36/Pid.B/2008/PN.RND., the defendant’s words containing “barbaric sub-district head, insolent regent” in front of several journalists in response to a polemic statement from the Northwest Rote Sub-District Head were deemed to fulfill the element of “verbal or written defamation.”

In addition, Mataram District Court Judgment No. 393/Pid.B/2018/PN Mtr, and West Jakarta District Court Judgment No. 1302/Pid.SUS/2019/PN.JKT.BRT are also examples of judgments where the defendants said something that had a negative connotation which became part of the defendant’s criticism of the officials who were targeted. In determining whether a statement with a negative connotation could be considered as “defaming”, the courts used different methods: some

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198 Muaro District Court Judgment No. 32/Pid.B/2016/PN Mrj, p. 22-23
199 Rote Ndao District Court Judgment No. 36/Pid.B/2008/PN.RND., p. 28.
used the testimony of linguists and some interpreted on their own based on the testimony of victims and witnesses. Both focus on the same method of interpretation, namely grammatical interpretation.

However, grammatical interpretation alone is not the right method to guarantee the protection of human rights because statements that are harsh or have a negative connotation will easily be considered as defamation. This method allows the court to be negligent in examining the dimensions of the public interest in individual expression directed against the authorities. In fact, it has been regulated in Article 310 paragraph (3) of the Criminal Code that expressions of defamatory nuances carried out in the public interest cannot be punished.

This problem does not only occur in cases prosecuted and convicted under Article 207 of the Criminal Code, but also occurs in cases of the ITE Law. One example is the Kebumen District Court Judgment No. 223/Pid.Sus/2018/PN Kbm as follows:

“... so based on this matter it was found that the defendant dislikes the Police so of course the defendant’s actions in writing and posting his uploads as mentioned above were done willingly, also the defendant must knew the meaning of these words which were to attack the honor and good name of the Police for equating the Police with animals while the act is an unlawful act;”

Decomposition of facts and analysis that solely focuses on narration or words that are considered insulting reduce the essence of the true intentions of the Defendant, for example in the context of conveying complaints and disappointment towards state institutions. Without any balance that the defendant's narrative is the exercise of the right to freedom of expression, in many judgments the defendant’s expression is easily seen as defamation. This is for example reflected in the consideration of the Pekalongan District Court Judgment No. 259/Pid.Sus/2019/PN Pkl. following:

“... the defendant posted the article deliberately which was done intentionally since the defendant felt disappointed of the police service when the defendant assisted his/her friend who got a ticket.”

However, there are also court judgment that decided to acquit expressions suspected of defaming the government or public institution by arguing on the position and capacity of the defendant that are relevant to the statement made. In the Poso District Court Judgment No. 262/Pid.Sus/2017/PN Pso, the court

200 Kebumen District Court Judgment No. 223/Pid.Sus/2018/PN Kbm, p. 40
201 Pekalongan District Court Judgment No. 259/Pid.Sus/2019/PN Pkl., p. 21
considered the following:

“Considering, based on the facts revealed in court, it is true that the Defendant is an anti-corruption activist who is a member of the Touna Corruption Watch (TCW) and serves as the Regional Coordinator of Tojo Una Una.”\(^{202}\)

“Considering, that according to the expert’s statement and the general understanding contained in the Big Indonesian Dictionary associated with these legal facts the Panel of Judges is of the opinion that these words fully contain the meaning that the Defendant is in his capacity as an anti-corruption activist who is a member of Touna Corruption Watch (TCW) and serves as the Tojo Una Una Regional Coordinator is currently conducting an investigation into information that cannot be verified in relation to a project in which there is also an alleged involvement of the Head of the Tojo Una Una Police which is also not necessarily true, based on all of the above considerations the Panel of Judges is of the opinion that the meaning of the these words do not contain accusations against the Head of Police Tojo Una Una regarding his/her involvement in a particular project or in other words that the Defendant’s post which is a status and comment on the Defendant’s Facebook account @MOHAMAD AKSA with these words: “INVESTIGATE PROJECTS OWNED BY PERSONNEL OF POLICE RESORT TOJO UNA UNA” and in the comment column “THIS TIME YOU SHOULD BE FOCUSED IT IS SAID THAT THE INVOLVEMENT OF THE HEAD OF POLICE RESORT IS SUSPECTED” does not contain content of defamation, thus the Panel of Judges is of the opinion that this element is not proven.”\(^{203}\)

This consideration is indeed still very focused on the grammatical interpretation of the defendant’s statement. However, there are aspects related to the defendant’s capacity as an anti-corruption activist which is related to the context of the defendant’s statement. From this correlation the court decided that the defendant’s actions were not a defamation to authorities or public institution.

Another case that stands out in the application of Article 27 paragraph (3) of the ITE Law is the case of Prita Mulyasari, who were acquitted during the Judicial Review stage by the Supreme Court. Although this case was not related to defamation against the authorities or public institution, however there were aspects of public interests considered in the court judgment. Prita was considered to have defamed the hospital through her complaint about the hospital’s services through an electronic document in the form of electronic mail. The Supreme Court

\(^{202}\) Poso District Court Judgment No. 262/Pid.Sus/2017/PN Pso, p. 35.

\(^{203}\) Ibid., pp. 35-36.
Review Judgment stated that there was a mistake in concluding facts about “public interest” and at the same time clarifying the definition of public interest, with the following arguments:

“That Judex Juris does not understand what is meant by “in the public interest” which exists/ contained in Article 310 paragraph (3) of the Criminal Code as the reason for negating the unlawful nature of the act of attacking (aanraden) in defamation. … therefore the APPLICANT FOR REVIEW cannot be convicted and must be distinguished from the indictment and demands of the Public Prosecutor/Prosecutor.

Whereas for the sake of the public interest as a reason for sentencing or exculpating the unlawful nature of defamation, according to their nature and circumstances there are two cumulative conditions, namely:

- First, the nature and contents of the accusation are not solely for the personal benefit of the accuser, but for other people or anyone who will and wants to be in contact with the accused person;
- Second, the content of what is accused must contain the truth.”

The judicial review judgment in the Prita Mulyasari case provides a good example for the court in considering the public interest aspect of the defendant’s actions as an excuse for slander, libel, or calumny as stated comprehensively in Article 310 – 312 of the Criminal Code.

Elements of public interest in individual expression must also be supported by the truth of the statement. This is in line with the provisions stipulated in the series of legal norms in Article 310-Article 312 of the Criminal Code. Another judgment that also considers the truth of the defendant’s statement is contained in cases of defaming authorities or public bodies, contained in the Gorontalo District Court Judgment No. 199/Pid.B/2013/PN.Gtlo. The Gorontalo District Court takes the perspective that this element is considered not fulfilled if the statement submitted refers to a certain source or contains the truth.

In this case, the court found the fact that the sentence used by the defendant was not a sentence that came from his own thoughts but was a quote from the Audit Board of Gorontalo City Audit Report. Expressions like this in the practice of regional human rights courts are referred to as statements of facts which indeed, if proven to contains the truth, cannot be classified as defamation (defence of truth). Besides that, also referring to the practice of regional human rights courts, if an expression is included in the category of opinion, which has sufficient

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205 Gorontalo District Court Judgment No. 199/Pid.B/2013/PN.Gtlo, p. 66.
206 UN Human Rights Committee, General Comment No. 34 ICCPR..., Loc. Cit.
FREEDOM OF EXPRESSION AND DEFAMATION

factual basis, then that expression also cannot be considered as a defamation. This approach has also been explained in the SKB UU ITE regarding the guidelines for implementing Article 27 paragraph (3) of the ITE Law which states “There is no offense related to content of defamation, if the content that is transmitted, distributed, and/or made accessible is in the form of an assessment, opinion, evaluation result or a fact.”

Looking at the various examples of these judgment, it should be emphasized again that in examining and considering cases of contempt against authorities or public institution, the court must be more careful and thorough in looking at the context of the defendant’s actions and not solely convict the defendant based on harsh or negative words said. In this regard, it is necessary to remind that one of the important elements in the provisions on the limitation of rights, both in articles of the ICCPR and Article 28J of the 1945 Constitution, namely that the restriction of rights is carried out according to legitimate purposes in a democratic society. Since Article 207 is essentially an offense of defamation, the context of interest that one wants to protect is reputation. Furthermore, reputation can only be attached to individuals. Apart from that, in deciding whether an expression should be restricted, the impact on the continuity of democracy must also be considered. This is quite relevant in discussing defamations to authorities or public institution because excessive punishment is prone to cause a chilling effect for those who are critical of the ruling government.

The national criminal law framework and several examples have provided a sufficiently clear mechanism to examine whether an individual’s expression alleged as defamation to authorities or public institution has sufficient grounds to be categorized as having purposes in the public interest. As long as an expression, whether in oral or written form or conveyed via electronic means, contains the truth and has a purpose for the public interest, the court cannot convict the act. On the other hand, proof of other elements, such as the elements of “intentionally” and “accusing something”, are equally important.

In addition, so that the court does not get stuck in proving only negative words, referring to the practice of the regional human rights courts described above, for example the African Court on Human and Peoples’ Rights in the case of Loha Issa Konate v. Burkina Faso and the Inter-American Court of Human Rights in the case of Herrera Ulloa v. Costa Rica, there were fundamental considerations in looking at cases of individual comments or criticism of the authorities. In the case of Herrera Ulloa v. Costa Rica, the Inter-American Court of Human Rights stated that the concept of limiting the right to freedom of expression should be applied more loosely when such expressions or statements relate to public officials

207 SKB UU ITE..., Loc. Cit.
because public officials with inherent functions must consciously and inevitably open themselves up to comments from public.208 Meanwhile, the African Court on Human and Peoples’ Rights in the case of Loha Issa Konate v. Burkina Faso explained that the prosecutor’s position is that of a public figure and restrictions on freedom of expression should be looser when it comes to public discourse about public figures or officials.209

The UN Human Rights Committee also explained the same thing in General Comment No. 34. In the context of public expression regarding public figures in the political field or those sitting in government seats, expressions or statements that are derogatory in nature are not enough to make someone blamed or punished.210 Further standards are given in the General Comment No. 34 that in such cases punishment shall be avoided as much as possible or order the defendant to correct his/her statement which was proven to be untrue which was said without any malicious intent.211

Another issue that needs to be discussed is regarding the definition of “an authority or public institution existing in Indonesia” which is difficult to define with precision. All “rulers or public bodies in Indonesia” can be considered to fall into this category, which in a number of cases analyzed includes police, courts, head of sub-districts, regents, mayors and so on. In the Rote Ndao District Court Judgment No. 36/Pid.B/2008/PN.RND., the Defendant’s statement mentioning the positions of Regent and Head of Sub-district, is considered a clear statement addressed to an agency/institution/position of authority or a public institution that exists in Indonesia and is a leader/ruler in district and sub-district level administration.

Likewise in the Marisa District Court Judgment No. 20/PID.B/2014/PN.MARISA, the Defendant was found guilty based on one of the Defendant’s statements addressed to the Chief of the Marisa District Court, not to Lucky R. Kalalo (name of the then Chief of the Marisa District Court), with the consideration that the position of the Chief of the Marisa District Court was the power holder over the court whose jurisdiction is still included in the territory of Indonesia. Based on these considerations, the court stated that the defendant’s actions had met the elements of “an authority or public body in Indonesia.” This consideration, when seen in the construction of the argumentum a contrario, shows that if the defendant at that time mentioned the name of the Chief of Marisa District Court and not his position, then it is possible that the element of “authority or public body in

211 ibid., para. 47.
Indonesia” was not fulfilled in the defendant’s actions.

These considerations is interesting to compare with the Mataram District Court Judgment No. 393/Pid.B/2018/PN Mtr. In this judgment, it was explained that the defendant wrote a comment reading “Jokowi tai (Jokowi is shit)” on social media. Unfortunately, without a good description of the elements and only repeating the chronology of the case in the indictment of the prosecutor, the court immediately concluded that the defendant had been proven to have intended to defame Joko Widodo in terms of his qualities as a president so that through his writing it was stated that he had defamed the authorities or public institution. In fact, the defendant did not mention Joko Widodo’s position in his comments. Because there is no sufficient explanation of the Mataram District Court judgment, it is difficult to prove the truth of the a contrario logic.

Another interesting example to relate to this discourse is the Manado District Court Judgment No. 300/Pid.B/2013/PN.Mdo. which has been explained above regarding the application of Article 310 of the Criminal Code and Article 311 of the Criminal Code. In this case, the defendant was convicted of slandering the victim, Vicky Lumentut, who was the Mayor of Manado, who at that time was suspected of being involved in a corruption case. So, the accusations made by the defendant are clear in the context of a mayor in his duties and functions as a public official. In this slander case, the defendant did not mention the position of Vicky Lumentut at all, but only mentioned his first name. Additional information, the public prosecutor in this case indicted the defendant alternatively with Article 311 paragraph (1) of the Criminal Code or Article 310 paragraph (2) of the Criminal Code, so there was no indictment under Article 207 of the Criminal Code. However, the description contained in the Manado District Court Judgment No. 300/Pid.B/2013/PN.Mdo. also did not provide even slightest explanation on the reasons for the absence of indictment under Article 207 of the Criminal Code. However, in connection with the consideration of Marisa District Court Judgment No. 20/PID.B/2014/PN.MARISA, this seems to indicate that the mention of a name or position of an official in a defamation crime may influence the decision of the prosecutor or judge in determining the indictment or in determining the guilt of the defendant.

In addition, Article 207 of the Criminal Code enables criminalization for defaming institutions or organizations, instead of individuals. This is in principle contrary to human rights legal standards regarding the right to freedom of expression and reputation protection. Reputation can only be considered attached to the individual. In the previous paragraphs it has also been explained through various versions of the Criminal Code translation and also the perspective of international human rights law that protection of a corporation’s reputation cannot be justified.

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Thus, a public institution, which from any point of view cannot be equated with an individual, should not be considered to have a reputation, so that there may be no restriction on the right to freedom of expression in the event that the expression is addressed to a public institution in the sense of Article 207 of the Criminal Code.

This problem can lead to a conclusion that the formulation of Article 207 of the Criminal Code is not in accordance with the requirements for limiting the right to freedom of expression, specifically that it must be provided by law. The main characteristic of the “legal provisions”, according to General Comment no. 34, is that it is regulated precisely so that each individual can act in accordance with these provisions because they understand what is permissible and what is not. Even though Article 207 of the Criminal Code is a legal norm at the statutory level, if the formulation of the norm does not have a precise formulation that makes it difficult for the public to understand what is permissible and what is not then Article 207 of the Criminal Code cannot be used to limit the right to freedom of expression.

Based on the explanation above, it becomes difficult to justify the existence of Article 207 of the Criminal Code for various reasons. First, within the framework of human rights law, reputation is attached to individuals and protection of reputation is given to individuals, not positions held by individuals or institutions where individuals work. Second, the content of Article 207 of the Criminal Code is very similar to the substance of Article 134, Article 136 bis, and Article 137 of the Criminal Code which have been declared contrary to the 1945 Constitution and revoked by the Constitutional Court. Third, public officials or “public institutions” formed by the state have very strong and dominant positions and resources compared to the general public, so that the provision of space to instigate criminal proceedings for defamations to these parties is dangerous for the promotion of a democratic climate. Fourth, for the same reason that public officials and agencies formed by the state have strong and dominant positions and resources, including in terms of access to the media, public officials can respond and clarify criticisms from the public.\(^{213}\)

Referring to these various reasons, ideally Article 207 of the Criminal Code is annulled or revoked through the mechanism of amendment or judicial review. However, since this process usually takes quite a long time, as long as the article is still valid, various limitation and adjustments are needed in its application. The application of Article 207 of the Criminal Code must be carried out very carefully as is human rights law standards in the application of articles on defaming public figures. The first thing that must be considered is that law enforcement officials must refer to the considerations of the Constitutional Court regarding the existence

3.7.6. Application of Proportionality of Different Sentences between Defamation Charged under the Criminal Code and the ITE Law

Human rights standards in limiting the right to freedom of expression do not only discuss about regulations in law and are carried out for legitimate purposes. When the court finds that a person is guilty of attacking the honor or reputation of another person, another thing that must be measured is how necessary it is to punish the act (necessity) and whether the sentence imposed is proportionate (proportionality). This aspect is one of the overall testing mechanisms that has become the standard for regional human rights courts in examining the legitimacy of state restrictions on rights, which is often referred to as a three-part test.

The previous paragraphs have explained the “necessity” criteria in the Siracusa Principle. One of the important elements of “necessity” is that the court needs to consider whether or not there is an urgent social or public need to impose restrictions on a person’s right to freedom of expression (in this case through sentencing).

From court judgments related to cases charged with defamation or slander, it is known that the options of acquittal as well as non-imprisonment sentences are often used. For example, of the 48 cases researched which were prosecuted under Article 310 paragraph (1) or Article 310 paragraph (2) of the Criminal Code, there were 20 cases which received acquittal sentences and 11 cases which received criminal sentence with suspended sentences. Then, of the 34 cases researched which were prosecuted under Article 311 paragraph (1) of the Criminal Code, there were 12 cases which were acquitted by the court and 6 cases where the court imposed suspended sentences.

Measuring necessity and proportionality certainly needs to look at the case-by-

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214 This figure must be considered with note that the maximum prison sentence in Article 310 paragraph (1) of the Criminal Code is nine months and for Article 310 paragraph (2) is one year and four months. Conditional punishment with a probationary period in accordance with Article 14a of the Criminal Code can be applied, one of which is if the judge imposes a maximum of one year imprisonment. Thus, naturally it becomes easier for judges to impose suspended sentences in cases convicted under Article 310 paragraph (1) of the Criminal Code and Article 310 paragraph (2) of the Criminal Code.
case situation. However, the data presented in the previous paragraph are still relevant to show that the application of articles related to slander, libel, or calumny does not always have to end in prison and Indonesian criminal law has provided alternatives to non-imprisonment punishment through suspended sentence for cases where the expression in question does qualify to be restricted. This understanding is needed to avoid imposing an excessive sentence, provided that the court has correctly decided the guilt of the defendant in relation to the alleged defamation that he committed.

Furthermore, referring to the Report of the UN Special Rapporteur on Freedom of Opinion and Expression, Frank La Rue, the internet world has unique characteristics and regulations or restrictions that may be considered valid and balanced for traditional (offline) media often cannot be applied to internet access. La Rue gave an example, in cases of defamations in the internet era, individuals who feel their reputation has been defamed can exercise their right of reply right away, so that criminal sanctions for defamations via the internet do not need to be imposed.²¹⁵ This standard provides the consequence that expressions on the internet medium can be given the right of reply to clarify in the same forum, and this step is a proportional step. This means that punitive actions for expressions carried out in online media do not need to be criminal penalties because they are disproportionate.

As mentioned earlier, the forms of punishment in Article 27 paragraph (3) of the ITE Law include imprisonment and/or fines, with a variety of suspended sentences. There are many cases with imprisonment in a matter of months (or adjusting and completing the detention period), or judgments with suspended sentences. This condition raises the issue of proportionality and necessity whether a person should be sentenced for his statement and the issue of what punishment is deemed necessary and proportionate for the accused. This is related to La Rue's opinion, that statements that are considered defaming on the internet medium should be considered redeemed if there have been efforts to correct them on the same medium, and the fact that currently many cases of defamations in various other countries are resolved by mediation mechanisms.

The few judgments that analyze alleged facts to the guaranty freedom of expression have resulted in the issue of the proportionality of the sentence being more related to the form of punishment to be imposed. Various attempts at mediation, apology from the accused or removal of content, were placed more as reasons to reduce punishment, not in the context of the proportionality of the state's response to

expressions that were deemed to be overreaching, in this context defaming.

In various cases, the defendant has expressed an apology, both verbally and in writing, but the defendant was still found guilty and sentenced. The defendant Augie Fantinus Wiyana, for example, who also made peace with the complainant, was still sentenced. In many cases charged with Article 27 paragraph (3) of the ITE Law, suspended sentences were given, which indicates that the defendant’s guilt was actually quite light, apart from the presence of mitigating factors for the defendant. In another judgment, an apology became the basis for giving a conditional sentence in the form of a suspended sentence, for example against the Defendant Tiong Shan Daniel Budi Santoso:

“Considering that the Panel of Judges applied Article 14 letter (a) of the Criminal Code or the need for a suspended sentence against Defendant Tiong Shan Daniel Budi Santoso Als. Budi Bin M. Hasan with legal reasons, during trial the Defendant has expressed an apology for his mistake in sending electronic information via the Whatsapp application to the witness Prof. Dr. Marry Astuti (witness Gunawan Wibisono’s parents) which contained demeaning other people’s dignity, this was done by the Defendant because of the difficulty in communicating directly regarding solving the Defendant’s household problems which were related to witness Gunawan Wibisono, but in the end the household the defendant ended in a divorce. Furthermore, the Defendant at trial has realized his mistake and in the future will be wiser in using electronic information media, and after the Panel of Judges has examined the actions of the Defendant who sent electronic information with the Whatsapp application via a private network (not uploaded publicly) so that the consequences were not directly and widespread embarrassment and degrade, and did not cause material harm to other parties.”

In a number of cases, the Judgment has been adequate in considering the aspect of proportionality, even though the sentencing is also not easy to justify. In the case with the defendant Florence Sihombing, as the case received considerable public attention and the accusation was deemed to have defamed a group of people, the arguments for the Judgment are as follows:

“... is a principle in imposing a sentence that must be proportional to the weight of the Defendant’s guilt. Punishment must not reflect arbitrariness without regard to the function and meaning of the punishment itself. Also, sentencing must consider the benefits and damage to self (body and soul) and the future of the Defendant;”

216 Jakarta Pusat District Court Judgment No. 84/PID.Sus/2019/PN. Jkt.Pst., p. 16.  
217 Sukoharjo District Court Judgment No. 87/Pid.Sus/2019/PN Skh., p. 47.
“That the nature of punishment is as a corrective, introspective, educative and contemplative tool for the Defendant who must reflect the purpose of supervision and teaching for herself, who in turn can reflect on what she has done. From there it is hoped that a deterrent feeling will arise in her, which in turn can prevent other people from making similar mistakes.”

“That as a nation that adheres to a noble culture, moreover the Defendant has apologized to all the people of Yogyakarta through her Path account, the process of recovering the situation involving the Defendant, the community (victims) by grant her the apology is the right and wise choice to make this legal event as a shared learning.”

In the Judgment with the Defendant Elridawati, the Judgment also states that the punishment must be proportional, as the following argument stipulates:

“...according to the Panel of Judges, the purpose of the punishment that will be imposed on the Defendant is not solely for revenge, but to make the Defendant aware of her mistakes so that the Defendant can return to good society. According to the Panel of Judges, sentencing must pay attention to the principle of proportion (according to the level of guilt of the Defendant) and fulfill the objectives of punishment which must be corrective, preventive and educational in nature, and look at the good and bad character of the Defendants as required by Article 8 paragraph (2) of the Law Number 48 Year 2009 concerning Judicial Power.”

The issue of proportionality and the need to punish someone’s expression is a crucial issue in the midst of regulations at the statutory level that are imprecise and cause multiple interpretations among law enforcement officials, especially in terms of the application of Article 27 paragraph (3) of the ITE Law. The Panel of Judges faced a difficult problem when legally and based on sufficient facts the elements of a crime were fulfilled so that they still had to give a sentence, even though the expression alleged to be defamation did not really reflect intention (deliberation) to defame.

In human rights law standards, the UN Human Rights Committee explained by citing again its views in the case of Shin v. Republic of Korea, namely that the state must indicate specifically and specifically regarding what kind of threats arise as a result of someone’s expression against other interests that they want to protect and explain the level of necessity and proportionality of the punishment given

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218 Yogyakarta District Court Judgment No. 382/Pid.Sus/2014/PN.Yyk, p. 27.
219 Kualasimpang District Court Judgment No. 380/Pid.Sus/2018/PNKsp, p. 28.
by showing a direct relationship between the perpetrator's expression and the threat behind the restriction. This approach can be adopted by the courts when examining cases that have a dimension of freedom of expression. Legal considerations do not only explain the legal facts and elements of crime, but also explain why the accused needs to be punished (in the event s/he is found guilty) by explaining what threats arise from the defendant's actions to the reputation of the victim or other relevant interests according to Article 19 paragraph (3) of the ICCPR.

In cases related to defamations against authorities, bearing in mind that in this context that penalization has the potential to create a chilling effect on society, the court should also consider not sentencing the accused or simply giving orders to the accused, in cases where the expression or statement is untrue but delivered without any malicious intent, to correct this untrue statement. The option of suspended sentence with general conditions and special conditions provided in Article 14a of the Criminal Code and Article 14c of the Criminal Code can also be a way to ensure the proportionality of sentences.

However, all these considerations and conditions can only be carried out if the court has interpreted and applied the law correctly and precisely so that the determination of whether or not the accused is guilty is based on the theory of criminal law and applicable human rights law standards.

Judgments of regional human rights courts can be used as a reference in understanding how to assess the proportionality of the state’s response to acts of defamation, including responses in the form of penalization. In the case of Herrera-Ulloa v. Costa Rica, the Inter-American Court of Human Rights is of the view that the conviction of Herrera-Ulloa by the Costa Rican court because he was unable to prove the truth of his accusations has hindered and created chilling and inhibiting effect for journalism work and ultimately hindered public discourse on issues of public interest. In the case of Uson Ramirez v. Venezuela, the Inter-American Court of Human Rights found Venezuela guilty of violating the Inter-American Human Rights Convention with one of its considerations stating that intervention or restriction of freedom of expression through criminal law should be used in a very limited manner and only when absolutely necessary to protect basic interests from attacks which can damage these interests, because the nature of criminal law is as an ultima ratio (last resort).

Another example can be found in the case of Ingabire Victoire Umuhoza v. Rwanda.

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220 UN Human Rights Committee, General Comment No. 34 ICCPR..., Op. Cit., para. 35.
In this case the African Court on Human and Peoples’ Rights argued that it was not justified to impose criminal penalties on expressions that were misinterpreted by the context because it would create an atmosphere of fear in society so that criminal penalties against Umuhoza were unnecessary in a democratic society.\textsuperscript{223} In the case of Loha Issa Konate v. Burkina Faso, the African Court on Human and Peoples’ Rights considered that Burkina Faso cannot prove why imprisonment is a necessary form of sanction to protect the rights and reputation of law enforcement officials.\textsuperscript{224} In addition, violations of laws relating to freedom of expression and the press shall not punishable by deprivation of liberty and as such, Konate’s punishment is disproportionate and excessively restricts freedom of expression.\textsuperscript{225}

These various examples of the practice of regional human rights courts are proof that the requirements of “necessity” and “proportionality” are equally important as other restrictions on the right to freedom of expression. It is not uncommon practice for regional human rights courts to rule that violations of the right to freedom of expression existed solely based on finding the government of the respondent country had imposed disproportionate sanctions against the individual complaining. Therefore, the courts in Indonesia need to start strengthening perspectives regarding the necessity of an expression to be penalized and the proportionality of the sanctions imposed.

3.7.7. The formulation of the Crime of Defamation in the ITE Law Duplicates Defamation in the Criminal Code and Does Not Guarantee Legal Certainty

Whereas Article 310 paragraph (1) and paragraph (2) as well as Article 311 paragraph (1) of the Criminal Code are the articles that are referred to in the formulation of Article 27 paragraph (3) of the ITE Law. The article of the ITE Law relates to the dissemination of defamatory content in the form of electronic information and/or documents. As a reminder, the elements of Article 27 paragraph (3) of the ITE Law are as follows:

“Every person intentionally and without rights distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that contain defamation.”

The elucidation of Article 27 paragraph (3) of the ITE Law explains that the provisions in that article refer to the provisions on slander, libel, or calumny regulated in the Criminal Code. It can be understood that the intent of the elucidation of the article is that the interpretation of Article 27 paragraph (3) of the ITE Law is carried out

\textsuperscript{225} Ibid., paras. 164-165.
by referring to Article 310 and/or Article 311 of the Criminal Code. If each of these articles is broken down into independent elements, it can be seen that indeed the series of elements of the act provided in Article 27 paragraph (3) of the ITE Law are similar to Article 310 paragraph (1) and paragraph (2) of the Criminal Code and Article 311 paragraph (1) of the Criminal Code and some of the elements in the ITE Law have equivalent (parallel meanings) with the elements in the Criminal Code. This can be described in the following table.

**Table of Equivalent Elements in the Articles of Slander, Libel, and Calumny in the ITE Law and the Criminal Code**

<table>
<thead>
<tr>
<th>Article 27 paragraph (3) of the ITE Law</th>
<th>Article 310 para. (1) of the Criminal Code</th>
<th>Article 310 para. (2) of the Criminal Code</th>
<th>Article 311 para. (1) of the Criminal Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Everyone”</td>
<td>“Any person”</td>
<td>“Any person”</td>
<td>“Any person”</td>
</tr>
<tr>
<td>“intentionally”</td>
<td>“intentionally”</td>
<td>“intentionally”</td>
<td>“intentionally”</td>
</tr>
<tr>
<td>“without right”</td>
<td>No equivalent</td>
<td>No equivalent</td>
<td>No equivalent</td>
</tr>
<tr>
<td>“Distribute and/or transmit and/or make accessible”</td>
<td>“with obvious intent to give publicity thereof”</td>
<td>“with obvious intent to give publicity thereof” and “by means of writings or drawings broadcasted, openly demonstrated or put up”</td>
<td>“with obvious intent to give publicity thereof” and/or “by means of writings or drawings broadcasted, openly demonstrated or put up”</td>
</tr>
<tr>
<td>“Electronic Information and/or Electronic Documents”</td>
<td>No equivalent</td>
<td>“Writings or drawings”</td>
<td>“Writings or drawings”</td>
</tr>
<tr>
<td>&quot;Which has content of defamation&quot;</td>
<td>&quot;Attacking someone's honor or good name by accusing something&quot;</td>
<td>&quot;Attacking someone's honor or good name by accusing something&quot;</td>
<td>&quot;Attacking someone's honor or good name by accusing something&quot;</td>
</tr>
</tbody>
</table>
In the elaboration of the previous paragraphs, it has been explained that the element “intentionally” in the formulation of the crime of slander, libel, or calumny must be interpreted as intentional with a purpose (opzet als oogmerk). In addition, it has also been explained that the element “intentionally” in Article 27 paragraph (3) of the ITE Law has the same meaning as the element “intentionally” in Article 310 of the Criminal Code and Article 311 of the Criminal Code. Thus, it is clear that the meaning of the element “intentionally” in Article 27 paragraph (3) of the ITE Law, Article 310 of the Criminal Code, and Article 311 of the Criminal Code are the same.

One of the equivalent elements that deserves attention is the element “distributing and/or transmitting and/or making accessible” in the ITE Law with its various equivalents in the Criminal Code, namely the element “with the intention to give publicity thereof” and the element “done in writing or drawing which is broadcasted, shown or put up in public”, especially in this case the element “in public”.

An explanation regarding the meaning of the elements of “distributing and/or transmitting and/or making accessible” can be seen in the elucidation of Article 27 paragraph (1) of the ITE Law, which reads as follows:

“What is meant by “distributing” is sending and/or distributing Electronic Information and/or Electronic Documents to many people or various parties through Electronic Systems. What is meant by “transmitting” is sending Electronic Information and/or Electronic Documents addressed to another party through the Electronic System. What is meant by “making accessible” are all actions other than distributing and transmitting through Electronic Systems that cause Electronic Information and/or Electronic Documents known by other parties or the public.”
Regarding the element “with the intention to give publicity thereof”, the interpretation of this element can be seen again in the explanation in the previous chapter, which basically explains that it must be proven: 1) is it true that the perpetrator who accused something to another person wanted this matter to be publicly known; and 2) is it true that many people have come to know about the accusation because of the perpetrator’s actions. In terms of the context of the act, both elements in the ITE Law and the Criminal Code have the same end goal or condition, namely to make other people or the public aware of the defamation act.

Related to the other equivalent, the element “in public”, it has also been explained in the previous paragraphs that this element is interpreted as a place where many other people can see or hear the occurrence of an act, where the meaning of “place” can be interpreted as a public place or spaces or other space that is not public but other people can still see or hear the actions being committed. From this definition we can conclude that the act of defamation which is “committed in writings or drawings that are broadcasted, shown or posted in public” has the same context as “distributing and/or transmitting and/or making accessible” electronic information and/or documents with defamatory content. The meaning of both refers to the access of other people or the public to see, hear, or know about defamation acts that have occurred.

Thus, it can be concluded that almost the entire set of elements in Article 27 paragraph (3) of the ITE Law has an equivalent or parallel meaning with the series of elements in the articles of the Criminal Code which are related to slander, libel, and calumny, which are Article 310 paragraph (1) and paragraph (2) of the Criminal Code and Article 311 paragraph (1) of the Criminal Code. However, there are also some obvious differences in elements, one of which is regarding the “without rights” element contained in the ITE Law but has no equivalent in the relevant articles in the Criminal Code.

Referring to the comparison of elements and analysis above, the related provisions in the Criminal Code are eligible to accommodate acts of defamation in the online sphere. Article 310 paragraph (1) and paragraph (2) of the Criminal Code do not strictly stipulate that criminal acts of defamation regulated in these articles are only acts of defamation committed outside the internet network.

Article 310 paragraph (1) of the Criminal Code is quite generic or general in describing prohibited acts, namely “intentionally attacking someone's honor or reputation by accusing something.” Meanwhile, Article 310 paragraph (2) adds an aggravating element if “the act was committed in writing or drawing”. These articles
do not stipulate that the prohibited actions must be carried out in the offline realm and not in the internet network or online domain. This is also supported by the findings of 21 cases that were prosecuted for defamation based on Article 27 paragraph (3) of the ITE Law, at least 11 cases using alternative charges or subsidiarity using Article 310 paragraph (1) or paragraph (2) of the Criminal Code and Article 311 paragraph (1) of the Criminal Code. This finding shows that in fact law enforcement officials themselves understand that allegations of defamation that are prosecuted using the provisions of Article 27 paragraph (3) of the ITE Law can also be prosecuted under the provisions of criminal acts of slander, libel, or calumny as regulated in the Criminal Code.

The difference that can be seen in the provisions for defamation offenses in the ITE Law and criminal acts of slander, libel, or calumny in the Criminal Code, apart from being related to the element of “electronic information and/or electronic documents”, is regarding the punishment. In the Criminal Code, the crime of slander is punishable by imprisonment for a maximum of 9 (nine) months or a fine of up to four thousand five hundred rupiahs, while for libel it is punishable by imprisonment for a maximum of 1 (one) year and 4 (four) months or a maximum fine of four thousand five hundred rupiahs. Against criminal acts of calumny, the Criminal Code provides for a maximum imprisonment of 4 (four) years.

In the ITE Law before the amendment, it was stipulated that anyone who commits an act prohibited in Article 27 paragraph (3) is threatened with imprisonment for a maximum of 6 (six) years and/or a fine of up to Rp. 1,000,000,000.00 (one billion rupiah). This sanction was later reduced through the amendment of the ITE Law in 2016 so that such acts are punishable by imprisonment for a maximum of 4 (four) years and/or a fine of up to Rp. 750,000,000.00 (seven hundred and fifty million rupiah).

From this comparison, it can be seen that the criminal penalties for defamations regulated by the ITE Law have increased or severer compared to the criminal threats for defamations that are regulated in the Criminal Code. Even though the maximum prison sentence for defamation in the ITE Law has been reduced so that it is the same as the sentence for calumny in the Criminal Code, the fine is still much higher than what is provided for in the Criminal Code. In fact, according to the analysis in the previous paragraphs, it is clear that Article 27 paragraph (3) of the ITE Law substantially regulates the same matters as Article 310 paragraph (1) and paragraph (2) of the Criminal Code and Article 311 paragraph (1) of the Criminal Code. Thus, the provisions for defamation offenses in the ITE Law basically only introduce a higher criminal penalties for actions that are substantially the same as slander, libel, and calumny in the Criminal Code. The increase of criminal penalties in the ITE Law has no clear justification. The elucidation of the ITE Law also does
not provide a description of the basis for the differences in the criminal penalties.

In addition to the increase of criminal penalties that have no justification, Article 27 paragraph (3) of the ITE Law also mixes up criminal acts of slander, libel, and calumny into one and the same act which is regulated in the same article. In fact, the provisions in the Criminal Code show that slander/libel and calumny are two different crimes because the act of calumny has an aggravating element, namely the existence of proof of the truth of the accusation where the perpetrator cannot prove it and the accusation contradicts what s/he knows. Due to the existence of these aggravating element, the criminal threat for calumnious acts regulated in the Criminal Code is also heavier than slander and libel.

Therefore, the incorporation of criminal provisions regarding slander, libel, and calumny in the same article as in Article 27 paragraph (3) of the ITE Law is an anomaly in the penal system that applies in the Indonesian criminal law system. The formulation of Article 27 paragraph (3) of the ITE Law creates confusion in distinguishing acts of slander/libel and calumny in the ITE Law regime, meanwhile the provisions in the Criminal Code have expressly stipulated that slander/libel and calumny are two different criminal acts with different criminal penalties.

The problem of increasing criminal penalties without clear justification and the incorporation of regulations on criminal acts of slander/libel and calumny into the same article, shows that Article 27 paragraph (3) of the ITE Law has problems in its formulation. This problematic formulation enables various application of laws so that logically it also enables opportunity to cause abuse of authority of law enforcement officials. Fundamentally, the formulation of Article 27 paragraph (3) of the ITE Law also has the opportunity to cause violations of the right to legal certainty which according to the 1945 Constitution is included as a human right guaranteed as constitutional rights.

3.7.8. Law Enforcement Officials Use Contextually Different Criminal Articles in Subsidiarity/Alternative to Convict Expressions

Referring to the interrelatedness of Article 310 of the Criminal Code, Article 311 of the Criminal Code and Article 27 (3) of the ITE Law, the provisions on slander, libel, and calumny are very effective in ensnaring various forms of expression and do not guarantee legal certainty. Various indictments with alleged violations of Article 27 paragraph (3) of the ITE Law, for example, are often accompanied by indictments using other articles of the ITE Law, such as Article 28 paragraph (2), articles of the Criminal Code and other related laws. This is a result of the unclear differences and scope of each of these articles so it become easy to deviate from the true intent of the criminal provisions. This condition is exacerbated by law
enforcement officials who tend to generalize different offenses as defamations. As a result, it will be very difficult for the accused to be acquitted.

For example, in the case with the defendant Syaeful Lillah, the prosecutor indicted the defendant with three counts using various articles of the ITE Law, as follows:\textsuperscript{226}

1) Violating Article 36 \textit{juncto} Article 51 paragraph (2) of the ITE Law\textsuperscript{227}, based on the argument “that the defendant replaced the Police, especially the Kebumen Police with the words “WERCOK” (Brown Planthopper), “Asu 88” (Dog 88) is demeaning the honor of the Police institution, especially the Kebumen Police, because it equates Kebumen Police officers”;

2) Violating Article 28 paragraph (2) jo. Article 45A paragraph (2)\textsuperscript{228}, based on the argument “That the defendant replaced the Police, especially the Kebumen Police with the words “WERCOK” (Brown Planthopper), “Asu 88” (Dog 88) can cause feelings of dislike for people who read the post and have had dealt with the Police, especially the Kebumen Police.”;

3) Violating Article 27 paragraph (3) jo. Article 45 paragraph (3) of the ITE Law\textsuperscript{229} based on the argument “That the defendant’s argument to replace the Police, especially the Kebumen Police in posting his FB status with the words “WERCOK” (Brown Planthopper), “Asu 88” (Dog 88) is very demeaning and insulting the honor of the Indonesian Police institution, especially the Kebumen Police Resort as one of the law enforcement officers, for equating Kebumen Police officers with animals.”

Multiple charges with different offenses were also faced by several other defendants as described in the following table.

\textsuperscript{226} Kebumen District Court Judgment No. 223/Pid.Sus/2018/PN Kbm, pp. 19-22.

\textsuperscript{227} These articles prohibit intentionally and without right or against the law to carry out actions regulated in Articles 27 to 34 of the ITE Law which result in harm to other people.

\textsuperscript{228} These articles prohibit intentionally and unlawfully spreading information aimed at creating feelings of hatred or hostility towards certain individuals and/or groups of people based on ethnicity, religion, race and inter-group (SARA).

\textsuperscript{229} These articles prohibit committing acts intentionally and without rights to distribute and/or transmit and/or make Electronic Information and/or Electronic Documents that contain defamation accessible.
Table of Examples of Subsidiarity Indictment

<table>
<thead>
<tr>
<th>Name</th>
<th>Indictment under ITE Law 2008</th>
<th>Indictment under amended ITE Law 2016</th>
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<tbody>
<tr>
<td><strong>Prabowo</strong></td>
<td>Indicted under</td>
<td>Indicted for violating:</td>
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<tr>
<td></td>
<td>• Article 27 paragraph (3) <em>juncto</em> Article 45 paragraph (1) of the ITE Law; or</td>
<td>• Article 28 paragraph (1) <em>juncto</em> Article 45A paragraph (2) of the ITE Law;</td>
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<td></td>
<td>• Article 311 paragraph (1) of the Criminal Code; or</td>
<td>• Article 27 paragraph (3) <em>juncto</em> Article 45A paragraph (3) of the ITE Law;</td>
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<td></td>
<td>• Article 335 paragraph (1) number 2 of the Criminal Code.</td>
<td>• Article 310 paragraph (1) of the Criminal Code; or</td>
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<td>• Article 311 of the Criminal Code.</td>
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<tr>
<td><strong>Augie Fatinus Wiyana</strong></td>
<td>Indicted for violating: <em>juncto</em> Article 45A paragraph (2) of the ITE Law; or Article 27 paragraph (3) <em>juncto</em> Article 45A paragraph (3) of the ITE Law; or Article 310 paragraph (1) of the Criminal Code; or Article 311 of the Criminal Code.</td>
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<tr>
<td><strong>Diki Chandra</strong></td>
<td>Indicted under</td>
<td>Indicted for violating</td>
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<td></td>
<td>• Article 45 paragraph (1) <em>juncto</em> Article 27 paragraph (3) of the ITE Law; or</td>
<td>• Article 36 <em>juncto</em> Article 51 paragraph (2) of the ITE Law;</td>
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<td>• Primary: Article 310 paragraph (2) KUHP dan Subsidiary: Article 311 paragraph (1) KUHP.</td>
<td>• Article 28 paragraph (2) <em>juncto</em> Article 45A paragraph (2) of the ITE Law; or</td>
</tr>
<tr>
<td><strong>Syaeful Lillah</strong></td>
<td>Indicted for violating</td>
<td>• Article 27 paragraph (3) <em>juncto</em> Article 45 paragraph (3) of the ITE Law.</td>
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<td></td>
<td>• Article 28 paragraph (2) <em>juncto</em> Article 45A paragraph (2) of the ITE Law; or</td>
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<tr>
<td></td>
<td>• Article 27 paragraph (3) <em>juncto</em> Article 45A paragraph (3) of the ITE Law; or</td>
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<tr>
<td><strong>Ira Simatupang</strong></td>
<td>Indicted for violating</td>
<td>Indicted for violating</td>
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<td></td>
<td>• Article 42 paragraph (1) <em>juncto</em> Article 27 paragraph (3) of the ITE Law; or</td>
<td>• Article 29 <em>juncto</em> Article 45 Paragraph (3) of the ITE Law;</td>
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<td></td>
<td>• Article 310 paragraph (2) of the Criminal Code; or</td>
<td>• Article 27 Paragraph (3) <em>juncto</em> Article 45 Paragraph (1) of the ITE Law; or</td>
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<td>• Article 311 paragraph (1) of the Criminal Code.</td>
<td>• Article 27 Paragraph (4) <em>juncto</em> Article 45 Paragraph (1) of the ITE Law.</td>
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<td><strong>Rusmiati</strong></td>
<td>Indicted for violating</td>
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<td>• Article 29 <em>juncto</em> Article 45 Paragraph (3) of the ITE Law;</td>
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<td>• Article 27 Paragraph (3) <em>juncto</em> Article 45 Paragraph (1) of the ITE Law; or</td>
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<td></td>
<td>• Article 27 Paragraph (4) <em>juncto</em> Article 45 Paragraph (1) of the ITE Law.</td>
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<tr>
<td>Name</td>
<td>Indicted for violating</td>
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<tr>
<td>Prita Mulyasari</td>
<td>• Article 45 paragraph (1) \textit{juncto} Article 27 paragraph (3) of the ITE Law; or</td>
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<td></td>
<td>• Article 310 paragraph (2) of the Criminal Code; or</td>
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<td>• Article 311 paragraph (1) of the Criminal Code.</td>
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<td>Teguh Basuki</td>
<td>• Article 28 paragraph (2) \textit{juncto} Article 45A paragraph (2) of the ITE Law; atau</td>
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<td></td>
<td>• Article 27 paragraph (3) \textit{juncto} Article 45 paragraph (3) of the ITE Law.</td>
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<tr>
<td>Herrybertus Julius Calame</td>
<td>• Article 27 paragraph (3) \textit{juncto} Article 45 paragraph (1) of the ITE Law; or</td>
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<td></td>
<td>• Article 310 paragraph (2) of the Criminal Code.</td>
<td></td>
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<tr>
<td>Danang Tri Widodo</td>
<td>• Article 45 A paragraph (2) \textit{juncto} Article 28 paragraph (2) of the ITE Law;</td>
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<td></td>
<td>• Article 45 paragraph (3) \textit{juncto} Article 27 paragraph (3) of the ITE Law; or</td>
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<td></td>
<td>• Article 16 \textit{juncto} Article 4 letter (b) number (1) Law No. 40 Year 2008</td>
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<td>on Elimination of Racial and Ethnic Discrimination</td>
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From various sources

With the use of this subsidiary/alternative indictment strategy, it is difficult for people who express opinions or expressions that are later deemed to have violated the ITE Law to be free from punishment. One of the examples, in the cases above, the Panel of Judges chose to consider the facts closest to the charges filed, as in the Judgment against Defendant Syaeful Lillah:

“Considering that the Defendant has been indicted by the Public Prosecutor with an alternative form of indictment, so that the Panel of Judges taking into account the legal facts mentioned above directly chooses the third alternative indictment as stipulated in Article 27 paragraph (3) in conjunction with Article 45 paragraph (3) of Law No. 11 Year 2008 as amended and supplemented by Law Number 19 Year 2016 on Amendments to Law Number 11 Year 2008 on Electronic Information and Transactions, the elements of which are as follows:

\footnote{Kebumen District Court Judgment No. 223/Pid.Sus/2018/PN Kbm, p. 37.}
This condition logically makes it difficult for the public to regulate their own behavior due to the lack of clarity regarding which expression is right or wrong according to the law. This is due to the formulation of regulations that are not regulated clearly and precisely as required by human rights law standards in setting norms that limit a right. According to General Comment No. 34 this situation should not have occurred in regulating and implementing rights restriction norms. A rule that limits rights should be set with precision.

3.8. Conclusion and Recommendation
Based on previous elaboration, the following conclusions are gathered:

- The courts have not applied the elements of defamation articles correctly, such as:
  - Did not apply “intentionally” element as *animus injuriiandi* consistently, by among others:
    - Did not wholly prove the intention element by connecting it to the other elements;
    - Did not meticulous and prudent in connecting the purpose of elements of the article to the legal facts of defendant’s action;
    - so that the courts convicted acts that should not be punished under slander, libel, or calumny articles;
  - Using the provisions on slander, libel, and calumny to convict a defendant in cases where those whose honor claimed to be defamed are legal entities;
  - Understood and applied the element of “intentionally to give publicity thereof” limited to actions in public spaces.
- There is no uniformity in how courts interpret and apply articles related to slander, libel, calumny and defamations against authorities or public institutions. This is at least caused by:
  - the formulation of regulations in the ITE Law which previously did not provide clear and firm boundaries regarding defamation referred to in the said law;
  - incorrect methods of interpretation and understanding on the application of the elements of the article; and/or
  - the courts do not have sufficient perspective and consideration regarding human rights law in adjudicating the cases indicted.
- Considerations regarding the protection of freedom of expression, including testing the three main criteria for limiting rights, have never been used by most courts in examining and deciding cases with the dimension of the right to freedom of expression. This has impacted on
many things, including the different views of the court which are reflected in judgments and punishments for legal expression that should be protected. This impact occurred both in cases of slander, libel, or calumny regulated in the Criminal Code and the ITE Law as well as defamations against authorities or public institutions, for example in cases where:

- The defendant allegedly insult a company/corporation;
- The defendant wrote and sent a letter of complaint or grievance addressed to a limited party and through a closed channel;
- The defendant conveyed information on alleged unlawful acts by government officials through the media without malicious intent; and
- The defendant criticized or complained about the performance of government officials, both offline and online, both in harsh and bold language and in plain language.

- The provisions for defamation in Article 310 of the Criminal Code and Article 311 of the Criminal Code are basically similar to Article 27 paragraph (3) of the ITE Law, since all the elements of Article 27 paragraph (3) of the ITE Law have their equivalents in the elements of Article 310 of the Criminal Code and Article 311 of the Criminal Code. Thus, the court can use similar method in interpreting the elements and analyzing the actions of the defendant between defamations that occurred in the online and offline domains by referring to the provisions regarding slander, libel, and calumny in the Criminal Code. Apart from that, the formulation of Article 27 paragraph (3) of the ITE Law turns out to cause problems due to the increase of criminal sanctions without clear justification and by merging regulations on prohibition of slander/libel and calumny into the same article, that enable violations of citizens’ constitutional rights.

- The existence of the SKB UU ITE should be appreciated, but it does not eliminate the urgency to amend articles that restrict the right to freedom of expression in the ITE Law. The SKB UU ITE has provided additional explanations on articles that often raise questions in the society, including article 27 paragraph (3) of the ITE Law. However, based on human rights standards, regulation and elucidation of articles that regulate restrictions on freedom of expression must be in the form of laws therefore the Joint Decree is not an appropriate legal product in providing guidance and limitations on these articles.

Therefore, in order to promote the fulfillment of human rights standards in protecting freedom of expression, law enforcement officials, especially judges, when examining and adjudicating defamation cases, need to:

- Using references to international and national human rights law instruments related to the protection of the right to freedom of expression which apply as positive law, namely the International Covenant on Civil and Political Rights and its General Comment Number 34, as well as the provisions
in the 1945 Constitution as a basis for developing legal considerations on defamation cases. In addition, law enforcement officials need to pay attention to human rights principles that apply universally, including the opinions of experts and human rights principles that are set forth in the form of documents, one of which is the Siracusa Principles;

- Considers the following:
  - **The contribution of the defendant’s actions to the discourse on the public interest.** In this case, if an expression is indeed closely related to debates regarding public interest, then protection of freedom of expression must be prioritized and punishment must be avoided;
  - **The roles and functions in the public sphere of persons affected by their reputations and the subject matter of the expressions or related statements of the accused.** In this case, if the person whose reputation is affected is a politician or public official, then the protection of the right to freedom of expression must prevail over the interests of protecting the person’s reputation. In addition, the relationship between the content of the expression or statement which is the subject of the case and aspects of public interest must be considered. For example, in the event that the content of an expression or statement is closely related to the actions of a politician in his official capacity, for sure it is closely related to aspects of public interest so that protection of the right to freedom of expression must be prioritized and prosecution must be avoided; and
  - **The content, form, and consequences of related expressions.** In this case, there are two types of expression that can be identified, namely whether the expression includes a statement of facts or an opinion (value judgment). Statements of facts must be proven true. Meanwhile, an opinion does not require proof of its truth, but must have sufficient factual basis to be called an opinion. If an expression is claimed to be a statement of facts or a value judgment, but in the proof it turns out to be inconsistent with the character of the two types of expression, then the protection of the reputation of the person who is the victim of defamation can be prioritized. In addition, the consequences of an expression on the personal life of the person whose reputation is violated also need to be assessed. If it is not proven that there are harmful consequences for a person’s personal life, the protection of the right to freedom of expression must be prioritized;
  - **Analyze whether restrictions on the right to freedom of expression are necessary** (which in the context of the criminal justice process means punishment or convicting the accused) by **conducting a three-part test**, namely by examining:
    - Whether the limitation on the right to freedom of expression of the accused has been regulated by law;
Whether the limitation on the right to freedom of expression of the accused is aimed at protecting legitimate interests, which in the context of a defamation offense are the rights or reputation of another person; and

Whether the restriction on the right to freedom of expression for the accused is urgent or necessary to be carried out in a democratic society, which means that the state has not other option than by imposing punishment or conviction on the actions or expressions of the accused. When it is deemed necessary, the sentence must be imposed while still taking into account the proportionality of the sentence so that it will not disrupt the functioning of democracy.

In addition, to encourage uniformity of interpretation and application of elements in criminal acts of slander, libel, calumny and defamations against authorities or public institutions, the provisions of Article 310 of the Criminal Code, Article 311 of the Criminal Code, Article 27 paragraph (3) of the ITE Law, and Article 207 of the Criminal Code shall be implemented in the following way:

**Article 310 of the Criminal Code and Article 311 of the Criminal Code**

- The element “intentionally” must be interpreted in the context of intentionality as a goal (oogmerk);
- The element of “attacking someone’s honor or good name by accusing something” must be proven together with the element “intentionally” and the proof of both must be treated in a series of actions;
- The element “a person” in the formula must be understood as an individual human being and not a corporation or legal entity;
- The application of the element “with the intention to give publicity thereof” must be treated in the same way as proving an element of intent, but in this case it is specifically related to the intention to make the accused’s accusations known to the public;
- The application of the element of “attacking honor or good name” must look at the context of the events surrounding the occurrence of slander, libel, or calumny. The mere use of grammatical interpretation of the defendant’s actions cannot be used to convict the accused.

**Article 207 of the Criminal Code**

- Article 207 of the Criminal Code needs to be annulled because it is contrary to the principles of human rights law and threatens the sustainability of a democratic society whose application can create a chilling effect in society;
- In the event that Article 207 of the Criminal Code will be maintained, the interpretation of the elements of the crime must refer to the interpretation of Article 310 of the Criminal Code;
The specific elements in Article 207 of the Criminal Code must be interpreted as follows:

- The element “defaming” must be translated as “attacking someone's honor or good name by accusing something.” An important element is the existence of accusations from the defendant so that the use of Article 207 of the Criminal Code is in line with the construction of slander and libel in Article 310 of the Criminal Code. In addition, this clarifies the difference between Article 207 of the Criminal Code and Article 315 of the Criminal Code regarding minor defamations which do not require an element of accusation;
- The application of the element of “attacking honor or good name” must be seen in the context of the events surrounding the defamation to the authorities. The mere use of grammatical interpretation of the defendant's actions cannot be used to convict the accused;
- The element of “accusing something” must be interpreted as conveying accusations only in the context of carrying out the duties and functions of the official as part of the government. Allegations relating to the personal life of the authorities should be applied to Article 310 of the Criminal Code or Article 311 of the Criminal Code if they are made offline or Article 27 paragraph (3) of the ITE Law if they are made online;
- The legitimate interest protected by Article 207 of the Criminal Code is the protection of reputation, which can only be attached to individuals. Public institutions, from any point of view, cannot be equated with the individual and therefore cannot have a reputation. So in the context of Article 207 of the Criminal Code, there may be no restriction on the right to freedom of expression in the event that the expression is addressed to a public institutions;
- The offense in Article 207 of the Criminal Code must be based on complaint, in line with the consideration of the Constitutional Court which states that prosecution under Article 207 of the Criminal Code must be carried out on the basis of a complaint (bij klacht).

**Article 27 paragraph (3) of the ITE Law**

- The provision of Article 27 paragraph (3) of the ITE Law is duplicating the provision on slander, libel, and calumny offenses in the Criminal Code, which are Article 310 of the Criminal Code and Article 311 of the Criminal Code, and its formulation is problematic. Therefore, the provisions of Article 27 paragraph (3) of the ITE Law are not needed and need to be revoked in order to encourage the fulfillment of the right to legal certainty;
- In the event that the provisions of Article 27 paragraph (3) of the ITE Law will be maintained, the interpretation of the elements of the crime must refer to the interpretation in Article 310 and Article 311 of the Criminal Code and refer to the guidelines in the SKB UU ITE for Article 27 (3) of the ITE Law;
• The specific elements in Article 27 paragraph (3) of the ITE Law must be interpreted:
  • The meaning of the element “intentionally” is intentional with the aim or the existence of *animus juriandi*;
  • The meaning of the elements “distribute”, “transmit”, and make accessible” is interpreted as “to give publicity”;
  • The meaning of the element “contains defamation”, is interpreted similar to the scope of Article 310 of the Criminal Code and Article 311 of the Criminal Code.

**Sentencing Proportionality and Urgency**

• Referring to human rights standards and norms related to freedom of expression that in the event of a conflict between rights that are protected and rights that are not protected by the ICCPR, recognition and consideration should be given to the fact that the ICCPR seeks to protect the most basic rights and freedoms. In this context, freedom of expression is a fundamental freedom that has a very high level of protection, so it is important for the Court to give robust considerations regarding the importance of protecting freedom of expression before giving criminal judgments in defamation cases.

• In the event that the defendant is proven guilty according to the standard interpretation of the elements of the article as well as the principles of criminal law and human rights law that have been previously explained, the court must also consider the degree of necessity and the proportionality of the sentence imposed on the defendant. As far as possible, imprisonment shall not be imposed and replaced by other forms of punishment. Arguments and considerations about this depend on the characteristics of each case. However, certain situations to consider include:
  • If the defendant has made clarifications or has withdrawn his accusations (both verbally and in writing) through the same medium where he conveyed his accusations, imprisonment should be avoided.
  • If the defendant has not made clarifications or has not withdrawn his accusations (both verbally and in writing), then sentencing can be avoided by applying Article 14a of the Criminal Code and/or Article 14c of the Criminal Code so that the court can impose general and specific conditions for the defendant to make clarifications or withdraw his accusations or other special conditions.
CHAPTER IV

CRIMES OF HATE SPEECH AND HOSTILITY ONLINE
This chapter discusses freedom of expression in relation to criminal acts related to “hate speech” and “hostility” as stipulated in criminal law and human rights law in Indonesia as well as international human rights law. This section begins with the context of the issues of “hate speech” and its relation to freedom of expression, which is followed by an analysis of a number of regulations and court judgments related to “hate speech” crimes. The final section outlines the conclusions and provides various recommendations.

### 4.1 Context and Trends of Hate Speech in Indonesia

The increase of hate speech has become a global concern since it is experienced by different countries, including Indonesia. Hate speech occurs online and offline with various backgrounds, ranging from hate speech targeted at other individuals, hatred towards minority and vulnerable groups to hatred motivated by political issues. Hate speech is currently increasingly prevalent in the online sphere, in line with the development of the internet which has created a space and medium for everyone to express and share information, including information containing hate and hostility. During the COVID-19 Pandemic, hate speech has become increasingly high and widespread globally. UN Secretary General, Antonio Guteres, expected States to combat the “tsunami” of hatred related to Covid-19.

In Indonesia, hundreds of sites and content identified as spreading hoaxes and hate speech on the internet were taken down by the government (police and other related agencies). The Ministry of Communication and Information Technology claimed to have handled cases of hate speech based on ethnicity, religion, race and inter-group in the digital space since 2018 to April 2021, by terminated or taken down 3,640 contents, 54 of which contain hate and hostility content. Cases of hate speech emerged in various regions, for example in Jakarta, based on a report by Jakarta Provincial Police – Polda Metro Jaya, which reported that hoaxes

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and hate speech were the most prominent cases of cybercrime. safenet’s research on hate speech in the digital sphere, which was released in january 2022, shows the breadth of patterns of hate speech, the basis or reasons for committing hate speech and the various perpetrators and victims.

in 2020, cases of hate speech and hostility in the online domain that were charged with violating article 28 paragraph (2) have also increased. the parties charged with “inciting hatred” or “hostility” varied widely, including individuals with certain professions, such as musicians and journalists. one of the cases that stood out was the statements made by jerinx, a musician, who was charged with committing hatred against the indonesian medical association (idi) on social media. jerinx was indicted under article 28 paragraph (2) jo. article 45 paragraph (2) of the ite law, and found guilty and sentenced to 1 year and 2 months in prison by the first instance court, and sentenced to 10 months by the appellate court. previously, in april 2018, m. yusuf, a journalist, was arrested and charged with hate speech after writing a critical report detailing cases of land disputes between farmers and the palm oil plantation company - pt multi sarana agro mandiri. yusuf died in custody while awaiting trial in june 2018. a number of “public figures” were also charged with article 28 paragraph (2) of the ite law, for example musician ahmad dhani.

handling acts of hate speech, including legal action through penalization, on the one hand, is necessary, but on the other hand, has the potential to limit or even violate freedom of expression if it is carried out arbitrarily, excessively and without clear boundaries. various cases of hate speech that have been brought to court in general indicate that there is an excessive application of articles on hate speech and hostility, which arise from a number of factors including the formulation of criminal provisions that are very loose and facilitate penalization on allegation of spreading hatred or creating hostility.

human rights standards and norms related to the prohibition of hate speech state that the state must enact legislation (regulations) that stipulate appropriate sanctions that apply equally to individuals and state entities. prohibition of hate speech applies to any person who carries out advocacy containing incitement for discrimination, hostility or violence. a person advocating a minority or even offensive interpretation of religious teachings or historical events, or someone who is spreading examples of hatred and incitement to report it or raise awareness

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of these issues, must not be silenced under Article 20 the ICCPR. The state must protect this person even when the state disapproves of or takes offense at what s/he expresses.

The development of internet governance has given rise to concern and debate about the impact of using the internet and information technology, including those related to hate speech. This is for example, in 2018, the UN Special Rapporteur on freedom of opinion and expression provided a recommendation to the UN Human Rights Council that in regulating content in the online domain, countries are still bound by their obligation to ensure that any restrictions on freedom of expression must comply with Article 19 paragraph (3) the ICCPR which includes legality, legitimate interests and proportionality and in accordance with the limitations under Article 20 paragraph (2) of the ICCPR.\footnote{UN Human Rights Council, \textit{Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression}, David Kaye, A/HRC/38/35 (6 April 2018), paras. 7 dan 8.}

In 2020, the Council of Europe conducted a study on models of hate speech governance and their regulation in the online sphere. This study covered three levels of hate speech regulation, namely: (i) moderation level, namely internet platforms use certain tools to directly handle hate speech content; (ii) the oversight level, through establishment and supervision of moderation policies and control procedures for content; and (iii) the regulatory level, especially at this level which aims to eradicate unlawful and illegal speech.\footnote{Alexander Brown, \textit{Models of Governance of Online Hate Speech: On the emergence of collaborative governance and the challenges of giving redress to targets of online hate speech within a human rights framework in Europe}, (Strasbourg: Council of Europe, 2020), p. 6 and 63.}

In this context, it is important to refer back to General Comment No. 34 of the UN Human Rights Committee, that any restrictions on expression must not “... put in jeopardy the right itself... the relation between right and restriction and between norm and exception must not be reversed”.\footnote{UN Human Rights Committee, \textit{General Comment No. 34 ICCPR...}, \textit{Op. Cit.}, para. 21.} Restrictions on expression, including in dealing with problems and the dissemination of information containing and causing hatred and hostility, must be an exceptional step and criminal law must be the last resort (\textit{ultimum remedium}) because of the intrusive nature of criminal law on human rights and the potential impact of penalization that creates a chilling effect.

\section*{4.2. Concept and Regulation of Hate Speech in Indonesian Law}

Indonesian laws and regulations, especially criminal law, have regulated various acts and expressions of hatred and actions that are considered to cause hatred and hostility towards individuals, or groups of the population. The application of
criminal articles on hostility and hatred in various cases intersects closely with the right to freedom of expression, including criminal laws that have criminalized various legitimate expressions. Criminal provisions regarding hatred and hostility also often function as articles of “insulting” the state, institutions, or the President.\textsuperscript{243}

\textbf{4.2.1. Article 156 and 157 of the Criminal Code}

As a background, various Indonesian laws and regulations prohibiting acts of “hostility” and “hate speech”, in order to protect individuals and groups in society, including minority groups and vulnerable groups. Specifically, there is Law No. 40 Year 2008 on the Elimination of Racial and Ethnic Discrimination, which is one of the laws that prohibits acts of hatred based on race and ethnicity. The law is a manifestation of Indonesia's commitment to eliminating racial discrimination as Indonesia has ratified CERD. This commitment can also be seen from Indonesia's ratification of the ICCPR which in Article 20 stipulates that the State has a legal obligation to prohibit all advocacy of hatred based on race and religion which leads to incitement to discrimination, hostility and violence.

Older than the Law on the Elimination of Racial and Ethnic Discrimination, Indonesia has provisions regarding the prohibition of “hostility” and “hatred” as stipulated in Articles 156 and 157 of the Criminal Code. These two articles are under the Chapter “Crimes Against Public Order”, so these provisions are more nuanced to maintain “order” and overcome “security” issues, with a focus on protecting the Government (Article 156) and protecting “groups of the Indonesian people” (Article 157). Other related articles, Article 154 and Article 155 were declared invalid by the Constitutional Court because they were not compatible to the 1945 Constitution.\textsuperscript{244}

Another article, namely Article 156A of the Criminal Code on Religious Blasphemy (Article 4 of Law No. 1/PNPS/1965), is currently also used to criminalize acts of hatred and hostility related to religion/belief.\textsuperscript{245} Other provisions are Article 59 paragraph (3) letter a of Law No. 16 Year 2017 on the Stipulation of Government Regulation in Lieu of Law Number 2 Year 2017 on Amendments to Law Number 17 Year 2013 on Community Organizations to Become Laws\textsuperscript{246} (Law on Mass

\textsuperscript{243} Adhigama A. Budiman et al., \textit{Studi Tentang Penerapan UU ITE di Indonesia: Mengatur Ulang Kebijakan Pidana di Ruang Siber}, (Jakarta: ICJR, 2021), pp.138-139.


\textsuperscript{246} In this provision Mass Organizations are prohibited to take action of hostility towards ethnicity, religion, race or group. The meaning of “acts of hostility” are words, statements, attitudes or aspirations, both verbally and in writing, whether through electronic or non-electronic media that generate hatred, both against certain groups and against everyone including state administrators.
Organisation) and Article 14 of Law No. 1 Year 1946 on Criminal Law Regulations.\textsuperscript{247}

Article 156 of the Criminal Code provides the following regarding hate speech and hostility:

“Whoever publicly expresses feelings of hostility, hatred or insult towards one or several groups of the Indonesian people, shall be punished by a maximum imprisonment of four years or a maximum fine of four thousand five hundred rupiahs. The term group in this article and the following articles mean each part of the Indonesian people who are different from one or several other parts because of race, country of origin, religion, place, origin, ancestry, nationality or position according to constitutional law.”

While the formulation of Article 157 of the Criminal Code is as follows:

1. Any person who broadcasts, shows or post a writing or painting in public, the contents of which contain expressions of feelings of hostility, hatred or insult among or against groups of the Indonesian people, with the intention of making the contents known or made known to the public, shall be punished by a crime imprisonment for a maximum of two years and six months or a maximum fine of four thousand and five hundred rupiahs.

2. If the person who is guilty of committing the said crime is at the same time carrying out his search and at the time, it is not yet five years since his sentence has final for such a crime, the person concerned may be prohibited from carrying out the search.”

In the various arrangements above, the main problem lies in the inadequacy or lack of explanation of the elements of a crime, for example regarding the meaning of “feelings of hostility, hatred and contempt”. In a number of other laws, limitedly elucidate an understanding of the meaning of “hostile” for example in the Law on Mass Organizations which states “acts of hostility” are words, statements, attitudes or aspirations, both verbally and in writing, both through electronic or non-electronic media that cause hatred, both against certain groups and against everyone, including state administrators.

Whereas in Article 156 and Article 157 of the Criminal Code, there are 3 (three) categories of acts that are sanctioned, namely “hatred”, “hostility” and “insult”.

\textsuperscript{247} Article XIV of Law No. 1 Year 1946 on Criminal Law Regulations: (1) Whoever, by broadcasting news or false notifications, deliberately causes uproar among the people, is punished with a maximum imprisonment of ten years. (2) Whoever broadcasts a news or issue a notification, which can cause uproar among the people, while s/he should be able to think that the news or notification is a lie, shall be punished with imprisonment for a maximum of three years.
The original word “insult” in these two articles is originally formulated using the term “minachting” (Dutch) which can be interpreted as “dislike”, “demeaning” or “harassing” which is different from the conception of “beleediging” or insult.

Another issue is the meaning of the “group of Indonesian peoples”. The meaning of “group” was originally interpreted in the legal system and constitutional position of Indonesia in the era of the Dutch East Indies colonial government, according to Article 163 Indische Staatsregeling. The three groups before the law are divided into European, native, and Eastern Foreign groups. In the Constitutional Court Judgment Number 76/PUU/-XV/2017, the definition of this group is given a broader meaning, not only including religious, ethnic and racial groups, but includes all entities that are not represented or embodied by the terms ethnicity, religion and race.

In addition, another provision related to “hostility” in the context of “public order” is Article 156A (Article 4 of Law No. 1/PNPS/1956, which is often known as the provision on “religious blasphemy”, which reads:

“Penalized by imprisonment for a maximum of five years whoever intentionally in public expresses feelings or commits an act: a. which is essentially hostile, abusing or blasphemous against a religion that is adhered to in Indonesia;”

This religious blasphemy provision is one of the most frequent used provisions for punishing lawful expressions, including by accusations of “hostility” to a religion. The main problems of this blasphemy provision are: (i) the absence of an adequate definition of the meaning of “hostility” and “insult” of religion; (ii) differences in subjects that must be protected between freedom of religion or belief and the application of Article 156A of the Criminal Code, namely the protection of legal subjects that are individual and “group”.

In practice, blasphemy in the form of hostility to religion has a wide scope and its application tends to be discriminatory and hinders/limits the rights of certain groups and violates the right to freedom of religion or belief. In this practice, the application of the penal provisions on “religious blasphemy” often does not meet the requirements for human rights restrictions in accordance with international human rights standards, particularly Article 19 paragraph (3) and Article 18 of the

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249 Based on an interview with Arsil, LeIP Senior Researcher, 6 November 2021.
250 Constitutional Court Judgment No. 76/PUU/-XV/2017, p 69.
ICCPR.\textsuperscript{251} For example, actions such as criticizing religious leaders should not be punished, but are often classified as acts that are hostile, abuse or blasphemous to a religion. Such actions can only be prohibited and “punished” if they contain expressions of hatred that lead to incitement to hatred, discrimination, hostility and violence.

**4.2.2. Article 28 paragraph (2) of the ITE Law**

The existence of the ITE Law raises criminal prohibition of spreading information or content that contains elements of hostility and hatred in the online domain, as stipulated in Article 28 paragraph (2) of the ITE Law as follows:

“Everyone intentionally and without rights disseminates information aimed at creating feelings of hatred or hostility towards certain individuals and/or groups of people based on ethnicity, religion, race and inter-groups.”

The ITE Law does not provide an explanation of the purpose of the elements of the crime\textsuperscript{252}, for example the meaning of the phrases “creating hatred”, “hatred or hostility”, as well as no explanation regarding the meaning of the words “hatred” and “hostility” itself. Furthermore, there is no phrase disseminating information online in Article 28 paragraph (2). So that this Article is similar to several different elements compared to Article 156 and Article 157 of the Criminal Code. A number of phrases in other important elements of crime that are not given an explanation are “inter-groups”. In the amendment of the ITE Law in 2016, Article 28 paragraph (2) did not amended.

A search of the Academic Paper and the ITE Bill developed by the Ministry of Information and Communication showed that initially there were no provisions regarding hate speech as stipulated in Article 28 paragraph (2) of the ITE Law. Part (B) of the Academic Paper entitled “Forms of Violations That Need to Be Regulated in Regulation on Information Technology Utilization, Especially Information and Electronic Transactions”, contains violations that were intended to be prohibited. In number 3 entitled “Other Violations” it is mentioned about “Hate sites”, namely sites containing hate that are used by extremists to promote the issue of racial hatred. The example used in the Academic Paper is that in the United States, an anti-abortion website has repeatedly come under attack from groups that support abortion.”\textsuperscript{253} So based on the Draft Law and Academic Papers, the intent of the drafters of the law was originally to prohibit hate-filled sites.

The absence of various adequate explanations for the elements of the crime of

\textsuperscript{251} See LeIP..., Loc. Cit.

\textsuperscript{252} Elucidation of Article 28 Paragraph (2) of the ITE Law read as “sufficiently clear”.

\textsuperscript{253} See Communication and Information Technology Department, \textit{Naskah Akademik Rancangan Undang-Undang tentang Informasi dan Transaksi Elektronik}, p. 62, letter I.
Article 28 paragraph (2) makes this provision a quite controversial and excessive when applied. Various expressions that are considered criticism, for example Jerinx’s statements and journalistic reports, can easily be charged with inciting hatred. The interpretation of the elements of the crime of Article 28 paragraph (2) is then inconsistent and lack of clear and definite references. In its development, a number of elements were clarified “a little”, for example the meaning of “inter-group” as interpreted in the Constitutional Court Judgment. The meaning of “group” in the Constitutional Court Judgment is covering not only to religion, ethnicity and race, but has a broader meaning, which includes religion, ethnicity and race, and includes all entities that are not represented or embodied by the terms ethnicity, religion and race. The Constitutional Court gave its consideration that limiting other entities as part of a “group” apart from ethnicity, race and religion would actually negate the legal protection of these other entities and potentially violate Article 27 paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution.

Until 2021, Article 28 paragraph (2) continued to raise concerns. To respond, the government and law enforcers, in this case the Minister of Communication and Information Technology, the Attorney General and the Chief of the Indonesian National Police, issued a Joint Decree on the ITE Law – SKB UU ITE. The existence of SKB UU ITE more or less, although does not answer the fundamental problem, has provided a solution by providing explanations and references that have not existed before. The main contents of the implementation guidelines in the SKB UU ITE related to Article 28 paragraph (2) of the ITE Law are as follows:

1) The main offense of Article 28 paragraph (2) of the ITE Law is the act of spreading information that creates hatred or hostility towards individuals or groups of people based on ethnicity, religion, race and inter-group (SARA).

2) The form of information that is disseminated can be in the form of images, videos, sounds, or writings that have the meaning of inviting, or broadcasting it to other people to share feelings of hatred and/or hostility towards individuals or groups of people based on sentiment issues over ethnicity, race, religion, inter-group.

3) The criteria for “dissemination” can be equated with being “publicly known” which can be in the form of uploading to a social media account with accessible to the public settings, or broadcasting something on a chat group application with an open nature where anyone can join the chat group, no content or information traffic in control, anyone can upload and share outside the group, or in other words without any moderation (open group).

255 Ibid., p. 69.
256 Ibid., p. 68.
4) The prohibited acts in this article are motivated by raising feelings of hatred and/or hostility on the basis of ethnicity, religion, race and inter-group. Law enforcement officials must prove the motive of raising which is characterized by content that invite, influence, mobilize the public, inciting/turning one against another with the aim of causing hatred, and/or hostility.  
5) The phrase “inter-group” is an entity group of people apart from ethnicity, religion and race as the meaning between groups refers to the Constitutional Court Judgment Number 76/PUU-XV/2017.  
6) Delivery of opinions, statements of disapproval or dislike to individuals or groups of people are not included in prohibited acts, unless those that are disseminated can be proven to have been an attempt to solicit, influence, and/or mobilize the community, incite/turn one against another to create feelings of hatred or hostility based on ethnicity, religion, race and inter-group difference sentiment issues.

4.3. Cases Where Expressions Were Prosecuted as Hate Speech  
This research explores and examines various judgments regarding the crimes of “hate” and “hostility” charged with Article 28 paragraph (2) of the ITE Law in order to understand how the Court applies the elements of Article 28 paragraph (2) of the ITE Law. These judgments are divided into two, before and after the issuance of the SKB UU ITE so that their suitability will be part of the analysis.

Court judgments prior to the issuance of SKB UU ITE which were reviewed included:  
1) **Alexander Aan Case**: Aan, a candidate for civil servants at the Regional Development Planning Agency of Dharmasraya District, who was arrested by local residents and handed over to the Dharmasraya Police for writing on his Facebook account and a Facebook group called the Minang Atheist Group titled Prophet Muhammad interested in his own daughter-in-law and cartoons of the Prophet Muhammad having sex with his wife’s maid. Aan also wrote an article saying that the verses of the Koran were revealed in connection with legalizing the Prophet Muhammad’s marriage to Zainab bint Jas. Aan’s writings on his Facebook account and the Minang Atheist group are considered to have angered and disturbed the Muslim community. Aan was charged alternatively with Article 28 paragraph (2) jo. Article 45 paragraph (2) Law No. 11 Year 2008 or Article 156A letter a of the Criminal Code, or Article 156A letter b of the Criminal Code, who was tried at the Muaro District Court and on 13 June 2012 were found guilty of violating Article 28 paragraph (2) jo. Article 45 paragraph (2) Law No. 11 Year 2008. Aan was sentenced to 2 years and 3 months and a fine of Rp. 100,000,000. This decision was upheld by Padang High Court and his cassation was rejected by the Supreme Court.

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257 Muaro District Court Judgment No. 45/PID.B/2012/PN.MR.  
258 Padang High Court Judgment No. 137/PID/2012/PT.PDG.  
259 Supreme Court Judgment No. 2112 K/Pid.Sus/2012.
2) Alfian Tanjung Case: Tanjung was indicted for making and publishing a tweet through his Twitter account with the name #GanyangPKI, containing the sentence “PDIP (Indonesian Democratic Party of Struggle) whose 85% are PKI (Indonesian Communist Party) cadres supporting Anti-Islam governor candidate” in January 2017. The indictment stated that his Twitter account has approximately 1,000 followers, and can also be seen by anyone who access his twitter account. The contents of this tweet were also posted by the online news site sebarr.com. Tanjung was indicted in a combination of alternative and subsidiary, with the First Primary indictment under Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of Law No. 19 Year 2016. The First Subsidiary Charge uses Article 27 paragraph (3) in conjunction with Article 45 paragraph (3) of the ITE Law; Second Primary Indictment Article 310 paragraph (1) and (2) of the Criminal Code; and the Second Subsidiary indictment was under Article 311 paragraph (1) of the Criminal Code. The Central Jakarta District Court acquitted Alfian Tanjung, because his actions were proven but considered not a crime. The prosecutor then filed an appeal and was granted by the Supreme Court which annulled the Central Jakarta District Court judgment and declared Tanjung guilty of violating Article 28 paragraph (2) of the ITE Law and sentenced him to 2 years and a fine of Rp. 100,000,000 (one hundred million rupiah).

3) Alnoldy Bahari alias Ki Ngawur Permana Bin Altik Hanafi Case: Bahari was charged for the statuses on his Facebook account which contained statements related to religion, including the following statements:

- “Every time before maghrib, you can hear spells (mantras) of poverty and complaints from the mosques around here. no wonder many of its citizens are not progressing.”
- “It’s strange around here, the religious leaders are held in high esteem even though their routine lessons are just learning to read the Koran and recite prayers.”
- “I testify that there is no god but Allah SWT, if you have not seen Allah then you are a false witness.”
- “I am Moslem and I truly testify that there is no god but Allah, I have seen Allah, what about you?”
- Allah SWT when He is bored says: they are like livestocks and are more despicable than a cattle.”
- “Even people who read the Koran but don’t know the contents of what is read, mediocre, they don’t know and get angry when I say “it was the angel who first taught magic to humans, soon the idiots will protest at my status. Just watch!!!”

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260 Central Jakarta District Court Judgment No. 1521/Pid.Sus/2017/PN Jkt.Pst.
261 Supreme Court Judgment No. 1940 K/Pid.Sus/2018.
“Lyrics of a song from the mosque: the government is unfair, who voted for the local government? So whose fault is it??”

“The shining mosque and the dark mosque” were accompanied by two photos from Google Maps which compared the photo of the mosque in the small but luminous Baban Kembang village to the Al-istijar mosque in Gadong Village, Cibitung (where the defendant lives) which is large but dim.

“Women are not allowed to enter the mosque here”

“If the fake cleric have entered political world, then the verses of the Koran are no longer a guideline as absolute truth”

“No matter how cool a book is, if it is offered to an area where there are still a lot of idiots, then it will only become a wrapper for tempe”

“Clerics who are not sincere when they enter the world of politics, then they can say “a woman is not more valuable than a handful of land. Talk without any basis in order to bring down his political opponents who are female.”

“The irony is that the person who claims to be a cleric is a woman. It is inappropriate to criticize women”.

“Islam exists to elevate the dignity of women too, why do you want to return to the time of ignorance.”

These statuses were seen by residents around Gadog Sub-Village, Cikadu Village, Cibitung District, Pandeglang, which were then screenshot and discussed with local clerics and ended up being reported to the Police. Bahari was charged alternatively, with the first charge under Article 28 paragraph (2) jo. Article 45A paragraph (2) of the ITE Law juncto Article 64 paragraph (1) of the Criminal Code, or both with Article 156 a letter a juncto Article 64 of the Criminal Code. The Pandeglang District Court found Bahari guilty of violating Article 28 paragraph (2) of the ITE Law and sentenced him to 5 years in prison and a fine of Rp. 100,000,000 (100 million). Bahari was charged alternatively, with the first charge under Article 28 paragraph (2) jo. Article 45A paragraph (2) of the ITE Law juncto Article 64 paragraph (1) of the Criminal Code, or both with Article 156 a letter a juncto Article 64 of the Criminal Code. The Pandeglang District Court found Bahari guilty of violating Article 28 paragraph (2) of the ITE Law and sentenced him to 5 years in prison and a fine of Rp. 100,000,000 (100 million). Bahari was charged alternatively, with the first charge under Article 28 paragraph (2) jo. Article 45A paragraph (2) of the ITE Law juncto Article 64 paragraph (1) of the Criminal Code, or both with Article 156 a letter a juncto Article 64 of the Criminal Code. The Pandeglang District Court found Bahari guilty of violating Article 28 paragraph (2) of the ITE Law and sentenced him to 5 years in prison and a fine of Rp. 100,000,000 (100 million). Banten High Court revised the prison sentence to 3 years and a fine of 100 million rupiah. At the cassation level, the Supreme Court rejected the prosecutor’s and defendant’s cassation requests, and amended Banten High Court’s judgment by changing the prison sentence to 5 years and a fine of 100 million rupiah.

4) I Gede Aryastina alias Jerinx Case: Jerinx was prosecuted for making two posts on Instagram on his account @jrxsid, with the first post containing, “Because of pride in being a lackey to WHO, IDI (Indonesian Medical Association) and hospitals arbitrarily require all those who are about to give birth to be tested

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263 Banten High Court Judgment No. 26/PID/2018/PT.BTN.
264 Supreme Court Judgment No. 3086 K/Pid.Sus/2018.
for CV19. There is already a lot of evidences where the test results err, why force them? If the test results cause stress and resulted in death to the baby/mother, who will be responsible?” and then in the comments column he added “DISOLVE IDI! I will not stop attacking you @ikatandokterindonesia until there is an explanation about this! (pig emoticon) People are being pitted against IDI/hospital? NO. IDI & hospitals are pitting themselves against people’s rights”. This post received 3,394 likes and 56,958 comments as of 29 July 29 2020. The second post said “In 2018 there were 21 Indonesian doctors who died. This is only what is reported by the media. It’s a shame there is a rotten conspiracy that dramatizes the situation as if the doctor died ONLY IN THIS YEAR so that people are overly afraid of CV19. How I knew? Please copy all the links in the photo, post on your FB/IG, then see WHAT HAPPENED! Still saying CV19 is not a conspiracy? WAKE THE FUCK UP INDONESIA!”. As of 29 July 2020, this second post received 2,532 likes and 41,189 comments.

Jerinx was reported to the police by the Head of Indonesian Medical Doctor Association, Bali Region and alternatively indicted with the first count under Article 28 paragraph (2) juncto Article 45A paragraph (2) of the ITE Law juncto Article 64 paragraph (1) of the Criminal Code or the second count under Article 27 paragraph (3) jo. Article 45 paragraph (3) of the ITE Law juncto Article 64 paragraph (1) of the Criminal Code. Denpasar District Court in Judgment No. 828/Pid. Sus/2020/PN.Dps found Jerinx was guilty of hate speech based on Article 28 paragraph (2) jo. Article 45A paragraph (2) of the ITE Law juncto Article 64 paragraph (1) of the Criminal Code and punished him to 1 year and 2 months imprisonment and a fine of Rp. 10,000,000 subsidiary 1 month confinement.265

5) Lomboan Djahamao and Gerson Blegur Cases: On 4 December 2017, Djahamou used his cellphone to post a status on his Facebook containing sentences that questioned and challenged the celebration of the birth of Jesus on 25 December. When posting this status, Djahamou also tagged 40 of his Facebook friends. This post was considered insulting and harassing Christians in Alor Regency, as well as causing hatred and hostility towards certain individuals and/or community groups which was then reported by the Catholic Youth Commissariat of Alor Branch. Meanwhile, Blegur was one of the people tagged in Djahamao’s post and for his comments in the post he was also reported and processed in a separate case. Blegur’s comments also questioned the truth of Jesus’ birth on December 25, including questioning why the church and the Vatican lied about this.

Djahamou and Blegur were charged with alternative indictments, the first indictment of Article 45A paragraph (2) juncto Article 28 paragraph (2) of the

265 Denpasar District Court No. 828/Pid. Sus/2020/PN.Dps.
ITE Law and secondly Article 157 paragraph (1) of the Criminal Code. The public prosecutor indicted both of them with Article 45A paragraph (2) \textit{juncto} Article 28 paragraph (2) of the ITE Law, with a penalty of 2 years and a fine of Rp. 100,000,000 subsidiary 6 months in prison. The Kalabahi District Court decided that Djahamou and Blegur were found guilty and sentenced to 6 months in prison and a fine of Rp. 100,000,000 subsidiary 3 months in prison.\textsuperscript{266} The public prosecutor appealed both cases to Kupang High Court, who then increased the prison sentence to 1 year and 6 months and a fine of Rp. 100,000,000 subsidiary 6 months in prison.\textsuperscript{267} The two defendants submitted cassations to the Supreme Court and were rejected, with the Supreme Court amending Kupang High Court’s judgments and imposing prison sentences of 6 months and fines of Rp. 100,000,000 subsidiary 3 month imprisonment.\textsuperscript{268}

6) \textbf{Soni Suasono Panggabean Case:} Panggabean on 20 March 2017 wrote on his Instagram posts that were considered insulting to Islam, including: “It’s not like Islam, who are obscene and kill each other here and there”, “By shouting auuwooo \textit{akbar} they kill fellow human beings. “Like Tarzan, the slogan for worship is auuwoo aauuuuwooooo \textit{akbar}, “They worship by bending their back downward” and “They say religion is holy, but when worshiping it’s like a dog mating with Doggie Style.”\textsuperscript{269}

The post was made as an expression of irritation and retaliation against another account’ (@pangeran muda 54) post which was considered insulting and harassing Protestants. These writings were then distributed by other people to several other social media such as Whatsapp and Facebook and were then reported by members of the Islamic Defenders Front (FPI) in Riau Region. Panggabean was charged for violating Article 45A paragraph (2) \textit{juncto} Article 28 paragraph (2) of the ITE Law. Pekanbaru District Court declared the defendant guilty and sentenced him to 2 years,\textsuperscript{270} which was upheld by Pekanbaru High Court.\textsuperscript{271}

Judgments \textit{after the issuance of SKB UU ITE} that were studied and reviewed:

7) \textbf{Wahyu Rasasi Putri Case:} Wahyu, as a member of the Whatsapp group “We are Medan”, which consisted of approximately 70 individuals from various elements of society, wrote the following sentences after participating in the

\begin{itemize}
\item \textsuperscript{266} Kalabahi District Court Judgment No. 39/Pid.Sus/2018/PN Klb and 40/Pid.Sus/2018/PN Klb.
\item \textsuperscript{267} Kupang High Court Judgment No. 65/PID/2018/PT.KPG dan 66/PID/2018/PT KPG.
\item \textsuperscript{268} Supreme Court Judgment No. 3215 K/Pid.Sus/2018 dan 3103 K/Pid.Sus/2018.
\item \textsuperscript{269} Pekanbaru District Court Judgment No.465/Pid.Sus/2017/PN.Pbr, p. 5.
\item \textsuperscript{270} Ibid.
\item \textsuperscript{271} Pekanbaru High Court Judgment No. 210/Pid.Sus/2017/PT PBR.
\end{itemize}
protest against the Job Creation Law on Thursday, 8 October 2020 at the North Sumatra Regional Parliament:

“...It’s difficult, Mom, just slow down and get chased by those bastards. I was also holding a stone and difficult since I was chased and shot with tear gas. The sound was so scary and made me go back and forth. Next time we have to bring a Molotov cocktail I was really furious.”

This sentence is considered to invite all group members to hate and antagonize Indonesian Police members. She was charged with alternative indictments, first with Article 28 paragraph (2) juncto Article 45A paragraph (2) of the ITE Law, a subsidiary of Article 14 paragraph (1) of Law No. 1 Year 1946 on Criminal Law Regulations; secondly with Article 14 paragraph (2) of Law No. 1 Year 1946; and third with Article 160 of the Criminal Code. Medan District Court on 19 May 2021 decided that Wahyu was found guilty of violating Article 28 paragraph (2) of the ITE Law and sentenced her to 7 months and 10 days in prison.272 Among the verdicts there is an order that the imprisonment reduced by the period of arrest and detention that had been served, and that the public prosecutor released the defendant from the time the judgment was read. The public prosecutor filed an appeal on the grounds that the judges did not impose a fine in accordance with Article 45A paragraph (2) of the ITE Law. Medan High Court decided to accept the appeal and affirm the Medan District Court Judgment on September 9, 2021.273

8) Imam Kurniawan Case: Imam Kurniawan wrote in the Facebook group “All Indonesian Construction Labourer Alliance (AKSI)” and commented on the news of the sinking of the KRI Nanggala (a Navy’s submarine) on 25 April 2021, read as “When your submarine sank, I will make love with your wife.” The AKSI group has public setting and everyone can read it, so a member of the Belawan Navy reported Imam to the police. He was charged with Article 28 paragraph (2) juncto Article 45A paragraph (2) UU ITE. The Medan District Court on 27 August 2021 decided that Imam was found guilty and sentenced him to 1 year in prison and a fine of Rp. 100,000,000 (one hundred million rupiah) subsidiary of 2 months imprisonment.274

9) Wahidin Bin Zulkifli Case: On Saturday, 8 May 2021, Wahidin recorded a video of himself saying the following lines:

Assalamualaikum Wr.Wb.... to all my brothers and sisters who are going home wherever you are, continue to go home, you must together pierce their barriers, go home, meet your parents, meet your mother, meet your

272 Medan District Court Judgment No. 151/Pid.Sus/2021/PN.Mdn.
273 Medan High Court Judgment No. 1259/Pid.Sus/2021/PT Mdn.
274 Medan District Court Judgment No. 1845/Pid.Sus/2021/PN Mdn.
father, meet your children, meet your relatives, ask for forgiveness from Allah SWT, ask for both your parents' grace, never be afraid of the satanic regime of the devil which has been controlled by the communists, they work for the communists, keep the unity promote unification, fight against this tyrannical regime, pierce through all barriers at the post guard, the Indonesian borders are ours, an independent Indonesia with the words takbir Allahu Akbar. We are very tolerant but they are not tolerant of us Moslems they want to silence Islam. Want to kill Moslems to eliminate Islam, before it’s too late rise up to fight, Allahu Akbar:"

This video was then sent to a WhatsApp group “Forsil Sumatra” consisting of 28 members, and then this video went viral on Facebook and Instagram. Wahidin was charged with Article 28 paragraph (2) juncto Article 45A paragraph (2) of the ITE Law or Article 160 of the Criminal Code. The Banda Aceh District Court found Wahidin guilty of violating Article 28 paragraph (2) of the ITE Law and sentenced him to 5 months and 15 days in prison and a fine of Rp. 2,000,000 (two million rupiah) subsidiary 1 month in prison.

4.4. The Courts’ Interpretation on the Elements of Article 28 Paragraph (2) of the ITE Law

In general, the elements of the crime of Article 28 paragraph (2) of the ITE Law are divided into 3 elements:

1) Everyone;
2) Intentionally and without rights;
3) Disseminate information aimed at creating feelings of hatred or hostility towards certain individuals and/or groups of people based on ethnicity, religion, race and intergroup.

That the elements of “everyone”, “intentionally” and “without right” are elements that have been widely explained in the previous Chapter and in general the interpretation of these elements is almost the same as the interpretation of Article 27 paragraph (3). The discussion in this section focuses more on the element of “spreading information aimed at creating feelings of hatred or hostility towards certain individuals and or groups based on ethnicity, religion, race and intergroup”.

The element of “spreading information aimed at creating feelings of hatred or hostility towards certain individuals and/or groups of people based on ethnicity, religion, race and inter-group” is an element that differentiates this provision from other forms of criminal acts in the ITE Law. This element can be described in a number of sub-elements namely “spreading information”, “generating hatred”, “hostility between individuals and or certain groups of people”, and “ethnicity,

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275 Banda Aceh District Court Judgment No. 248/Pid.Sus/2021/PN Bna.
religion, race and inter-group”.

In the Banda Aceh District Court judgment against the defendant Wahidin, the Panel of Judges at the Banda Aceh District Court considered that the element “Without the right to disseminate information aimed at creating feelings of hatred or hostility towards certain individuals and or community groups based on ethnicity, religion, race and inter-group” are alternative in nature, so that if one of the sub-elements is proven then all of these phrases can be said to be fulfilled.\textsuperscript{276}

\textbf{4.4.1. Disseminating Information}

Article 28 paragraph (2) of the ITE Law uses a different phrase, namely “disseminating information”, which is different from the formulation of Article 27 paragraph (3) of the ITE Law which uses the word “transmit, distribute and make accessible”.\textsuperscript{277}

Prior to the SKB UU ITE, the intention of the element disseminating information was simply interpreted as spreading information via the internet by posting or linking content so that it appeared on internet media with a specific purpose.\textsuperscript{278} A number of judgment in outlining the phrase “disseminating information” then also provide a definition of the meaning of “posting” and “linking”. Another judgment also interprets that “dissemination of information” is the act of sending electronic information to many parties and/or making this information accessible to the public.\textsuperscript{279}

Whereas the essence of the phrase “disseminating information” is the impact of information that is “publicly known”, which was then also emphasized in the SKB UU ITE. The meaning of disseminating information as “publicly known” has been implemented by the Panel of judges who gave the interpretation of the word “spreading” to mean an action intended to be publicly known, publicly known or non-private in nature, by stating:

“... the Defendant’s act of spreading electronic information intentionally with the aim of being read by the public, especially the Defendant’s friends on Facebook where the Defendant’s Facebook account can be viewed publicly or not privately, even though the Defendant does not have the authority or right to disseminate this information.”\textsuperscript{280}

Another judgment also affirm that the meaning of “disseminating information” is

\begin{itemize}
\item \textsuperscript{276} Ibid.
\item \textsuperscript{277} Adhigama A. Budiman dkk…, Op. Cit., p. 81.
\item \textsuperscript{278} Muaro District Court Judgment No. 45/PID.B/2012/PN.MR, p. 43.
\item \textsuperscript{279} Pangkalpinang District Court Judgment No. 231/Pid.Sus/2018/PN Pgp., p.60.
\item \textsuperscript{280} Pandeglang District Court Judgment No. 28/Pid.Sus/2018/PN Pdl, p. 73.
\end{itemize}
for the purpose of making it known to the public, as in the following judgments:

“That the Defendant adheres to an Atheist ideology based on freedom of expression but this cannot be stated openly to the public via the internet (cyberspace) so that it can be known by the public.”

4.4.2. Intended to Raise Hatred And Or Hostility

That the element “aimed at creating a feeling of hatred and or hostility” is a crucial element in Article 28 paragraph (2) of the ITE Law. The phrase “aimed at” in this element is a reinforcing element of the elements “intentionally” and “spreading information”. This sentence is important to decipher whether the defendant’s actions really aimed to cause hatred and/or hostility. In contrast to the emphasis on the sentence “intentionally” which refers to “disseminating information”, the sentence “aimed at” can specifically refer to acts committed for the purpose of causing hatred and hostility.

In various judgments, there is no specific meaning regarding the sentence “aimed at”, but it is attached to the element “intentionally”. Proof of this element was mainly carried out by looking at the statement or content issues spread by the defendant and then concluded that there was a certain “purpose”, which in this context raises feelings of hatred and/or hostility. This can be seen in the case with the defendant Bahari, the Panel of Judges concluded that because he had posted information that offended Kampung Gadog residents on his Facebook status, one of which was by comparing the mosque in Kampung Gadog with mosque in another area, the Defendant’s intention was clear to raise feelings of hatred or hostility towards certain individuals and/or community groups based on ethnic, religion, race and inter-groups, especially the Islamic religion and Gadog Village community groups.

The main problem in these elemental sentences is the intent of the phrases “raises hatred” and “hostility” in addition to the meanings of “hatred” and “hostility” itself, which can be interpreted very broadly and subjectively. As previously mentioned, the ITE Law does not provide an explanation regarding the meaning of “hatred” and “hostility”.

A number of judgments interpretes that the element “aimed to raise hatred and/or hostility” is an alternative element so that if one or both of them have been proven, then the element is considered proven and the other sub-elements do not need to be proven.

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281 Muaro District Court Judgment No. 45/PID.B/2012/PN.MR, p. 44.
282 Pandeglang District Court Judgment No. 28/Pid.Sus/2018/PN Pdl, pp. 77-78.
The Panel of Judges interpreted this element through a number of methods, including interpreting the meaning of each word. In the verdict against the accused Bahari, the Panel of Judges broke down the elements to interpret their meaning, for example the words “spread”, “information”, “aimed at”, “raise”, “hostility”, “individual”, “group”, “community”, “ethnic”, “religion”, “race”, and “group”. The Panel of Judges then interprets the phrase by combining several words which meanings are taken from the Indonesian Dictionary or expert opinion.

The meaning of “raising hatred and/or hostility” is interpreted in various possible meanings. For example, the meaning of “hatred” is interpreted as a response to hatred or feelings of hatred which will lead to hostility among individuals/groups of people. The interpretation of “raising hatred” also includes broadcasting false news/notifications that can cause uproar among the public, namely information conveyed, or false statements against a person or against a group. In addition, the word “hatred” is also interpreted as an act that shows intense hostility, prolonged feelings of antipathy and is often accompanied by malicious intent and such a condition of “hatred” can become a strong emotion that encourages someone to try to harm the object. However, the word “hatred” can also refer to feelings of intense dislike but without the intention of harming the object.

In interpreting whether the defendant committed the act of spreading information that raised hatred or hostility, in general the Panel of Judges interpreted this element with indicators and benchmarks from the wordings of the defendant’s text or sentence, which could be in the form of expressions that “demean”, “insult” or “religious blasphemous”. In the case with the defendant Panggabean, the defendant’s statement was assessed by an indicator of whether it contained words that demeaned, offended, insulted and blasphemous against religion which raised feelings of hatred or hostility towards certain individuals and/or groups of people. Likewise, in the case judgment with the Defendant Ahmad Dhani, the defendant’s words were deemed to have created “a sense of hatred” from the interpretation of his sentence:

“That the sentence “Anyone who supports the perpetrator of blasphemy is a bastard who needs to be spit in his/her face” is an expression of hate speech, this sentence includes hate speech. The sentence is an speech or sentence that clearly shows insulting expressions (shown by the words ‘bastard’ and ‘need to spit in the face’) by the accused or the account

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284 Pandeglang District Court Judgment No. 28/Pid.Sus/2018/PN Pdl, pp. 67-68.
285 Batam District Court Judgment No. 36/ Pid.Sus/2021/PN Btm, p 55.
owner against any supporters of religious blasphemy.”

In another case, a defendant who expressed views related to beliefs was considered to have committed hate speech and was convicted because a statement posted on social media caused a religious person to feel **insulted and harassed**, the defendant did not have basis/right or authority to comment which has a negative connotation towards a certain religious authority, and the post creates feelings of hatred and hostility towards certain individuals and/or groups of people based on ethnicity, religion, race and inter-group. Something similar was found in the case with the defendant Aan:

“... that the Defendant who claims to be an adherent of Atheism, namely an ideology that does not acknowledge God, but the content posted or linked by the Defendant only insults one particular religion in Indonesia, namely Islam and insults the lord or Messenger of Islam, namely the Prophet Muhammad SAW, this proves that the Defendant has the aim of causing hatred or hostility towards certain individuals and/or groups of people based on Ethnicity, Religion, Race and Inter-Group (SARA), especially the Minang Tribe and Islam.”

Apart from being interpreted as referring to the Defendant’s sentence, the element “raised hostility” also referred to certain situations which resulted in “hatred” and “hostility”, for example statements which resulted in pros and cons from comments on the Defendant’s post which contained provocation. These pros and cons are then considered to have formed opposing groups of people and can lead to open conflicts that is based on ethnic, religion, race and inter-group in nature, as stated in the following judgment:

“... besides that, when the post in question generates both pro and con comments, it can be concluded that the post contains a provocation because it has an impact on the formation of opposing groups which is a state of hidden conflict and can lead to open conflict that is based on ethnic, religion, race and inter-group in nature.”

A similar approach was found in the case with Defendant Jerinx whose judgment stated that posts about IDI (Indonesian Medical Association) as the lackey of WHO inspired others, as evidenced in many negative comments implying hatred

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288 South Jakarta District Court Judgment No. 370/Pid.Sus/2018/PN Jkt.Sel, p. 64.
290 Muaro District Court Judgment No. 45/PID.B/2012/PN.MR, p. 45.
292 Ibid., p. 70
against IDI.\textsuperscript{293}

Referring to the case above, the phrase “raise hatred and or a sense of hostility” is interpreted from the existence of a response in the form of comments from the defendant’s statement on certain social media/communication platforms and is seen as a situation that has “potential” to generate feelings of hatred and or hostility.

The element of “raising hatred and/or hostility” is also often only proven as a potential for hatred or hostility to occur and not analyzed in depth using indicators of the seriousness of statements that actually cause hatred or hostility. This is for example in the following judgment:

“Considering that the facts were revealed in court that it is true that the content of the video made by the defendant was inaccurate in conveying information so that negative accusations aimed at the regime (current government) are more baseless accusations which can also create feelings of hatred or hostility among individuals or groups of people who are affected by the video which used religion to contradict the people and the government, especially the border officers.”\textsuperscript{294}

The sentence “raise hatred and or feelings of hostility” in a number of judgments is also constructed as a potential impact in the form of “raising perceptions” or “stigma”. In the case with Defendant Tanjung, who was acquitted in the first instance, the Supreme Court considered that the impact of the defendant’s post regarding the connection between PDIP (Indonesian Democratic Party of Struggle) and PKI (Indonesian Communist Party) (“PDIP whose 85% are PKI cadres supporting Anti-Islam governor candidate”) influenced the perceptions of other people who saw or read it, so that it could raise other people’s feelings of dislike and hatred towards members of the Indonesian Democratic Party of Struggle (PDIP) group.\textsuperscript{295} The Supreme Court further stated that from a stigma perspective this would lead to hatred which does not have to be physically reflected, but normatively this attack is not justified by the norms that exist in society. Based on these considerations, the Supreme Court annulled the Judgment of Central Jakarta District Court and declared the defendant guilty.\textsuperscript{296}

\textbf{4.4.3. Certain individual and or group based on ethnic, religion, race, inter-group}

The sentence “certain individuals and or community groups based on ethnicity,
religion, race, inter-group” is a very broad scope of parties based on the background or basis of the target party’s goals to commit acts that cause hatred and hostility. This means that the phrase “individuals and or groups” includes two possibilities, namely the victim is between individuals on a small and limited scale or scope, as well as the word “group” which represents the scope of targets of hatred and hostility on a wider scale.

The sentence “ethnicity, religion, race, inter-group” in Article 28 paragraph (2) of the ITE Law is an important element as a basis for differentiating acts of hatred and hostility in general. This means that without the background of ethnic, religious, racial and inter-group, actions that cause hatred and hostility cannot be charged with Article 28 paragraph (2) of the ITE Law. Thus, the scope of “certain individuals and/or community groups” is limited on the basis of background on ethnicity, religion, race and intergroup (SARA) so that the target of acts of hatred or hostility must be against the background of these groups. However, there are various judgments that interpret the phrase “community group” more broadly, for example it is interpreted as a collection of a number of people in the broadest sense and bound by a culture.

In many judgments, the meaning of ethnicity, religion, race has been interpreted quite clearly and precisely, but in some others the interpretation is very loose, for example the meaning of “group”, as the following judgment reads:

“Sociologically, the ethnic and racial dimensions concern Ahok who is Chinese, the religious element is people who are considered anti-Islam, the inter-group element is the group that supports Ahok as a candidate for Governor of DKI Jakarta.”

From the wording of the Judgment above, the phrase “inter-group” is interpreted to include supporters of politicians and this represents a problem of interpretation of what the word “group” means. Many other judgments then provide a fairly broad interpretation of the meaning of “group”, especially after the Constitutional Court’s judgment regarding the meaning of “population group”. In addition to the judgment above, the judgment with the defendant Jerinx concluded that IDI (Indonesian Medical Association) was included as a group category. The Panel of Judges referred to the Constitutional Court’s Judgment which emphasized that inter-group does not only include ethnicity, religion and race but also all entities that are not represented or accommodated in these three categories. The Constitutional Court themselves has realized that this interpretation will have a very broad scope, that is, any group in society, both formal and non-formal, but

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297 Pandeglang District Court Judgment No. 28/Pid.Sus/2018/PN Pdl, pp. 67-68.
298 Jakarta Selatan District Court Judgment No. 370/Pid.Sus/2018/PN Jkt.Sel, p. 70.
299 Constitutional Court Judgment No.76/PUU/XV/2017.
300 Denpasar District Court Judgment No. 828/Pid.Sus/2020/PN.Dps, p. 96.
when removed, it will eliminate legal protection for various entities other than ethnicity, religion, race, which have the potential to violate Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution. So based on this interpretation, Indonesian Medical Association, which in its Constitution/Bylaws is the only medical professional organization in Indonesia, is deemed to be classified in the sense of inter-group.\textsuperscript{301}

In the Wahidin Judgment, the Banda Aceh District Court considered that the government regime could be classified as “inter-group”.\textsuperscript{302} Meanwhile in the judgment against the defendant Imam Kurniawan, the Indonesian Navy can also be included in inter-group according to the Medan District Court.\textsuperscript{303} Similar considerations that inter-group can also include the police can also be seen from the judgment against the defendant Wahyu Rasasi Putri, as decided by the Medan District Court and upheld by Medan High Court.\textsuperscript{304}

4.5. Hate Speech in International Law and Jurisprudences

4.5.1 Concept and Regulations in International Human Rights Law

Article 20 the ICCPR is a different element from other articles in the Covenant, because this article does not guarantee certain rights but limits other rights, namely the rights to freedom of expression and information, the right to freedom of religion, the right to organize and assemble. This article also differs from the restrictive provisions in articles related to freedom of religion, freedom of expression and other rights in that it not only gives the authority to intervene, but also requires the State to impose restrictions.\textsuperscript{305}

The right to life and the right to equality are priorities in the ICCPR so that later it was decided by the drafters that in order to combat the main root causes of systematic violations of these two rights, it is necessary to prohibit the formation of public opinion.\textsuperscript{306} The forms of systematic violations of the right to life and the right to equality in question are war, racial, national and religious discrimination.

UN Secretary General, Antonio Guterres stated that “hate speech is a menace to democratic values, social stability and peace”, but dealing with hate speech does not mean limiting or prohibiting freedom of expression.

\textsuperscript{301} Ibid., pp. 96-97.
\textsuperscript{302} Banda Aceh District Court Judgment No. 248/Pid.Sus/2021/PN Bna, p. 24.
\textsuperscript{303} Medan District Court Judgment No. 1845/Pid.Sus/2021/PN Mdn, hal. 13.
\textsuperscript{304} Medan High Court Judgment No. 1259/Pid.Sus/2021/PT Mdn.
\textsuperscript{305} Manfred Nowak..., Op. Cit., p. 468.
\textsuperscript{306} Ibid.
“Addressing hate speech does not mean limiting or prohibiting freedom of speech. It means keeping hate speech from escalating into something more dangerous, particularly incitement to discrimination, hostility and violence, which is prohibited under international law.”

International human rights law has regulated many expressions related to hate speech and hostility. The history of regulation of hate speech is closely related to the recognition and protection of freedom of expression, which shows that hate speech exists at two levels, namely as an attempt to “attack” minority and vulnerable groups and as an effort to “attack” the sovereignty of the Government through war propaganda. In the discourse on the development of recognition of freedom of expression, after the second world war when the UDHR was drafted, the question arose about the extent to which freedom should be allowed given the problems and dangers of ideology and thoughts related to the superiority of race and nationality, which was then accommodated in Article 20 the ICCPR and regulations in CERD.

Based on these historical factors, the regulation on the prohibition of hate speech in the international human rights lexicon is intended to provide protection for vulnerable groups from threats of discrimination and attacks of hatred because of racial or national superiority, and not solely in the context of “public order”. That is, the focus of regulating hate speech is intended to protect certain groups from hateful discrimination or violence.

4.5.1.1. Six Factors for the Seriousness of Hate Speech
Rabat Plan of Action also provides six factors for considering the seriousness of incitement to a criminal conviction:

a. “The social and political context prevalent when the speech was made and disseminated”;

b. The status of the speaker, “specifically the individual’s or organization’s standing in the context of the audience to whom the speech is directed”;

c. Intention, which means that “Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the ICCPR”, which states that mere distribution or circulation is not the same as advocacy or incitement;

d. The content and form of the speech, in particular “the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech”;

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308 In Indonesia “hate speech” is translated into a number of terms, among others “ujaran kebencian”, “siar kebencian”, and “penebaran kebencian”.

e. Extent of the Speech Act, such as “magnitude and number of audiences”, including whether it was “a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement”;

f. Likelihood, including imminent, meaning that “some degree of risk of harm must be identified”, including through a determination (by a court, as advised in the Rabat Plan of Action) of “a reasonable probability that the speech would succeed in inciting actual action against the target group”.

David Kaye, UN Special Rapporteur on Freedom of Expression in the 2019 Report stated that there are forms of expression that can be classified as “advocacy of hatred that constitutes incitement”.310 Although acts of hate speech need to be punished, not all of them have to be declared a crime and punished with a criminal sentence. The Special Rapporteur emphasized the principles in the Rabat Plan of Action stating that criminal penalties must be limited to serious cases,311 so there needs to be clear and definite references to the terms used, for example hatred, discrimination, violence and hostility.312

Based on the Rabat Plan of Action, the terms “hate” and “hostility” have been strictly formulated so as not to jeopardize freedom of expression. The meanings of the words “hatred” and “hostility” refer to intense emotions and irrational sharp criticism, enmity and hatred towards the target group. The term “advocacy” as in Article 20 paragraph (2) of the ICCPR must be understood as requiring the intention to openly promote hatred towards the target group. While the term “incitement” refers to statements about national, racial or religious groups that create risks of discrimination, violence or hostility towards members of such groups. While the meaning of “religion” includes both religion and belief as the ICCPR protects the right to freedom of religion and belief.313

The Rabat Plan of Action also recommends that there should be a clear distinction between three forms of expression: (i) forms of expression which must be declared as criminal acts; (ii) forms of expression that are not criminalized, but can be justified for civil action or administrative sanctions; and (iii) forms of expression that have no basis for obtaining criminal sanctions and civil action, but raise problems related to tolerance, civility and respect for other people’s beliefs.314

310 UN General Assembly... A/74/486... Op. Cit., paras. 11-19.
311 Ibid., para. 16.
4.5.1.2. Classifications of Hate Speech

In the United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences also classifies hate speech into three categories based on severity, with the classification of “incitement”, “unlawful hate speech”, and “lawful hate speech”.\textsuperscript{315} It is important to note that even though there is hate speech that is not prohibited, hate speech might still be harmful.\textsuperscript{316} This document also refer to the Hate Speech Pyramid compiled by ARTICLE 19,\textsuperscript{317} as follows:

\begin{center}
\includegraphics[width=\textwidth]{hate_speech_pyramid.png}
\end{center}

4.5.2. Application of Hate Speech Prohibition Based on the Committee on the Elimination of All Forms of Racial Discrimination: The Jewish Community of Oslo et al. v. Norway

In line with Article 20 of the ICCPR, Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) stipulates that:

\begin{itemize}
\item Incitement to genocide and other violations of international Law
\item Advocacy of discriminatory hatred constituting incitement to hostility, discrimination or violence
\item Hate speech which may be restricted to protect the rights or reputations of others, or for the protection of national security or of public order, or of public health or morals
\item Lawful “hate speech” raising concerns in terms of intolerance
\end{itemize}

\begin{itemize}
\item Article 20 (2) ICCPR
\item Article 19 (3) ICCPR
\item Article 19 (3) ICCPR
\item Applicable International Legal Instruments
\item Genocide convention + Rome Statute
\end{itemize}

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\textsuperscript{315} Antonio Guterres…, \textit{Op. Cit.}, hal 12.

\textsuperscript{316} \textit{Ibid.}, hal. 1.

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Based on Article 4 of the ICERD, the Jewish Community of Oslo et al. made an individual complaint to the Committee regarding alleged violations committed by Norway. The complainants felt they have been victims of hate speech directed at the Jewish community in Norway by Terje Sjolie, and that the Norwegian Government has failed to protect them as mandated in Article 4 of ICERD. Terje Sjolie was the leader of a rally in memory of the Nazi leader, which was held on 19 August 2000 in Askim, near Oslo. Around 38 people participated in the action and the action participants wore semi-military uniforms. Terje Sjolie gave a speech which included:

‘We are gathered here to honor our great hero, Rudolf Hess, for his brave attempt to save Germany and Europe from Bolshevism and Jewry during the Second World War. While we stand here, over 15,000 Communists and Jew-lovers are gathered at Youngsroget in a demonstration against freedom of speech and the white race. Every day immigrants rob, rape and kill Norwegians, every day our people and country are being plundered and destroyed by the Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts. We were prohibited from marching in Oslo three times, whilst the Communists did not even
need to ask. Is this freedom of speech? Is this democracy? ...

Our dear Führer Adolf Hitler and Rudolf Hess sat in prison for what they believed in, we shall not depart from their principles and heroic efforts, on the contrary we shall follow in their footsteps and fight for what we believe in, namely a Norway built on National Socialism.”

The rally ended with repeated Nazi salutes. After this rally, violence against black residents and political opposition increased including the murder of Benjamin Hermansen, 15 years old, a son of an interracial marriage - a Ghanaian man and a Norwegian woman.

For this commemoration rally, Terje Sjolie was reported to the police. He was charged with using Article 135a of the Norwegian Penal Code which prohibits threats, insults, hatred, persecution or demeaning acts based on belief, race, skin colour, nationality or ethnicity. This crime is punishable by a fine or imprisonment for a maximum of 2 years. Terje Sjolie was acquitted by the Court of First Instance, found guilty by the Borgarting Court of Appeal, but then acquitted again by the Norwegian Supreme Court on the grounds that punishing approval of Nazism would include banning its organization and this would violate freedom of expression. The Norwegian Supreme Court also considered that Sjolie’s remarks did not contain threats or invitations to do something even though they demeaned and offended the Jewish community. The Oslo Jewish community et al were dissatisfied with the Norwegian Supreme Court judgment and then made a complaint to the CERD Committee.

In its consideration, the CERD Committee stated, among other things, that the contents of Terje Sjolie’s speech contained ideas based on racial superiority or hatred; and sentences to follow in the “trails” of Hitler were considered as incitement to at least racial discrimination, if not incitement to violence. The Committee noted that the prohibition of all ideas based on hatred or racial superiority is incompatible with freedom of expression and opinion and for this reason Terje Sjolie’s speech cannot be categorized as protected speech based on freedom of expression. Therefore the Norwegian Supreme Court’s judgment in the Terje Sjolie case resulted in a violation of Article 4 ICERD. The Committee recommended that Norway take steps to ensure that Norwegian law does not protect similar speech based on freedom of expression.

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[^319]: *Ibid*, para. 10.4.
4.5.3. The Application of Hate Speech Prohibition by European Court of Human Rights and European Commission on Human Rights

In the case of Glimmerveen and Hagenbeek v. Netherlands, hate speech was considered by the European Commission on Human Rights. Glimmerveen is president of the Nederlandse Volks Unie” (N.V.U) a political party founded in 1971 with one of its basic principles being that the common good of a country will best be achieved if its population is ethnically homogeneous and without racial mixing. In 1977 Glimmerveen was found guilty by the Rotterdam Regional Court and sentenced to two weeks’ imprisonment for possession with intent to distribute leaflets deemed to incite racial discrimination. These leaflets contained calls for, among other things “As soon as the Nederlandse Volks Unie will have gained political power in our country, it will put order into business and, to begin with will remove all Surinamers, Turks and other so-called guest workers from the Netherlands ...” The complainants who were prosecuted in the Netherlands felt their right to freedom of expression was being violated. The European Commission on Human Rights in this case stated that Article 10 of the European Human Rights Convention which protects freedom of expression does not allow the spread of ideas of racial discrimination, so the actions of the Dutch Government in processing the criminal penalties of the two complainants were appropriate.

In the case of Norwood v. England, Norwood felt his right to freedom of expression was violated because he was found guilty of committing acts of hostility towards certain religious groups by the British Court, for putting up a poster of the British National Party in his window which contained a picture of the World Trade Center Twin Towers burning (9/11 incident) with the words “Islam out of Britain - Protect British Citizens”. The European Court of Human Rights ruled that Norwood’s complaint was unfounded, because the violent attacks on certain religious groups and linking all members of the group to acts of terrorism contradict the values upheld by the European Human Rights Convention, namely tolerance, social peace and non-discrimination. The European Court of Human Rights also stated that Norwood’s actions amounted to an abuse of rights, and could not be protected under freedom of expression.

Another case decided by the European Court of Human Rights is Gunduz v. Turkey. Gunduz is a member of an Islamic sect who was invited on a Turkish national TV show where he criticized the principles of democracy and secularism. He thinks secular institutions are the same as “impious”, and openly calls for the introduction

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322 Ibid., para. 4
323 Ibid.
of Sharia law. He was convicted by a Turkish Court for openly inciting the population to hate and enmity based on differences in religion or denomination. Gunduz sued Turkey for violating the right to freedom of expression. The European Court of Human Rights stated that there had been a violation of Gunduz’s freedom of expression. The court held that Gunduz represented the extremist ideas of his sect, which is well known to the public, has taken an active part in public discussions. The pluralist debate seeks to present sects and their unorthodox views, including the notion that democratic values are incompatible with their conception of Islam. The topic has been the subject of widespread debate in the Turkish media and is a matter of public interest. The European Court of Human Rights considered that the Petitioner’s statement could not be considered as an invitation to commit violence or as an expression of hatred on the basis of religious intolerance. The fact that someone defends sharia, without calling for violence to introduce it, cannot be construed as hate speech.\(^\text{325}\)

From these two cases, it can be seen that the European Commission on Human Rights and the European Court of Human Rights have similarities where the emphasis is on incitement to violence. Both of them offer ideas that are controversial and unacceptable to society. However, in the Glimmerveen & Hagenbeek case, the European Commission on Human Rights considers that there is an element of incitement to discriminate and violence against Muslim minorities in the Netherlands so that their actions are classified as hate speech. On the other hand in the Gunduz case, the European Court of Human Rights saw that the values promoted by Gunduz were indeed extreme but did not contain calls for violence or religious intolerance so that they could not be considered hate speech.

**4.5.4. Qualification of Hate and Hostility as Criminal Acts**

International human rights law and various references to hate speech and hostility as formulated in Articles 19 and 20 of the ICCPR have provided boundaries or indicators regarding the severity of acts of hatred and hostility that can qualify as criminal acts. The formulation of Article 28 (2) of the ITE Law is not in accordance with the limitations of these indicators which have an impact on prosecution of legitimate expressions, including expressions of criticism of public officials and politicians.

Thus, the crime of hatred and hostility in Article 28 (2) of the ITE Law must taking into account the limitations as stipulated in Articles 19 (3) and 20 of the ICCPR and the qualification as a crime when an act that fulfills the element of incitement to discriminate, hostility or violence. In addition, the form of information must also

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be part of a campaign or incitement to cause factual harm.\textsuperscript{326}

As described at the beginning, international human rights laws have provided a basis for forms of hate speech and hostility that must be “prohibited” and fall into the category of criminal acts, for example as formulated in the Rabat Plan of Action regarding three types of expression: (i) forms of expression that must be declared as criminal acts; (ii) forms of expression that are not criminalized, but can be justified for civil action or administrative sanctions; and (iii) forms of expression that have no basis for obtaining criminal sanctions and civil action, but raise problems related to tolerance, civility and respect for other people’s beliefs.”\textsuperscript{327} Referring to these three types, Article 28 paragraph (2) of the ITE Law should provide clearer and concrete boundaries, including by adding other key elements, namely that the act of disseminating information must constitute an act of incitement to commit hatred, discrimination and violence.

\textbf{4.6. Analysis of the Application of Articles and Elements by Indonesian Courts}

The application and interpretation of Article 28 paragraph (2) of the ITE Law, as with other interpretations of the elements of criminal acts in the ITE Law, the judges often find it difficult to provide precise definitions of elements related to technical terms related to electronic information systems and technology. In a number of cases that were prosecuted before the amendment to the ITE Law, the definition of elements of crime was then interpreted by referring to sources that were less authoritative, for example referring to phrases based on individual blogs.\textsuperscript{328} In its development, a number of technical terms were then referred to from the Indonesian Dictionary\textsuperscript{329} or expert opinion and then interpreted the meaning of the elements based on the explanation in the Law after the amendment to the ITE Law.

\textbf{4.6.1. Very loose interpretation of intention or deliberately}

In the various judgment studied, the interpretation and application of elements related to the phrases “intentionally” and “aimed at” causing “hatred” and/or “feeling of hostility” is very loose, which allows for a broad interpretation that the defendant’s actions created the potential for hatred and hostility.

A number of problems in the interpretation of intent include: first, the meaning of “intentionally” refers to actions in the form of statements or content postings in certain media, so that intentionality here is aimed at actions related to content or statements in the form of spreading information.

\begin{itemize}
\item \textsuperscript{326} UN High Commissioner on Human Rights, \textit{The Rabat Plan of Action...}, \textit{Loc. Cit.} See also Adhigama A. Budiman et al..., \textit{Op. Cit.}, pp. 139-140.
\item \textsuperscript{327} UN High Commissioner on Human Rights, \textit{The Rabat Plan of Action...}, \textit{Ibid.}, par 20.
\item \textsuperscript{328} Muaro District Court Judgment No. 45/PID.B/2012/PN.MR, p. 43
\item \textsuperscript{329} Pandeglang District Court Judgment No. 28/Pid.Sus/2018/PN Pdl., p. 67.
\end{itemize}
Second, the sentence “aimed at” refers to the intention to “raise” feelings of hatred and hostility. The interpretation of the two phrases above is still problematic, mainly because many judgments concluded that it is proven that the aim is to create hatred and hostility from comments in response to statements or content distributed by the defendant. In fact, the pros and cons and “provocative” statements do not necessarily represent an objective impact of hatred or hostility, but can also be interpreted as part of the public debate and response.

Third, the intention or purpose with the impact of creating hatred and hostility is still widely inferred by the perception that the defendant’s actions actually caused hatred and hostility without strong evidence. This was mainly when a case occurred because of a report by a certain group who felt offended or humiliated by statements or contents spread by the Defendant and their pros and cons, which were then analyzed and concluded that the Defendant had the aim of causing hatred and hostility.

Fourth, the elements of intent and purpose in a number of cases did not really show that the defendant’s actions were intended to raise feelings of hatred and hostility. In several cases the defendant admitted that his/her actions were not intended to raise hatred or hostility and have apologized. For example, in the case with the defendant Djahamao, who admitted and apologized and had no intention of offending Christians or Catholics because he only wanted to discuss, but was still found guilty and convicted.330 In the case with Defendant Bahari, he had signed an apology and an agreement with the party who felt harmed, and this was witnessed by the local authorities and village superintendent (Babinsa).331 Meanwhile in the Panggabean case, the Defendant’s sister has apologized via blog for the expressions made by her brother.332 This means that from a number of cases above there was no real intention on the part of the defendant to commit an act to cause hatred and hostility.

The SKB UU ITE emphasized that Article 28 paragraph (2) of the ITE Law prohibits acts that have the motive of arousing hatred and/or hostility on the basis of ethnic, religion, race and inter-group. In evidence examination, law enforcers must prove the motive of raising which is characterized by the existence of content that was inviting, influencing, mobilizing the public, inciting/turning one against another with the aim of causing hatred, and/or hostility. Nevertheless, the SKB on the one hand provides an explanation of the meaning of “to raise” with an element of inciting, but on the other hand it leaves room for interpretation which is even

331 Based on an interview with the lawyer of Alnoldy Bahari, Pratiwi Febry, S.H.
wider because of sentences such as “inviting”, influencing, “moving” and “turning one against another”.

4.6.2. Disseminating information must be interpreted as “in public”
Article 28 paragraph (2) of the ITE Law does not specifically contain an element of “in public” which raises concerns that the information being disseminated also targets more private spaces, for example in groups on limited and private social media platforms. In the example of one of the cases, the panel of judges correctly interpreted that the purpose of “spreading information” must be in a “public” fora. As a comparison in the Law on the Elimination of Racial and Ethnic Discrimination, crimes related to hate must be “in public” or “intended to be known by the public”, so that forms of private communication, for example private correspondence that do not fulfill the public aspect are in accordance with the purpose of the formulation this matter should not be punishable under Article 28 paragraph (2) of the ITE Law. 

The interpretation of this element has also been affirmed in the SKB UU ITE that the intention of “spreading information” must be done “in public”. The Joint Decree states in more detail that the criteria for “spreading” can be equated with “to be known publicly” which can be in the form of uploading it to a social media account with settings accessible to the public, or broadcasting something on a chat group application with an open nature where anyone can join the conversation group, no one controls content or information traffic, anyone can upload and share it outside, or in other words without any moderation (open group).

Of the two cases decided after the SKB UU ITE, namely the case against the defendant Wahidin which was decided by the Banda Aceh District Court and the defendant Wahyu Rasasi Putri who was decided by the Medan District Court and Medan High Court, both of whom disseminated information in a WhatsApp group with limited members. Especially in Wahidin’s case, his video was sent to a group with 28 members. Other members of the group spread the video so that it goes viral on other social media. So that the element of disseminating this information should not be fulfilled. But unfortunately in the Wahidin case, the Banda Aceh District Court uses the interpretation that this element is fulfilled because the other sub-elements are fulfilled.

4.6.3. The element “Raising Hate or Hostility” is interpreted broadly
In general, as long as the act of hate speech or hostility contains “hatred” which creates “provocation” or “disturbing” which is subjectively interpreted so as to cause symptoms of “hostility” is included in the qualifications of a crime under Article 28 (2) of the ITE Law. The definition of “raising”, “hatred” and “hostility” in

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Article 28 (2) of the ITE Law does not provide sufficient clarity which has an impact on a broad interpretation of the meaning of “raising”, “hatred” and “hostility”.

The existence of the SKB UU ITE more or less provides boundaries, for example related to the importance of clarity on the motives or intentions of the perpetrators with the necessary evidentiary indicators. The word “raise” seeks to be narrowed down with indicators (or “marked”) by the presence of content that “invites, influences, mobilizes the community, incites/pits against each other with the aim of causing hatred, and/or hostility”. In addition, this SKB also provides boundaries that expressing opinions, statements of disapproval or dislike of individuals or groups of people are not included in prohibited acts, unless those being disseminated can be proven to have attempted to solicit, influence and/or mobilize the community, incite/pits one against the other to create a feeling of hatred or hostility based on the issue of sentiments of ethnic, religion, race, inter-group differences.

However, the guidelines in the SKB UU ITE also have the potential to be problematic, namely whether the indicator “inviting, influencing, mobilizing the public, inciting/turning one against each other” actually raise feelings of hatred or hostility, or in the case of the content being distributed contains things to invite, influencing, mobilizing the community, inciting/turning one against each other” has fulfilled the qualification of “raising”. In addition, a number of sentences have also become looser in interpretation, for example the words “influence” and “mobilize”, which in the context of disseminating information on social media are highly dependent on the response from the readers.

In a number of cases, the interpretation of the element of “raise” is actually interpreted by the existence of posts on certain social media which then raises comments and pros and cons or even just based on the number of followers of the social media account where the defendant spread the information. That is, the pros and cons of a statement are interpreted as situations that generate feelings of hatred or hostility but are not interpreted as an arena for debate and discourse on a particular issue. Even hatred towards the speaker him/herself is also considered as the fulfillment of this element.

4.6.4. Interpretation of “Group” was very broad and unlimited

The phrase “inter-groups” and the meaning of “groups” are areas that are increasingly opening up a wide range of interpretations. The meaning of “group” in the Constitutional Court Judgment is stated not only to religion, ethnicity and race, but has a broader meaning, which includes religion, ethnicity and race, and includes all entities that are not represented or embodied by the terms ethnicity,
religion and race. The Constitutional Court considered that limiting other entities as part of a “group” apart from ethnicity, race and religion would actually negate the legal protection of these other entities and have the potential to violate Article 27 paragraph (2) and Article 28 (D) paragraph (1) of the 1945 Constitution.

The existence of a Constitutional Court Judgment that expands the meaning of “group” makes a certain group or organization can claim to be a “group” as formulated in Article 28 (2) of the ITE Law. The SKB UU ITE then strengthens this “inter-group” interpretation by stating that the phrase “inter-group” is an entity of people’s groups apart from ethnicity, religion, and race as the understanding between groups refers to Constitutional Court Judgment Number 76/PUU-XV/2017. The Constitutional Court’s judgment itself states that the legislators who form laws are to look for other groups besides ethnic, religion, race who are part of “inter-group”.

From the criminal law approach, if the meaning of “group” is not interpreted strictly and carefully it will greatly broaden, in the sense that the principle of criminal law states that the formulation of a criminal provision must be strict (lex stricta). Criminal law provisions must also be understood and predictable so that people can know that a certain act will be subject to criminal law. In the event that a legal provision cannot be predicted and understood clearly, then the criminal provision is actually a provision that has multiple interpretations and is contrary to the principles of criminal law.

In this context, judges have room for interpretation which should be used to interpret “inter-group” according to its true meaning so that it is not widespread and has no boundaries, which violates the principles of clarity and predictability in criminal law. The meaning of “inter-group” must be interpreted or based on the identity of the community or citizens, which is something that is inherent and difficult to change, not a particular profession or organization or other unclear forms of “group”.

In several cases, as described above, the scope of “group” includes groups of political parties, police, armed forces, medical professional organizations and even government regimes, and then becomes the basis for pros and cons and results in feelings of hatred and or hostility. This case example shows that the scope of “group” which is not definitive or defined with clear indicators actually has the

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334 Constitutional Court Judgment No. 76/PUU/XV/2017, p. 69.
335 Ibid., p. 68.
337 Ibid.
potential to criminalize various political expressions that criticize authorities or politicians as actions that generate feelings of hatred or hostility against group backgrounds.

4.6.5. Assessment of criminal acts of hate speech and hostility must be strict
The various judgments analyzed show that assessing the act of disseminating information that raises hatred or hostility has not been fully carried out based on a rigorous testing model. As the Rabat Plan of Action recommended, there must be a high standard of testing whether an expression of hate speech can be included in the category of a criminal act, namely by looking at the following factors:\(^{338}\)

a. “The social and political context prevalent when the speech was made and disseminated”;
b. The status of the speaker, “specifically the individual’s or organization’s standing in the context of the audience to whom the speech is directed”;
c. Intention, which means that “Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the ICCPR”, which states that mere distribution or circulation is not the same as advocacy or incitement;
d. The content and form of the speech, in particular “the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech”; 
e. Extent of the Speech Act, such as “magnitude and number of audiences”, including whether it was “a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement”;
f. Likelihood, including imminent, meaning that “some degree of risk of harm must be identified”, including through a determination (by a court, as advised in the Rabat Plan of Action) of “a reasonable probability that the speech would succeed in inciting actual action against the target group”.

Referring to various judgments related to hate and hostility, many of the defendants’ actions that were tested against the above criteria were far from being a statement or dissemination of content containing hate speech or hostility that could be punished. Of the six criteria regarding context, the status of the party disseminating the information, intent, content, the extent of the information being disseminated, or the possibility of impact arising, it is very rare for judgments to assess all of these indicators. As a result, every expression, both statements and contents that were spread through the internet media were easily charged with Article 28 (2) of the ITE Law.

4.6.6. Background of Protected Group

One of the issues in Article 28 paragraph (2) of the ITE Law is regarding the definition of “group” which opens up very broad possibilities for groups to be protected. On the one hand, the broad possible scope of the meaning of “group” is useful for protecting groups outside the categories of ethnicity, race and religion, or group identities that really must be protected, for example minority beliefs or sexual orientation. However, on the other hand this breadth of coverage will resulted in efforts to use the meaning of “group” to include other “groups” that must be protected by Article 28 paragraph (2) of the ITE Law, for example “profession”, “organization”, “political group”, “supporters of politicians” or other groups with unclear identities.

Whereas the purpose of protected groups in Article 28 paragraph (2) of the ITE Law should also not include protection for a particular ideological form, state entity or state power, so that these groups cannot become the basis for implementing Article 28 paragraph (2). This issue is raised because in a number of cases, there was a fact that hate speech was tried under Article 28 (2) even though the statement or content being disseminated was related to political statements or dislike of the government. Instead of interpreting such statements or content as public discourse and debate which is characterized by pros and cons, they are charged with inciting hatred and hostility.

In terms of determining the “groups” that are protected, it is important to return to the intent and purpose of protecting groups from hate speech, which is mainly to protect vulnerable groups and minorities. There is quite a lot of group background that needs to be protected, however, in the context of criminal law, so that the definition of “group” is not broad and includes an unclear “group”, it is important to refer back to the definition of group as formulated in Article 156 of the Criminal Code and the formulation of “group” must refer to an “identity” that is clear and not easily changed. Apart from that, considering the development of groups that need to be protected, it is also important to refer to the background of the groups identified in the Strategy and Plan of Action on Hate Speech 2019.

4.6.7. There is no proper consideration of human rights in court judgments

Basically, everyone is free to express themselves in various mediums: speech, writing, movement, appearance. This should be the main understanding of law enforcers, especially judges. For this reason, when there is a legal process that tries to classify a form of expression as a criminal act, this must be seen in the context

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of limiting human rights. The question that must be answered in examining or considering criminal charges related to someone's expression is whether such expression can be restricted, and whether the restriction is lawful. Therefore, in every judgment of a criminal case related to expression, it is necessary to consider related human rights regulations and use a three-part test to assess the validity of the restriction. This needs to be seen case by case, not only if criminal charges are based on laws then the element “based on law” is definitely fulfilled.

From the cases studied in this chapter, no proper consideration of human rights has been found. The existence of the element “without rights” in Article 28 paragraph (2) of the ITE Law were not interpreted in the framework of human rights. For example, in the Alexander An case, there was already a reference to Article 29 of the UDHR and Article 19 paragraph (3) of the ICCPR but the judges concluded that Article 28 paragraph (2) was in accordance with international human rights law thus they still concluded that the defendant was guilty. The emergence of this reference is also most likely influenced by the defense and amicus curiae from non-governmental human rights institutions.

4.6.8. Criminal proceedings are the last resort

From a human rights perspective, online expressions that cause offense or are considered as “attacking” are suggested to be resolved in the same forum without having to prosecute the perpetrators. That is, as long as there are efforts to correct mistakes including clarifying accusations, criminal law should function as the last resort (ultimum remedium).

Whereas actions that are considered as hate speech have actually given the opportunity for resolution through forums outside the criminal justice process. The Indonesian National Police have tried to take this approach, including by issuing the Chief of Indonesian Police Circular Number SE/06/2015 on the Handling of Hate Speech. This circular in point (3)(a)(d) regarding preventive measures that need to be taken by members of the police states that when finding an action that has the potential to lead to a criminal act of hate speech, it is obligatory to bring together the party suspected of committing hate speech with the victim to find a solution to reconciliation between parties. Only when these preventive measures fail to resolve the problem can law enforcement be carried out and criminal justice processes avoided.

However, a number of cases showed different conditions where the case continued to be brought to the court even though the perpetrator apologizes to the victim. In the case with the Defendant Alnoldy Bahari, he signed an apology

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341 See Surat Edaran Kapolri No. SE/06/2015 on Penanganan Ujaran Kebencian (Hate Speech), number 3 letter a dan d.
and an agreement with the party who felt aggrieved which was witnessed by the local authorities and Babinsa (army’s local superintendent). Meanwhile in the Panggabean case, the defendant’s sister has also apologized via a blog for the expressions made by her brother. The two cases should have been prevented from entering the criminal justice process.

From a human rights perspective, testing for human rights violations is related to the state’s response to an event or certain actions. Expressions that are considered as hate speech have various categories and the approaches or responses by the State shall not solely through criminal channels but can be carried out with administrative actions or civil sanctions or even the state does not need to take certain actions because the level of hate speech is limited to intolerant statements. The state’s response also needs to look at the proportionality of its actions so that it does not become an excessive response that endangers freedom of expression.

4.6.9. Considerations of judges after the issuance of SKB UU ITE
Of the three cases studied after the issuance of the SKB UU ITE, it appears that the judges did not consider the contents of the Joint Decree at all in their judgment. The ignorance towards the SKB UU ITE indicating that although there have been attempts by the executive branch to fill in the gaps in the interpretation guidelines for the articles in the ITE Law, it is not authoritative to be used as a reference by the judges.

As far as what was cited in the judgment, the defense submitted by the legal counsel also did not refer to the SKB UU ITE even though if it were used it might be a strong defense that the defendants should not have been sentenced.

4.7 Conclusion and Recommendation

Various cases related to hatred and hostility where Article 28 paragraph (2) of the ITE Law were applied showed that there are still various challenges that require regulatory changes because the formulation is not strict and opens up space for multiple interpretations. This formulation makes legitimate expression based on international human rights law easier to be criminalized so that it will have a frightening impact and threaten freedom of expression. As in various other studies related to Article 28 paragraph (2) of the ITE Law, this study also found the fact that the broad interpretation of the article has targeted various legitimate expressions, both in the form of criticism and journalistic reports.

The application and interpretation of Article 28 paragraph (2) of the ITE Law

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342 Based on an interview with the lawyer of Alnoldy Bahari, Pratiwi Febry, S.H.
appears to be excessive, for example, in the name of public order the criminal act of hate speech and hostility is applied to individuals or minority groups who are considered to be attacking, for example attacking beliefs and religion, the majority group, and attacking the authority, or attack a group that should not be included in the element of “group”. The application of hate speech crimes focuses on a security and order approach or is based on maintaining the interests of the majority group or the authority.

This research also found the fact that in a number of cases, the Public Prosecutor charged a particular act with an alternative form of indictment that equates Article 28 paragraph (2) of the ITE Law with Article 27 paragraph (3) of the ITE Law. Since these two articles regulate different crimes with different elements, this shows that the Public Prosecutor does not understand the difference between the two crimes.

In terms of regulation and interpretation, this study recommends, most of which are in accordance with the SKB UU ITE, but by providing in-depth recommendations as follows:

**First**, the paradigm of regulating hate speech and hostility needs to focus on the paradigm of protecting minority and vulnerable groups, so that it does not become a regulation that is actually used to prosecute minority groups with accusations of hatred against those in power and to silence public criticism, including the use of accusations of using hate speech to silence differing views.

**Second**, the provisions of Article 28 paragraph (2) of ITE Law need to be revised to provide a clearer formulation in accordance with the category of hate speech which needs to be regulated based on international human rights law standards, so that it is not easy to prosecute any expression as an act of spreading information that creates hatred or hostility. Improvements to this formulation include providing a more adequate explanation of acts of “hate” and “hostility” that can be punished and an explanation of the elements of the crime, as well as emphasizing the presence of elements of incitement to discriminate, violence or hostility. The position and influence of the speaker on his audience also needs to be considered, as required in the Rabat Plan of Action.

**Third**, the interpretation of Article 28 paragraph (2) of the ITE Law needs to refer to a number of provisions in the SKB UU ITE as a guideline, mainly related to the elements “intentionally” and the element “aimed at” to enable the test of connection between proving these elements and motives of the perpetrator, whether he really intends to commit a crime by spreading information that causes hatred and hostility.
Fourth. verification 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 that statements or content of hate speech and hostility are ascertained. This severity level indicator can refer to the indicators that have been compiled in the Rabat Plan of Action.

Fifth, the interpretation of the element “group” in Article 28 (2) of the ITE Law must be interpreted as an identity that cannot be changed, including ethnicity, race, religion, by referring to the original meaning of “group” based on Article 156 of the Criminal Code. In addition to referring to the developments, a number of groups that can be categorized for protection are ethnicity, gender, sexual orientation as described in the UN document on the Strategy and Plan of Action on Hate Speech.
CHAPTER V

POLITICAL EXPRESSION AND CRIME AGAINST STATE SECURITY
In the previous section, various expressions used in the context of insult, both against individuals and legal entities/corporations, and expressions related to hate speech have been discussed. However, the right to freedom of expression also covers expressions beyond insult and hate speech, including one that is more commonly discussed, namely political expressions. In practice in Indonesia, political expressions often have to contend with criminal provisions, especially those on crimes against the state and state security. This can be seen from several judgments that criminalize political expressions by using “makar” (treason) provisions, especially those regulated in Articles 104 and 106 of the Criminal Code.

For this reason, this section presents an analysis of the judges’ interpretation as found in judgments related to the crime of “treason”, specifically to test whether they are in accordance with the applicable regulations. The analysis shall be based on Indonesian criminal law and universally applicable human rights provisions. In terms of criminal law, the analysis is carried out by outlining the definition of “treason” throughout the history of its regulation and the concepts found in other articles related to the crime of treason, namely Article 87 of the Criminal Code which discusses the attempt of ]“treason”, and Article 110 of the Criminal Code which discusses conspiracy to commit the crime. Meanwhile, the human rights analysis will be carried out by explaining the practice of political expressions in lieu of the human rights law on the right to freedom of expression and the right to freedom of peaceful assembly.

5.1. Political Expression in Human Rights

In the previous section, various expressions made in the context of insults, both to individuals and legal entities/corporations, and expressions related to hate speech have been discussed. The right to freedom of expression basically includes expressions other than insults and hate speech as expressions that are more commonly discussed in general, namely political expressions. General Comment No. 34 of the Human Rights Committee emphasizes that political opinions and expressions in the form of political discourse are opinions and expressions that are protected under Article 19 of the ICCPR. The European Court of Human Rights (ECtHR), in the case of Steel and Morris V. The United Kingdom, states that political expressions, including expressions on matters of public interest and concern, require a high degree of protection under Article 10 of the European Convention on Human Rights (ECHR) which regulates the right to freedom of expression.

Meanwhile, as expressed by Edison Lanza, the Special Rapporteur for Freedom

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344 UN Human Rights Committee, General Comment No. 34 ICCPR..., Op. Cit., paras. 9 and 11.
345 European Court of Human Rights Judgment, Steel and Morris V. The United Kingdom, (Application no. 68416/01), 15 Februari 2005, para. 88. “The Court has long held that “political expression”, including expression on matters of public interest and concern, requires a high level of protection under Article 10".
of Expression on Inter-American Commission on Human Rights (IACHR) in a 2016 report, political speech is one type of expressions that receives special protection under Article 13 of the American Convention on Human Rights, bearing in mind the importance of such expression for the implementation of all other human rights to preserve democracy.\(^{346}\)

Various human rights provisions, whether national, regional, or international, do not define or limit the concept of political expression. Tom Lewis and Peter Cumper define political expression as the freedom to communicate one’s message in that person’s choice of ways.\(^{347}\) Alcides Velasquez and Hernando Rojas’s concept of political expression sees it as a form of communication that expresses certain opinions about ongoing political events or processes or disseminates information relevant to these political events or processes.\(^{348}\) Meanwhile, Michelle Vosloo states that a political expression includes all forms of expression that are concerned with the interests of certain groups, governments, politics, or countries, that stir public thought, provoke public controversy, or change public minds.\(^{349}\) Elena Gladkikh, citing Katharine Galber, states that “political speech” or political expression is a speech/expression related to public issues, criticism of government officials and policies, and debate on public issues, including attacks on the behavior of policy makers, judiciary, and other officials.\(^{350}\) Peter John Chen, adopting the concept of “public sphere” from Jurgen Habermas, who addresses the development of public involvement and debate in information dissemination and views that the truth can be obtained through the active participation of the public in a debate, states that the “public sphere” is a process of political expression because the public exchange views and opinions on governmental issues.\(^{351}\)

Based on the various definitions above, a political expression thus can be defined as an expression made to convey messages, opinions, or thoughts regarding a public issue, political event, interest of certain groups, government policies, behavior of public officials and so forth with the aim of providing information to the public and/or mobilize the public’s views/


\(^{347}\) Tom Lewis and Peter Cumper, Balancing freedom of political expression against freedom of political opportunity: the courts and the UK’s broadcasting ban on political advertising, in Public Law, 2009, pp. 89-111. Accessible at https://core.ac.uk/download/pdf/30639117.pdf.


thoughts regarding the messages, opinions, thoughts, and/or information conveyed. The forms of political expression at least include criticism, statements of disapproval or rejection of a state policy, or criticism against public officials and politicians. In concrete cases, several forms of expression that have been recognized by the courts include: the use of certain sentences, such as the use of the sentence ‘the voice of the people is the voice of god’ which is considered a common political expression in Peru and elsewhere in Latin America, certain ways of dressing, such as wearing the symbols “Easter Lily” in Ireland and “Red Star” in Hungary, calls for election boycott, singing a song, such as “Kem Skjøt Siv Jensen” (Who Shot Siv Jensen) by the Norwegian hip hop singer Lars Vaulars, and the burning of the national flag in New Zealand and the United States.

Political expression can be carried out in various actions, both offline and online.

352 Elena Gladkikh…, Op. Cit., pp. 10-13. This is the case for many black people in the United States whose frequent expressions are rooted in sarcasm, irony, and cynicism, driven by the sentiment that the American political arena has never fully embraced African Americans as citizens and a central part of American politics. This expression itself often appears in barbershops, beauty salons, bars, and other spaces that are public spaces for black Americans. See Alford A. Young, Jr., The Black Masculinities of Barack Obama: Some Implications for African American Men, in Daedalus, Spring 2011, Vol. 140, No. 2, Race, Inequality & Culture, volume 2 (Spring 2011), pp. 206-214, (Massachusetts: MIT Press, 2011). Case. 211.


355 ECHR decision in the case of Donaldson v. The United Kingdom, (Application No. 56975/09), 25 January 2011, par. 20. “It found that the applicant's decision to wear an Easter lily (a symbol to commemorate the Irish republican combatants who died during, or were executed after, the 1916 Easter Rising in Ireland) had to be regarded as a way of expressing his political views.”

356 ECHR decision in Vajnai v. Hungary, (Application no. 33629/06), 8 July 2008, par. 56. “As to the link between the prohibition of the red star and its offensive, underlying, totalitarian ideology, the Court stresses that the potential propagation of that ideology, obnoxious as it may be, cannot be the sole reason to limit it by way of a criminal sanction…For the Court, this indiscriminate feature of the prohibition corroborates the finding that it is unacceptably broad.”


359 See R v Morse [2009] NZCA 623, [2010] 2 NZLR 625 (CA). “Justice Arnold, for the majority, concluded that the conviction for offensive behavior was proper, even though Valerie Morse was exercising her right to free speech, protected by the BoRA, and that right includes such conduct as burning a New Zealand flag.”

360 Texas v. Johnson, 491 US 397 (1989). Accessible at https://www.uscourts.gov/sites/default/files/free-speech-flag-burning_1.pdf. “The majority of the Court, according to Justice William Brennan, agreed with Johnson and held that flag burning constitutes a form of “symbolic speech” that is protected by the First Amendment. The majority noted that freedom of speech protects actions that society may find very offensive, but society's outrage alone is not justification for suppressing free speech.”
Some offline expressions include: attending public hearings or meetings in public places, sending letters to public officials, protesting in public, conducting advocacy and deliberation, conducting and/or participating in open discussions, participating in peaceful demonstrations and so on. Meanwhile, one form of online expression is participating in public campaigns on social media. General Comment No. 34 of the ICCPR stipulates that protected “expression”, including political, is not only in the verbal or spoken form, but covers all forms of expression, namely spoken, written and sign language, and non-verbal expressions such as pictures and art objects, as well as ways of conveying the expression, such as through books, newspapers, pamphlets, posters, banners, clothing and filing of legal complaints, including in the form of audio-visual as well as electronic and internet-based expressions. Protected expressions are not only those that are well received, considered to be non-offensive or as a matter of indifference, but also expressions that are offensive, shocking, or disturbing.

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362 Ibid.

363 Ibid.


369 General Comment No. 34..., *Op. Cit.*, par. 12. See the ECtHR Judgment in the case of Oberschlick v. Austria, (Application no. 11662/85), 23 May 1991, para. 57 and Jersild v. Denmark, (Application no.15890/89), 23 September 1994, par. 31. “The protection of Article 10 extends not only to the substance of the ideas and information expressed but also to the form in which they are conveyed”. See also the ECtHR Decision in the case of Gough V. The United Kingdom, (Application no. 49327/11), 28 October 2014, par. 147. “The term “expression” had been widely construed by the Court to cover various different forms of expression, including expression in words, in pictures, by video and through conduct intended to convey an idea or information”.

370 ECtHR Judgment in *Handyside v the United Kingdom*, (Application No. 5493/72), 7 December 1976, par. 49. “Subject to paragraph 2 of Article 10 [of the European Convention on Human Rights], it is applicable not only to ‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb”. See also the ECtHR decision in the case of *Castells v. Spain*, (Application No. 11798/85), 23 April 1992, par. 42.
Therefore, States should tolerate the expression that are sharp, violent, scathing, and sometimes unpleasant attacks on government and the public officials, even if they could be seen as provocative or insulting.\textsuperscript{372}

\textbf{5.2. Political Expression in Indonesian Criminal Law}

\textbf{5.2.1. Political Expression and the Crime of “Treason”}

In Indonesian practice, exercise of forms of political expression or actions that meet the definition of political expression, especially conveying certain political views/demands and participating in meetings that have a political agenda, often intersect with criminal provisions in Indonesia, namely crimes against the state and state security. An example of this is the case with the defendant Willian Lawalata alias Ebeng who expressed his political views, namely demanding for the freedom of Republic of South Maluku (RMS) from the Republic of Indonesia, by making a banner for the RMS anniversary ceremony. For this he was convicted of having committed \textit{makar}/treason pursuant to Article 106 of the Criminal Code and was sentenced to 3 years and 6 months of imprisonment.\textsuperscript{373} Another one is the case of Arina Elopere alias Wenebita Gwijangge, who expressed her political views to demand independence for Papua by holding up the Morning Star flag (commonly known as the Papuan independence flag) and decorating her face with the Morning Star symbol during a protest in front of the State Palace in response to the attack against a Papuan student dorm in Surabaya. During the attack, which was triggered by the false rumor that the Papuan students had desecrated the Indonesian national flag, their dorm was surrounded and they were shouted at with slurs, including calling them “monkeys”. Arina Elopere was then convicted of \textit{makar} pursuant to Article 106 of the Criminal Code and sentenced to 9 months in prison.\textsuperscript{374} There is also the case of Hermawan Susanto alias Wawan, who expressed his political views in a demonstration in front of the General Elections Supervisory Agency (Bawaslu), during which he shouted “(I’m) from Poso, ready to behead Jokowi (President Joko Widodo), for God’s sake...”. He was also found guilty of \textit{makar} as stipulated in Article 104 of the Criminal Code and sentenced to 10 months and 5 days of imprisonment.\textsuperscript{375}

The various cases above show the importance of exploring how the judges at the Indonesian Court of Justice interpret the elements of crime in the articles on crimes against the state and state security, especially the crime of “treason”, in adjudicating cases related to political expressions.

\textsuperscript{372} ECtHR Judgment in the case of \textit{zgür Gündem v Turkey}, (Application no. 23144/93), 16 March 2000, para. 43.
\textsuperscript{373} Ambon District Court Judgment No. 307/Pid.B/2014/PN.Amb.
\textsuperscript{374} Central Jakarta District Court Judgment No. 1305/Pid.B/2019/PN.JKT.PST.
\textsuperscript{375} Central Jakarta District Court Judgment No. 1116/Pid.B/2019/PN.JKT.PST.
For the record, the Criminal Code regulates several crimes in the chapter on “crimes against the state and state security”, namely from Articles 104-129 of the Code. However, the discussion in this section focuses on the crime of “makar/treason” as regulated in:

- Article 104 of the Criminal Code on treason to kill or deprive the freedom of, or render the President or Vice President unable to govern;
- Article 106 of the Criminal Code on treason with the intent to bring the whole or part of the territory of into the hands of an adversary or to separate part of the territory of the state; and
- Article 110 of the Criminal Code on conspiracy and preparing/facilitating crimes regulated in Articles 104 to 106 of the Criminal Code, including treason in the two Articles above.

Political expression can also take the form of criticism against public and government officials, which can also lead to criminal prosecution, for example by using defamation provisions. However, as this has been discussed at length in the previous section; the discussion in this chapter shall be limited to political expression in the context of the crime of treason.

5.2.2. Trends in the Criminalization of Political Expression with Treason Articles
Various Court judgments in Indonesia have penalized political expressions with treason articles, as can be found in 33 Court Judgments on makar in 2003-2020, may they be at the first instance or cassation. The 33 judgments involve 49 defendants who were charged with makar. Out of that number, 47 defendants were found guilty for makar, namely 1 was convicted based on Article 104 of the Criminal Code, 32 based on Article 106, and 14 based on Article 110, while 2 were acquitted by the court. In terms of the form of political expression carried out, 1 defendant was sentenced to Article 104 of the Criminal Code, namely committing an act in the form of a self-declaration of himself ready to behead the president.

The defendants who were sentenced to Articles 106 and 110 of the Criminal Code generally carried out the acts as described in the table below.

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376 These judgments can be accessed from the official website of the Supreme Court Judgment. For the record, there are more than 33 judgment related to the crime of treason in Indonesia and there are several cases with events similar to the cases described below, where the perpetrators became defendants in separate trials. However, because the objective of the section is to emphasize on the various forms of political expressions criminalized with treason articles, not all of the judgments will be elaborated in this section, and with regards to judgments against different defendants on the same incidents, only some will be analyzed.
### Forms of Political Expression Convicted of Treason under Article 106 and Article 110 of the Criminal Code

<table>
<thead>
<tr>
<th>Article 106 of the Criminal Code</th>
<th>Article 110 of the Criminal Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prepare the flag of the symbol of independence to be flown</td>
<td>Attend a meeting that plans to raise the flag of the symbol of independence</td>
</tr>
<tr>
<td>Plan to raise the flag of the symbol of independence</td>
<td>Attend a meeting to raise funds for the independence movement</td>
</tr>
<tr>
<td>Attend a ceremony commemorating the anniversary of the independence movement / raising the flag of the symbol of independence</td>
<td>Sending a short message about the plan to raise the flag of the symbol of independence</td>
</tr>
<tr>
<td>Holding and/or raising the flag of the symbol of independence</td>
<td>Flying and/or spreading the flag of the symbol of independence</td>
</tr>
<tr>
<td>Delivering political speeches demanding independence</td>
<td></td>
</tr>
<tr>
<td>Performing certain actions as a form of participation in the anniversary ceremony of the independence movement (such as singing, dancing, blowing the trumpet, shouting slogans for independence, using banners, pamphlets, or others related to independence, typing, making, writing, etc.) print, and/or distribute guides or banners)</td>
<td></td>
</tr>
<tr>
<td>Enrolling to an armed force of the movement demanding independence</td>
<td></td>
</tr>
<tr>
<td>Holding meetings to develop profiles of the country which independence is demanded</td>
<td></td>
</tr>
<tr>
<td>Acting as the coordinator of the demonstrations demanding independence</td>
<td></td>
</tr>
</tbody>
</table>

From the table above, the courts appear to be inconsistent in their use of criminal articles on political expression in the form of raising the flag as a symbol of independence. In Judgment No. 1977 K/Pid/ 2008, 2157 K/Pid.Sus/2010, 299/Pid.B/2014/PN.Amb, 1305/Pid.B/2019/PN.JKT.PST, and 56/Pid.B/2020 /PN.Ffk,
the courts stated that the expression was a form of treason and convicted the defendants in these cases under Article 104 of the Criminal Code. However, in Judgment No. 211/Pid.B/2020/PN.Amb and 212/Pid.B/2020/PN.Amb, the court stated that this expression was a form of conspiracy to commit treason and punish the defendants in these cases under Article 110 Paragraph (1) Criminal Code. This shows that the judges in the Indonesian courts do not have the same view in punishing the act of raising the flag of independence under the treason article.

There are 3 other judgments, Judgment No. 802 K/Pid/2014, 804 K/Pid/2014, and 806 K/Pid/2014, which convicted the act of raising the flag of the symbol of independence under Article 110 Paragraph (1) of the Criminal Code. However, the use of this article cannot be seen as the judge’s choice because the public prosecutor only included Article 110 of the Criminal Code in the indictment and not Article 106. Since judges are mandated to decide cases based on the public prosecutor’s indictment,\textsuperscript{377} they must utilize Article 110 of the Criminal Code in considering the case, even when potentially they felt the defendants should have been sentenced based on Article 106 of the Criminal Code. This condition is different from Judgment No. 211/Pid.B/2020/PN.Amb and 212/Pid.B/2020/PN.Amb, where the public prosecutor’s indictment is based on Article 106 of the Criminal Code as an alternative to Article 110, and the Judges opted to convict based on Article 110 Paragraph (1). This shows that law enforcers other than judges also do not have the same view in legally processing the act of raising the flag of the symbol of independence.

5.2.2.1. Judges Interpretation on the Element of “Treason” in Convicting Political Expressions

The judge’s application and interpretation of the crime of “treason” in this section focuses on 18 judgments (out of 33) which contain the judges’ interpretation of the elements of “treason”. Not all judges’ interpretations in the cases studied are spelled out because some of these judgments are from cassation, which only consider whether the \textit{judex facti} (the court of the first instance or appeal) has not misapplied the law\textsuperscript{378} and the \textit{judex facti} judgments in question are not available, either in the official Supreme Court’s judgment database nor on the internet, rendering it impossible to know what was the judges’ interpretation of the elements of “treason” in these cases.

In addition to the judgments above, there are judgments that do not interpret the

\textsuperscript{377} Article 182 paragraph (4) and Article 193 paragraph (1) of Law No 8 Year 1981 on Criminal Procedural Code (KUHAP).

\textsuperscript{378} For example in the case with defendant Michael Pattisinay, who was acquitted by the District Court of Ambon through Decision No. 284/Pid.B/2008/PN.Ab on the act of preparing materials to make a South Molucca Republic (RMS) flag to be flown later during the commemoration of National Family Day. At the cassation level, the Supreme Court through Decision No. 1889 K/Pid/2009 only stated that the District Court of Ambon did not err in implementing the law.
element of “treason” but directly state that the defendant’s actions are criminal acts of treason. This was found in the cassation judgment which first instance judgment acquitted the defendant of treason. However, the judgment of the first instance could not be found, thus the judges’ interpretation on the element of “treason” in this case is unknown and cannot be further elaborated in this section. There are at least 2 (two) cassation judgments related to this matter, including:

a. Supreme Court Judgment No. 1151 K/Pid/2005 with the defendant Chrtistine ES Kakisina/Manuputty alias Mei. In this judgment, the Supreme Court stated that the Ambon District Court Judges had misapplied the law by acquitting the defendant of the crime of sedition/makar. The Supreme Court is of the opinion that her actions, namely receiving a call from an RMS figure, attending the RMS flag-raising ceremony, gathering and praying together for the cause of the RMS struggle, and directing other people to prepare food and drinks for the RMS flag-raising ceremony had fulfilled the elements of sedition/makar as stipulated in Article 106 in conjunction with Article 55 Paragraph (1) point 1 of the Criminal Code. Therefore, the Supreme Court overturned the Ambon District Court's Judgment No. 99/Pid.B/2004/PN.Ab and sentenced the defendant to 2 year and 6 month imprisonment;

b. Supreme Court Judgment No. 1977 K/Pid/2008 with defendants Yakobus Pigai and Polce Magai. In the first instance, the Timika District Court acquitted Yakobus Pigai from the charges based on the sedition/makar criminal article. However, at the cassation level, the Supreme Court stated that the actions of Yakobus Pigai who sent a short message to fly the Morning Star flag, recorded the flag raising, and sang and danced to keep the flag from being lowered during the commemoration of West Papua’s independence, had fulfilled the elements of the article on the crime of sedition/makar, as regulated in Article 106 in conjunction with Article 55 Paragraph (1) 1st of the Criminal Code. Therefore, the Supreme Court overturned the judgment of the Timika District Court No. 13/Pid.B/2007/ PN.Tmk by sentencing Yakobus Pigai to 5 years imprisonment.

There are also a number of judgments that cannot be further elaborated, namely judgments that do not contain the interpretation of the element of “sedition/makar”, where the Judges only aggravated the defendant’s sentence by considering the nature of the act and the role of the defendant. For example in Supreme Court Judgment No. 574 K/Pid/2012 with the defendant Sehu Blesman alias Melki Bleskadit, the Supreme Court increased the defendant’s sentence from 2 years imprisonment to 5 years on the grounds that the defendant’s actions were very dangerous for the integrity of the Republic of Indonesia and since 2002 he had been the Secretary General of the West Melanesian State Organization and actively organized the commemoration of the organization’s anniversary.
Similarly in the Supreme Court Judgment No. 802 K/Pid/2014 with defendant Oktovianus Warnares alias Otis, the Supreme Court increased the defendant’s sentence from 5 years to 7 years imprisonment because the defendant’s actions, which had awakened 109 pre-employment training participants at the Office of Education and Training Agency of the Biak Numfor District, were considered to have disturbed the peace of others. As a result of the defendant’s actions, the Indonesian Military (TNI) apparatus were deployed and 1 training participant was hit by the TNI’s stray bullet.

Based on this, there are 18 judgments that contain the judge’s interpretation of the element of “treason”, namely:

1) Wamena District Court Judgment No. 38/Pid.B/2011/PN.WmnCourt
2) Jayapura District Court Judgment No. 294/Pid.B/2012/PN.JprCourt
3) Sorong District Court Judgment No. 116/Pid.B/2013/PN.SRGCourt
4) Sorong District Court Judgment No. 117/Pid.B/2013/PN.SRGCourt
5) Sorong District Court Judgment No. 118/Pid.B/2013/PN.SRGCourt
6) Sorong District Court Judgment No. 119/Pid.B/2013/PN.SRGCourt
7) Ambon District Court Judgment No. 291/Pid.B/2014/PN.AmbCourt
8) Ambon District Court Judgment No. 297/Pid.B/2014/PN.AmbCourt
9) Ambon District Court Judgment No. 299/Pid.B/2014/PN.AmbCourt
10) Ambon District Court Judgment No. 300/Pid.B/2014/PN.AmbCourt
11) Ambon District Court Judgment No. 307/Pid.B/2014/PN.AmbCourt
12) Wamena District Court Judgment No. 121/Pid.B/2018/PN.WmnCourt
13) Central Jakarta District Court Judgment No. 1305/Pid.B/2019/PN.JKT.PSTCourt
14) Ambon District Court Judgment No. 211/Pid.B/2020/PN.AmbCourt
15) Ambon District Court Judgment No. 212/Pid.B/2020/PN.AmbCourt
16) Fakfak District Court Judgment No. 56/Pid.B/2020/PN.FfkCourt
17) Balikpapan District Court Judgment No. 30/Pid.B/2020/PN.BppCourt
18) Balikpapan District Court Judgment No. 34/Pid.B/2020/PN.Bpp

Of the 18 judgments, the majority of judgments (15 judgments) interpreted the element of “treason” by using Article 87 of the Criminal Code, which reads “Attempt to commit treason exist as soon as the intent of the perpetrator has revealed itself by a commencement of the performance in the sense of Article 53.”. Meanwhile, Article 53 of the Criminal Code reads:

“Attempt to commit a crime is punishable if the intention of the perpetrator has revealed itself by the preparation of performance and the performance is

379 The three judgments that did not refer to Article 87 of the Criminal Code is the Judgment of Jayapura District Court No. 294/Pid.B/2012/PN.Jpr, Judgment of Ambon District Court No. 211/Pid.B/2020/PN.Amb, and Judgment of Ambon District Court No. 212/Pid.B/2020/PN.Amb.
not completed not solely because of his or her own will.”

In addition to referring to Article 87 of the Criminal Code, the judges also interpreted the element of “treason” by referring to the opinions of criminal law experts, including the following:

1) Wirjono Prodjodikoro, who stated that the word “treason” is the translation of “aanslag” which means attack;\(^{380}\)

2) PAF Lamintang, which stated that “aanslag” should not always be interpreted as an act of violence, because the formulation of the criminal act regulated in Article 106 of the Criminal Code is actually any action taken to harm the legal interests of the state namely the state territory staying intact;\(^{381}\)

3) R. Soesilo, who stated that “treason” is a translation of the word “aanslag” in Dutch which is translated into Indonesian as “attack”. “Aanslag” is not always interpreted as an act of violence because the formulation stipulated in Article 106 of the Criminal Code actually refers to the actions of persons who harm the legal interests of the State in the form of “State Territory Integrity”.\(^{382}\) R. Soesilo also stated that the object of the attack was the sovereignty over the territory or regions of the State. This sovereignty can be undermined in 2 (two) ways, namely: a). conquering the territory of the State wholly or partly under the administration of a foreign State, which entails surrendering the whole or some of the area to the power of a foreign State; or b). separating part of the territory of the State which means making that particular area into a sovereign State itself.\(^{383}\) Another R. Soesilo’s opinion that has been referred to by the courts is that treason is usually carried out with acts of violence. If a person has just carried out a preparatory act (voorbereidings handeling) then that person cannot be convicted; to be found guilty, s/he must have carried out the act of implementation (uitvoerinfshandeling). For treason, there is no need for prior planning, it is sufficient if there is the element of intent;\(^{384}\)

4) H.A.K Moch. Anwar, who stated that the purpose of the act of treason must be aimed at subjugating the whole or part of the territory of the State under a foreign government and separating part of it from the territory of the State;\(^{385}\)


\(^{381}\) Wamena District Court Judgment No. 38/Pid.B/2011/PN.Wmn,p.31. See also Ambon District Court Judgment No. 211/Pid.B/2020/PN.Amb, p. 60 and Ambon District Court Judgment No. 212/Pid.B/2020/ PN.Amb, p. 76.


\(^{383}\) Ambon District Court Judgment No. 297/Pid.B/2014/PN.Amb, p. 27.Court

\(^{384}\) Balikpapan District Court Judgment No. 34/Pid.B/2020/PN.Bpp, p. 60.Court

\(^{385}\) Jayapura District Court Judgment No. 294/Pid.B/2012/PN.Jpr, p. 35.
5) EY Kanter and SR Sianturi, who opined that for treason to occur, there is no need to question whether the intended act was successful or not, and voluntary withdrawal of intent in this matter does not nullify the crime;386

Of these judgments, there are 4 that refer to the Constitutional Court Judgment No. 7/PUU-XV/2017387 on the judicial review petition for the Court to interpret the word “treason” in Article 87, Article 104, 106, 107, 139a, 139b, and 140 as “aanslag” or “attack”. The Constitutional Court rejected the petition based on the consideration that for the “treason” offense, it is sufficient to indicate the intent and the preparatory acts, therefore when these conditions are met, law enforcement actions can be carried out against the perpetrator without the need for an act that is clearly an attack.

In addition to referring to the above legal opinions and judicial judgment, there are judges who draw the definition of “treason” from scientific fields other than criminal law as part of their consideration. This can be seen in 4 judgments that refer to the judgment of the Constitutional Court No. 7/PUU-XV/2017 above, which also refers to the definition of “treason” according to the Official Indonesian Dictionary (KBBI), namely scheming; 1. trickery; 2. an act (attempt) with the intention of attacking (killing) a person; 3. The act (attempt) to overthrow the legitimate government.

The definition of “makar” is also interpreted by referring to expert opinions in fields other than criminal law. For example in the Balikpapan District Court Judgment No. 30/Pid.B/2020/PN.Bpp, the Judges referred to the following expert opinions:388

1) Constitutional law expert, Muhammad Ruliyandi, who explained that from the perspective of the development of constitutional law best practice in Indonesia, “makar” can be interpreted as an position of resistance against the state of the fundamental system regulated in the constitution (in het staatsrecht is een contitutie de grondslag van een staat) of a country by intending to make a system change or a movement that begins with the intent of planning and the existence of an initial act that has the potential to threaten the integrity of the nation, either in whole or in part, putting at risk the foundational building blocks of the state, and hinders the running of a constitutional government with the aim of creating devastation and causing harm to all Indonesian people;

2) Indonesian language expert, Aprinus Salam, who stated that “makar” is intended as thought, action and/or deed, both in the form of words and sentences as well as various other activities, which are considered to be

386 Fakfak District Court Judgment No. 56/Pid.B/2020/PN.Ffk, p. 38. The
against the law, and undermine the official power of a certain government. The definition of “makar” can also be related to acts, actions, and or various forms of statements intended/aimed against the state and the incidents of “makar” or resistance are physical (by committing various acts of violence), involving events that are symbolic acts, either with certain symbolic movements or by issuing statements of agenda.

In general, the judges in the judgments above interpret the element of “treason” as follows:

1) To prove the element of “treason”, it is not necessary to have an act that is offensive or attacking in nature, but it is sufficient if there the intent and the attempt aimed at separating parts of the territory from the Republic of Indonesia;

2) Even if “treason” is defined as an “attack”, then the “attack” is not always interpreted as physical violence, but it is sufficient if the attack is carried out by way of an action that clearly threatens or undermines the territorial integrity of the Unitary State of the Republic of Indonesia;

3) “Treason” can be done by violent or peaceful means.

5.3. “Treason” Articles in Criminal Law

As previously described, there are 18 (out of the 33 court judgments analyzed) containing the judges’ interpretation of the element of “treason” with the majority of the panels interpreting the element of “treason” in Article 87 of the Criminal Code. Additionally, the judges interpreted the element of “treason” by referring to the opinion of criminal law experts and the Constitutional Court’s judgment no. 7/PUU-XV/2017 as well as the Official Indonesian Language Dictionary (KBBI) and the thoughts of experts in the field of constitutional law and Indonesian language. However, these interpretations are essentially not in line with the concept of the crime of “treason” and other articles and concepts related to it, namely the “preparatory acts” and “conspiracy” to commit “treason” as stipulated in Article 87 and 110 of the Criminal Code. Therefore, these interpretations should not be used as a basis for convicting the defendants in “treason” cases.

5.3.1. “Treason” is not a qualification (type) of a crime in Articles 104 and 106 of the Criminal Code

Before continuing the discussion, it should be noted that the content of these articles are as follows:

Article 104 of the Criminal Code of
Treason with the intent to kill, or to deprive the freedom of, or rendering the President or the Vice President unable to govern,
is punishable by death or life imprisonment or a temporal imprisonment for a maximum of twenty years.

**Article 106 of the Criminal Code of**

Treason with the intent that all or part of the territory of the state falls into the hands of an adversary or to separate part of the territory of the state, is punishable by life imprisonment or a temporal imprisonment of a maximum of twenty years.

In the articles’ formulation above, “treason” is one of the elements of the criminal acts regulated in Articles 104 and 106 of the Criminal Code and is not the qualification or name of the offenses/crime. This is different from the formulation of other articles which qualify all elements of a crime in an article as a certain type of offense, for example Article 310 Paragraph (1), Article 338, and Article 362 of the Criminal Code. To see the difference, the wording of the articles are as follows:

**Article 310 Paragraph (1) of the Criminal Code**

Whoever intentionally attacks someone’s honor or reputation by accusing him or her of something, which is clearly intended so that it is known to the public, is *punishable for defamation*...

**Article 338 of the Criminal Code**

Whoever who intentionally takes another person’s life, is *punishable for murder*...

**Article 362 of the Criminal Code**

Whoever takes a goods, which wholly or partly belongs to another person, with the intent to own it in a way that is against the law, is *punishable for theft*...

Upon closer look, the phrase “punishable for” in these articles indicate that all elements in the article are qualified for the specific offense. Thus, it can be seen that Article 310 Paragraph (1) of the Criminal Code qualifies the act of “deliberately attacking someone’s honor or reputation by accusing someone of something, which is clearly intended so that it is known to the public” as “defamation”. Similarly with Article 338, where the phrasing indicates that the offence of “murder” is an act that “takes another person’s life” according to Article 338 of the Criminal Code and what is meant by the crime of “theft” is the act of “taking goods, which wholly or partly belongs to another person, with the intent to own it in a way that is against the law” as regulated in Article 362. The formulation is different from the Articles 104 and 106, which do not contain the phrase “punishable for treason” thus all elements in these articles cannot be qualified as the crime of “treason”.

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Based on this, it can be concluded that Article 104 and Article 106 of the Criminal Code cannot be referred to as articles on the crime of “treason”. The word “treason” in the formulation is only one of the elements in the Articles, which is equal to the other elements, namely “with intent” and “killing, or seizing independence, or rendering the President or the Vice President unable to govern,” (in Article 104) as well as the element of “so that all or part of the territory of the state falls into the hands of an adversary or to separate part of the territory of the state,” (in Article 106). In the formulation of Articles 104 and 106 of the Criminal Code, it appears that the word “treason” is essentially included to describe a certain act, and thus these articles must be read as “a certain act (in the context of treason with the intent to kill, or deprive the freedom of, or render the President or Vice President unable to govern/so that all or part of the state’s territory falls into the hands of an adversary or to separate part of the state’s territory”. With this construction, the word treason itself must be defined to identify what kind of act is represented by the word in Articles 104 and 106 of the Criminal Code.

5.3.2. Definition of the element “treason”

Basically, the word “makar” is not an original Indonesian word. The word “makar” comes from Arabic, which means “deceit”. This definition was later formulated as one of the definitions of “makar” in the KBBI, namely “scheming, deceit”, along with 2 (two) other definitions, namely “act (attempt) with the intent to attack (kill) people” and “act (attempt) to overthrow the legitimate government”. However, the definitions in the KBBI actually cannot be used to interpret the word “makar” in Articles 104 and 106 of the Criminal Code. This is because the use of this definition for “makar” in the Articles will cause ambiguity on the prohibited actions, especially if “actions (attempts) with the intent to attack (kill) people/overthrow a legitimate government” is used. If the word “makar” is replaced with KBBI’s definition, then the formulation of Articles 104 and 106 of the Criminal Code will be read as:

Article 104
Acts (attempts) with the intent to attack (kill) people/overthrow the legitimate government with the intention of killing, or seizing independence, or rendering the President or Vice President unable to govern...

389 This is as stated in the Qur’an in Surah Ali-Imran verse 54 which reads: “Wamakaruw wamakarallah, wallahu khairul makiriu” (they cheat, Allah repays their deceit, and Allah is the best avenger of deceit).
Article 106
Acts (attempts) with the intent to attack (kill) people/overthrow the legitimate government with the intention that all or part of the country's territory falls into the hands of an adversary or to separate part of the state's territory...

In the above formulations there are 2 (two) objectives for the element of “act (attempt)” which is represented by the phrase “with the intent(ion)”, namely “to attack (kill) people/to overthrow the legitimate government” and “kill, or deprive the freedom of, or render the President or Vice President unable to govern” (in the context of Article 104) and “so that all or part of the territory of the state falls into the hands of an adversary or to separate part of the territory of the state” (in the context of Article 106). With these formulations, a person can only be convicted based on Articles 104 and 106 of the Criminal Code if s(he) commits an act intended to achieve these 2 (two) objectives.

The issue here is that the formulation causes the repeated mention of 2 (two) objectives which would make the prohibited acts unclear. This can be seen when the definition of makar as act with the “intent to attack (kill) people” is applied to Article 104 of the Criminal Code, making the article reads “acts (attempts) with the intent to attack (kill) people with the intention of killing, or seizing independence, or rendering the President or Vice President unable to govern.” If the “people” in the formulation is contextualized to makar, which in Article 104 of the Criminal Code means the “President” or “Vice President”, then the content of the article becomes “an act (attempt) with the intent to attack (kill) the President or Vice President with the intention of killing or seizing the freedom of or rendering the President or Vice President unable to govern”. In this formulation there is a repetition of the phrase “with the intent(ion) of killing the President or Vice President,” making it unclear what acts can be considered being carried out “with the intention of killing the President or Vice President to kill the President or Vice President”. Therefore, the definition of “makar” according to the KBBI should not be used to define the word in Article 104 of the Criminal Code because it will lead to ambiguity as to what acts are punishable by that article.

Additionally, the above formulation suggests that there is an objective to be achieved first from the acts committed to achieve other goals, thus obscuring the objective the provision aims to prohibit. This can be seen if the definition of makar used in Article 106 of the Criminal Code is the “intent to attack (kill) people” or “to overthrow the legitimate government,” making the article reads “acts (attempts) with the intent to attack (kill) people / to overthrow the legitimate government with the intention that all or part of the territory of the state falls into the hands
of an adversary or to separate part of the territory of the state". The formulation suggests that the perpetrator's intent to commit the act is to overthrow the legitimate government or kill people, which then, by achieving that condition, (s)he intends to have all or part of the country's territory to fall into the hands of an enemy or to separate part of the country's territory. In other words, the perpetrator must achieve his or her goal of killing people or overthrowing the legitimate government first and then making all or part of the country's territory fall into the hands of an enemy or separating part of the country's territory. In these conditions, it is unclear which purpose the perpetrator must actually have in committing his or her acts and whether the perpetrator who commits an act with the aim of making all or part of the country's territory fall into the hands of an enemy or separating part of the country's territory must kill people or overthrow the legitimate government first before they can be prosecuted and convicted based on Article 106 of the Criminal Code.

Based on the above concerns, it can be concluded that the definition of “makar” according to the KBBI, especially “acts (attempts) with the intent to attack (kill) people” and “acts (attempts) with the intent to overthrow the legitimate government” cannot be applied to define the word “makar” in Articles 104 and 106 of the Criminal Code. If we look closely, it is very likely that the definition of “makar” in the KBBI is actually derived from the application of the articles that include the word “makar”, such as the definition of “act (attempt) with the intention to attack (kill) people” which wording is similar to the elements in Article 104. However, it seems that the KBBI’s lexicographers consider that “makar” is a qualification or type of crime in the article, or in other words, considers articles that include the word “makar” to be “articles on the crime of makar”, thus formulating the definition by including all elements in the articles that contain the word, such as Articles 104 and 106 of the Criminal Code. Whereas In fact, as explained earlier, “makar” is not a qualification or type of crime, but only one of the elements in these articles, thus the definition of “makar” must be formulated based on the meaning of its own meaning rather than referring to all elements in the articles that include the word.

It should be noted that the current Criminal Code is a legal product of the Dutch government, originally called Wetboek van Strafrecht voor Nederlandsch Indie (WvS-NI) and naturally was written in Dutch. The name of the regulation was later

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391 WvS-NI came into force in Indonesia on January 1, 1918 based on Koninklijk Besluit (Order of the King) No. 33 dated October 15, 1915 through Staatblad No. 732 of 1915. See Dani Pratama Huzaini, “Ada Kekeliruan Pemahaman tentang Makar (There is a Misunderstanding of Makar)”,//www.Hukumonline.com/berita/baca/tt5cdcd93351aad6/ada-kekeliruan-pemahaman-about-makar, https://www.Hukumonline.com/berita/baca/tt5cdcd93351aad6/ada-kekeliruan-pemahaman-about-makar, accessed on Wednesday, April 14, 2021 After Indonesia's independence, through Article II of the transitional regulation for the Constitution in conjunction with the Presidential Regulation No. 2 of 1945, the Indonesian government determined that all regulations that existed prior to August 17, 1945 were still valid as long as there was no new legal product replacing them and they did not conflict with the Constitution.
changed into “Wetboek van Strafrecht/ Kitab Undang-Undang Hukum Pidana (KUHP)” and was in effect on the islands of Java and Madura based on Law Number 1 of 1946 and came into force throughout Indonesia by Law Number 73 of 1958. However, until now, the WvS-NI has never been officially translated by the Indonesian government and the Indonesian Criminal Code currently in circulation is an unofficial translation from criminal law experts. Indeed, both Law no. 1 of 1946 and Law no. 73 of 1958 made several adjustments to the WvS-NI to be applied to the KUHP. However, specifically for articles that currently include the word “makar”, the only amendments made were to change the phrase “den Koning, de regeerende koningin of den Regent” (king, reigning king, or his successor) in Article 104 of the Criminal Code into “den President of den Vice-President” (the President and Vice-President), making the formulation of Article 104 into as mentioned above, annul Article 105, and adjust the wording of Article 110 Paragraphs (1) and (2), Article 164, and Article 165 to be in line with the annulment of Article 105. Therefore, aside from these amendments, the formulation of articles which currently include the word “treason” still uses and must refer to the formulation of the articles as they are written in the WvS-NI, including by heeding the context of the word “treason” itself.

In its original formulation according to WvS-NI, after the above amendments, Article 104 of the Criminal Code reads:

**Article 104 WvS-NI**

*De aanslag ondernomen met het oogmerk om den President of den Vice-President van het leven of de vrijheid te berooven of tot regeeren ongeschikt te maken wordt gestraft met de doodstraf of levenslange gevangenisstraf of tijdelijke van ten hoogste twintig jaren.*

This formulation is similar to that of the article that regulates the crime in Article 392 Law No. 1 of 1946 on Criminal Law Regulations, Article 6 Paragraphs (1), (2), and 17. This provision states that the applicable criminal law regulations in Indonesia are those that existed on March 8, 1942 (See Article 1). It should be noted that March 8, 1942 was the day of the Kalijati agreement in which the Dutch government handed Indonesia over to the Japanese government (See Dani Pratama Huzaini... Loc. Cit.). Therefore, the purpose of Law no. 1 of 1946 was to enact criminal law regulations that were in effect when the Dutch government still controlled Indonesia, namely WvS-NI.

Law No. 73 of 1958 on Declaring Law no. 1 of 1946 of the Republic of Indonesia on Criminal Law Regulations in Effect in All of The Territory of the Republic of Indonesia and Amending the Criminal Code, Article I.

Dani Pratama Huzaini..., Loc. cit.


Ibid., Article 8 point 13.

Ibid., Article 8 points 14, 35, and 36.

104 of the Criminal Code in the criminal law that is in effect in the Netherlands, namely Article 92 of *Wetboek van Strafrecht* (Sr.) which reads: 399

**Article 92 Sr.**

*de vij aanslag* ondernomen met het oogmerk om de Koning, de regerende Koningin of de Regent van het leven of de vrijheid te beroven of tot regeren ongeschikt te maken, wordt gestraft met levenslange gevangenisstraf of tijdelijder of geltigete van ten hoogende.

Meanwhile, the original formulation of Article 106 of the Criminal Code according to WvS-NI is as follows: 400

**Article 106 WvS-NI**

*De aanslag* ondernomen met het oogmerk om het grondgebied van den staat geheel of gedeeltelijk onder vreemde heerschappij te brengen of om een deel te daarheen af, wordschei den gestraft met levenslange gevangenisstraf of tijdelijke van ten hoogste twintig Jaren.

As with Article 104 of the Criminal Code, the above formulation is similar to that of the article that regulates the crime in Article 106 of the Criminal Code in the Dutch criminal law, namely Article 93 Sr., which reads: 401

**Article 93 Sr.**

*De aanslag* ondernomen met het oogmerk om het Rijk geheel of gedeeltelijk onder vreemde heerschappij te brengen of om een deel daarvan af te scheiden, wordt gestraft met levenslange gevangenisstraf of tijdelijke of geltigete van ten hoogste de categorie.

WvS-NI essentially does not provide a conceptual definition or limitation for “aanslag”. However, in R. Boediharjo’s translation of the WvS-NI published in 1920 or shortly after the WvS-NI was enacted, the word “aanslag” was juxtaposed with the word “penjerangan”. 402 According to Lamintang, the word “aanslag” in Dutch has many meanings, which in the context of the application of Article 104 of the Criminal Code, refers to an *aanval* (attack) or *misdadige aanrading* (attack with ill intent). 403 This is in line with the opinion of Wirjono Prodjidikoro and R.

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402 R. Boediharjo, *Wetboek van Strafrecht voor Nederlandsch-Indie: Wetboek van Strafrecht voor Nederlandsch-Indie: Kitab Hoekoem Oentoek Tanah Hindia Belanda/ The Criminal Code for the Dutch East Indies Territories*, (Kediri: Toko Soerabaja, 1920), p. 34. This can be seen from the formulation of Article 104 of WvS-NI according to the document which reads “*Aanslag (penjerangan) carried out with the intent to take the life or independence or will result in no action by the government, the King, reigning Female King or Regent (guardian)*.”
Soesilo\textsuperscript{405} who defined \textit{aanslag} as an “attack”, as stated in the judgments described previously. Thus, the word “\textit{makar}” as in the Criminal Code must be read as “\textit{aanslag}” in the definition of “attack”, making Articles 104 and 106 of the Criminal Code read as follows:

\textbf{Article 104 of the Criminal Code}

Attack (\textit{aanslag}) with the intent to kill, or deprive the freedom of, or render the President or the Vice President unable to govern...

\textbf{Article 106 of the Criminal Code for (\textit{Offenseaanslag})}

with the intent that all or part of the state's territory falls into the hands of the adversary or separate part of the state's territory...

From the description above, it appears that the definition of “\textit{makar}” according to Arabic and the KBBI, which is deception, scheming, or deceit, cannot be applied to interpret the word “\textit{makar}” in the Criminal Code because the former does not describe “attack” pursuant to the word “\textit{aanslag}” in the WvS-NI. In fact, the inclusion of the word “\textit{makar}” which is derived from Arabic to replace the word “\textit{aanslag}” in the Criminal Code is inappropriate because the word “treason” has a different meaning from the word “\textit{aanslag}”. In this regard, it should be noted that the WvS-NI has never been officially translated by the Indonesian government and that the currently circulating Indonesian Criminal Code is an unofficial translation by criminal law experts.\textsuperscript{406} Therefore, it is highly likely that the inclusion of the word “\textit{makar}” as the word replacement for “\textit{aanslag}” in the Criminal Code, which only started in 1920,\textsuperscript{407} is an independent translation of criminal law experts and not the Government of Indonesia’s determination. Therefore, all terms and/or articles formulations in the current Criminal Code should refer back to the original document, namely WvS-NI, including the word “\textit{makar}” in the current Criminal Code, which definition must refer to the original word, namely “\textit{aanslag}” in the sense of “attack”.

\textbf{5.3.3. Concept/limitation of aanslag (attack) in the Criminal Code}

Basically, neither the Dutch WvS, nor the WvS-NI (KUHP) describe the concept or limitation of the \textit{aanslag} or attack. The concept or limitation of the term is discussed and included in the \textit{Memorie van Toelichting} (MvT), or “Minutes of Deliberation”, and \textit{Memorie van Antwoord} (MvA), or Minutes of Responses of WvS Netherlands and

\textsuperscript{405} R. Soesilo, \textit{Criminal Code (KUHP)}... Loc. cit.
\textsuperscript{406} Dani Pratama Huzaini... Loc. Cit.
According to these documents, during the deliberation on Article 94 Sr./Article 104 WvS-NI's formulation, *Raad van State* questioned and raised objections about the use of the term "aanslag" because the word was considered too vague/unclear so that it could result in legal uncertainty. The government, through the Minister of Justice, then replied that the word “aanslag” does not need to be clarified or given additional information because the meaning of the word is not an indefinite attack, but an attack directed at a certain person. The Minister of Justice added that the word “aanslag” includes *elke daad van geweld met inbegrip van de poging* (every act of violence, including the attempt to do so). That is, with the context of “aanslag” as an attack, it can be concluded that the document defines the concept of “aanslag” as “an attack in the form of violence, including an attempt to carry out such a violent attack.”

Basically, the concept of “aanslag” is in line with the grammatical interpretation of the word “aanslag” itself. In English, the word “aanslag” as “gewelddaigne aanval” is matched with the word “assault,” which has the definition of attack with violence. In addition, the word “aanslag” can also be equated with the word “onslaught” in English, which means “attack with violence and coercion.” A similar concept can be found in other countries’ criminal provisions which regulate the same acts with the articles that include the word “aanslag” in the Dutch WvS and WvS-NI. For example, the criminal code in Belgium and France uses the word “l’attentat/
attentat”, which is translated into English as “attack” (attack) and has the concept of “action criminelle violente” or “an attempt to commit a crime of violence.” 417, 418 Whereas the German criminal provision uses the word “Gewalt”, 419 which when translated into English refers to “violence,” with the requirement of “physical coercion.” 420 Based on these, it can be concluded that conceptually and grammatically the word “aanslag” means an “attack carried out by force or coercion.”

However, some criminal law scholars have different views on the concept of “aanslag”. Lamintang states that the word “attack /aanslag” should not always be interpreted as an act of violence because the actual meaning of the word is all actions taken to harm the legal interests of the life (leven) and body (liif) of the head of state and deputy head of state (in the context of Article 104 of KUHP) and the legal interests of the state in the form of the territory of the state staying intact (in the context of Article 106 of KUHP). 421 The same view is also expressed by Noyon and Langemeijer who state that although in most cases aanslag is an act of violence or at least an attempt to commit violence, but it does not always have to be interpreted as such because there are also practices where the aanslag is done without violence, for example aanslag to change the legal form of government. 422 Simons also expressed a similar view, namely that the word “aanslag” must also be interpreted as an action taken with the intent to achieve one of the consequences in the formulation of the articles which include the word. 423 From these views, it can be concluded that criminal law scholars provide the concept of “aanslag” which is not only limited to “violent attacks”, but also all attacks/actions carried out to achieve one of the objectives mentioned in the articles that include the word “Aanslag” in order to harm certain legal interests.

It should be noted that the Criminal Code also formulates another article that

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419 In In the German criminal code, a provision similar to Article 104 of KUHP is Article 106 of the Strafgesetzbuch (StGB) which reads "Wer den Bundespräsidenten...rechtswidrig mit Gewalt oder durch Drohung mit einem empfindlichen bel nötigt, seine Befugnisse nicht a bestizuüben e...inem oder in e. Meanwhile, the provision similar to Article 106 of KUHP is Article 82 Paragraph (1) number 1 Strafgesetzbuch (StGB) which reads "Wer es unternimmt, mit Gewalt oder durch Drohung mit Gewalt das Gebiet eines Landes ganz oder zum Teil einem anderen Land der Bundesrepublik einzuvleiben oder einen Teil eines Landes von diesem abzutrennen...” See https://www.gesetze-im-internet.de/stgb/index.html, accessed on Thursday, 15 April 2021. In the English version, the word "gewalt" is translated as "force". See https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0881, accessed on Thursday, 15 April 2021.

420 See the definition of “gewalt” at https://www.iurastudent.de/definition/gewalt, accessed on Thursday, April 15, 2021.


422 Ibid., p. 10.

423 Ibid.
regulates attacks on the body of the head of state, namely Article 131 of the Criminal Code, which reads “Every attack against the president or vice president’s self, which is not included in other more severe criminal provisions”. Historically, the word “attack” in the article also used the word “aanslag”. However, during the deliberation on this article, it was decided that the word “aanslag” in the article has a different meaning from the word in Article 79 Sr. (Article 87 of KUHP) which relates to “aanslag” in Article 92 Sr. (Article 104 of KUHP) and Article 93 of Sr. (Article 106 of KUHP). Thus it was decided that “aanslag” in Article 131 of the Criminal Code would be changed to “feitelijke aanranding” (factual or direct assault).

The concept of attack in the word “aanslag” is essentially more severe than in “feitelijke aanranding”. This is reflected in Article 131 of the Criminal Code which states “every attack...which is not included in other, more severe criminal provisions”. In fact, Article 131 of the Criminal Code carries a maximum imprisonment of 8 (eight) years, which is lighter than the maximum sentence in other articles that include the word “aanslag”, such as Article 104, which carries the maximum penalty of capital punishment, life imprisonment, or imprisonment for a maximum of 20 (twenty) years and Article 106 with the maximum imprisonment for life or temporal imprisonment for a maximum of 20 (twenty) years. Therefore, the concept of “attack” in the word “aanslag” must be interpreted as more severe than an ordinary direct attack, which is formulated with the phrase “feitelijke aanranding,” and should not be equated with every form of attack and acts as some criminal law scholars suggest.

The opinion of these scholars is not entirely wrong because there are acts other than “violent/coercive attacks” that can be categorized as aanslag, as explained by Johan Marius Lintz. However, the unclear parameters of these other acts have the potential to make attacks that should fall into the category of feitijke aanranding to be treated as aanslag. Johan Marius Lintz explained that the aanslag in Article 92 Sr. (Article 104 of KUHP) and Article 93 of Sr. (Article 106 of KUHP) includes not only violent attacks (geweld), but also attacks in the form of acts that can be equated with violence (een geweld gelijk te stellen handelingen), such as placing someone in a state of unconsciousness (fainting) or helplessness (which is regulated in Article 81 Sr./89 of KUHP), issuing threats (physical in nature), incarcerating someone, and

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424 The provisions were originally regulated in Article 199. Mr. HJ Smidt, Geschiedenis van het Wetboek van Strafrecht..., Op. cit. See discussion of Article 110.
425 Ibid.
426 Johan Marius Lintz, De plaats van de Wet terroristische misdrijven in het materiële strafrecht (The Position of the Terrorist Offences Act in Dutch Substantive Criminal Law), (Nijmegen: Wolf Legal Publishers, 2007), p. 299. In het cadre van zowel de bespreking van art. 92 Sr als die van art. 93 Sr werd hiervoor opgemerkt dat een aanslag niet noodzakelijkerwijs in geweldpleging behoefte te bestaan. Free translation "In the context of the discussion of Articles 92 and 93 Sr., the carrying out of "attack/aanslag" does not necessarily have to contain acts of violence".
administering poison. Thus, the word “aanslag” in Articles 104 and 106 of KUHP must be interpreted as “an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence”.

5.3.4. The element of “intent” in Articles 104 and 106 of the Criminal Code

One of the elements of the offenses in Articles 104 and 106 of the Criminal Code is “with the intent to/met het oogmerk”. This phrase is basically one of the terms used to describe intention (actopzet/dolus). In MvT, intentionality is defined as “committing a prohibited act wilfully and knowingly” (het tweegbrengen van verboden handeling willens en wetens). Meanwhile, according to MvA, intentionality is defined as “the (conscious) purpose of the will to commit a certain offense” (de bewuste richting van de wil op een bepaald misdrijf). This intentional concept has also been recognized in Hoge Raad’s judgments (arrest) which state that intentionality consists of willens or willfulness, which is defined as “the will to commit a certain act”, and wetens or knowing, which is defined as “knowing or being able to know”. that the act can lead to the desired result.

In general, in criminal law doctrine, intentional (opzet/dolus) is known in 3 (three) forms, namely: a) opzet als oogmerk (intentional with intent/purpose); b) opzet bij zekerheids-bewustzijn (intentional with conviction of certainty); and c) opzet bij mogelijkheids-bewustzijn (intentional with the realization of possibility). However, in the context of the articles that include the word “aanslag”, in particular Articles 104 and 106 of the Criminal Code, Lamintang states that the intentionality in these articles must be interpreted as limited to opzet als oogmerk or intentional with intent/purpose. This is because the element “with intent/met het oogmerk” in these articles indicates that the WvS legislators required the existence of the perpetrator’s personal intention/objective to cause the consequences formulated in these articles. This view is in line with the concept of opzet als oogmerk according

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427 Ibid., p. 298 and 301. “...de aanslag van art. 92 Sr wellicht nog het best kunnen worden gebracht onder de noemer geweld of aan geweld gelijk te stellen handelingen (free translation “attack/aanslag in Article 92 Sr. is probably best grouped under the heading of violence or acts equivalent to violence”). See p. 298. “...aanslag in de zin van de art. 93 en 94 Sr slechts daden van geweld of daden die met geweld gelijkgesteld kunnen worden (free translation “attack/aanslag in Articles 93 and 94 Sr. is only an act of violence or an act that can be equated with violence”). See p. 301.
429 P.A.F Lamintang, Dasar-dasar Hukum Pidana Indonesia, (Bandung: Citra Aditya Bakti, 2011), hal. 281.
430 Ibid.
431 Ibid., hal. 286.
432 Ibid., hal. 309.
to Kanter and Sianturi, where the perpetrator of a crime is said to have intent with purpose/objective (opzet als oogmerk) if the committing of the act or the consequences resulting from the perpetrator’s action is the realization of his or her intent or purpose.\textsuperscript{434} Regarding articles that include the phrase “with intent”, including Articles 104 and 106 of the Criminal Code, Kanter and Sianturi added that the phrase is a substitute term for “deliberately” which indicates that the will of the perpetrator must be directed or intended to cause the consequences mentioned in the articles, although the result does not have to be realized to determine that the crime has been completed thoroughly.\textsuperscript{435}

Based on this, it can be concluded that the determination of the intentionality of the person who is suspected of committing a crime pursuant to Articles 104 and 106 of the Criminal Code must use the definition of intent other than opzet als oogmerk or intent with purpose/objective. This means that a person can only be said to have intentionally committed a crime in Article 104 or 106 of the Criminal Code if the aanslag (attack with violence/coercion or an attack in the form of an act that can be equated with physical violence) that (s)he did was really directed or intended to kill, deprive the freedom of, or render the President or Vice President unable to govern (in the context of Article 104 of the Criminal Code) or so that all or part of the state’s territory falls into the hands of an adversary or to separate part of the state’s territory (in the context of Article 106 of the Criminal Code). However, these consequences do not have to transpire in order for the perpetrator to be convicted, rather it is sufficient if (s)he is proven to have committed aanslag and that it was carried out with the intention or purpose of causing the above mentioned consequences.

\textbf{5.3.5. The concept of “attempt for treason” in Article 87 of the Criminal Code}

As described in the previous chapter, the majority of judges in the analyzed court judgments use Article 87 of the Criminal Code to define the element of “treason”, which only requires intent that has been realized since the preparations of the perpetration. Justices of the Constitutional Court (MK) employed the same approach, as evident in the Constitutional Court’s Judgment No. 7 / PUU-XV / 2017, which declines to interpret the word “rebellion” as aanslag or “attack” and states that for “treason” offense it is sufficient to imply intent and preparatory acts, and therefore when the requirements are fulfilled, legal action can already be taken against the offender without the need for an act that is clearly an attack. This view is also shared by some criminal law scholars, such as Simons, van Bemmelen, and van Hattum, who essentially hold that the preparatory act is absolutely necessary.


\textsuperscript{435} \textit{Ibid.}, hal. 175.
to determine that there has been *makar* (in the original text called “*aanslag*”).

In principle, these opinions are acceptable considering that Article 87 of the Criminal Code stipulates that “Attempt to commit treason” exist as soon as the intent of the perpetrator has revealed itself by a commencement of the performance in the sense of article 53”. That is, the act of treason (*aanslag*) does not really need to occur in order to be punished with articles that include the word “treason/aanslag”, but it is sufficient if there is the intent and the preparatory act with the intention to carry out *aanslag*. This is in line with van Bemmelen’s opinion, which essentially states that the articles that include the element of “treason (*aanslag*)” apply to everyone who commits *aanslag*, whether it fails or has been concluded. In fact, van Bemmelen added that the perpetrator who had prepared for committing *aanslag* could still be convicted even when the deed is not completed or failed due to the perpetrator’s canceling his or her intention voluntarily. A similar opinion was expressed by Simons, namely that *aanslag* in Article 87 of the Criminal Code still exists even though the defendant has voluntarily canceled his or her intention to conclude the crime in question. This is what according to these criminal law scholars is the difference between the concept of attempted criminal offense (*poging*) as regulated in Article 53 of the Criminal Code with the concept of *aanslag* in Article 87 of the Criminal Code, namely Article 53 requires that the crime not transpiring must be due to conditions against the perpetrator’s will. Regarding this matter, Lamintang and van Bemmelen then stated that it is impossible to carry out *aanslag* attempt because the preparatory act is already sufficient to determine the *aanslag* is completed even though it did not finish, either because of the voluntary judgment of the perpetrator or due to certain conditions against his or her will.

However, as explained earlier, it should be remembered that “*makar/aanslag*” is not a qualification or type of crime regulated in the articles containing the word, but only one of the elements of the regulated offenses. Therefore, Article 87 of the Criminal Code only explains the “*aanslag*” element in articles that include the word, not the offenses regulated in their entirety in these articles. Moreover, upon closer look, Article 87 does not provide a definition for the word, but rather expands its scope to include also the uncompleted *aanslag* (meaning attack with violence/coercion or an in the form of an act that can be equated with physical violence) as long as the preparatory acts have been conducted. Therefore, the word “treason/aanslag” in the articles in the Chapter on Crimes Against the State

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438 *Ibid.*, hal. 15.
439 *Ibid*.
440 *Ibid.*, hal. 16.
and State Security must still be interpreted as “attacks with violence/coercion or attacks in the form of actions that can be equated with physical violence” and cannot be replaced by the formulation of Article 87 KUHP as currently practiced by judges in several cases. Thus, the concept “attempt” in Article 87 of the Criminal Code is not preparation for any act with the intention of causing consequences in the articles that include the element of “treason/aanslag”, but “the preparatory acts for an aanslag as an attack with violence/coercion or attacks in the form of actions that can be equated with physical violence”.

The use of Article 87 of the Criminal Code as the definition of or substitute for “treason/aanslag” does not only have an impact on the misinterpretation of the element in the cases described previously. It should be noted that on 27 February 1982, the Ministry of Justice (currently the Ministry of Law and Human Rights) of Indonesia released the English version of the Criminal Code to make it easier for the international community to understand the criminal provisions that apply in Indonesia.441 In the document, the word “treason/aanslag” in Articles 104 and 106 is translated into “attempt.” 442 Thus, when these articles translated back into Indonesian, they read as “attempts/the effort to with the intent to kill, deprive the freedom of, or render the President or Vice President unable to govern (Article 104) or in order for all or part of the state’s territory fall into the hands of an adversary or to separate parts of the state’s territory (Article 106)”.

The translation contradicts the concept of “treason/aanslag” itself. The use of the word “attempt” in the translation renders it unnecessary for a specific act in the form of an attack with violence/coercion or in the form of actions that can be equated with physical violence so that it can be classified as “treason/aanslag”. Moreover this makes any act and attempt to cause consequences contained in Articles 104 and 104 punishable under these provisions. This condition is further exacerbated by the translation of Article 87 of the Criminal Code in which the phrase “makar (aanslag) to commit an act...” is translated into “attempt to commit an act”.443 so that the concept of attempt in Article 87 in the English version of the Criminal Code is no longer an attempt to commit “treason/aanslag”, but “an attempt to perform an act” which is not limited to the aanslag itself. Most likely, this condition is caused by the use of Article 87 of the Criminal Code which essentially regulates “attempts to commit treason /aanslag” as the definition of “ treason/aanslag” itself, so that

442 Ibid. Article 104 “The attempt undertaken with intent to deprive the President or Vice President of his life or his liberty or to render him unfit to govern, shall be punished by capital punishment or life imprisonment or a maximum imprisonment of twenty years”. Article 106 “The attempt undertaken with intent to bring the territory of the state wholly or partially under foreign domination or to separate part thereof, shall be punished by life imprisonment or a maximum imprisonment of twenty years”.
443 Ibid. Article 87 “Attempt to commit an act” exist as soon as the intent of perpetrator has revealed itself by a commencement of performance in the sense of Article 53”.


the element of “treason/aanslag” in Articles 104 and 106 is equated with “attempt” in Article 87 and the word “treason/aanslag” is directly translated into “attempt” in English. From this description, it can be seen that the use of Article 87 of the Criminal Code as a definition or substitute for “treason/aanslag” element not only has an impact on the misinterpretation of these elements in judicial practice, but also causes the Criminal Code’s mistranslation into foreign languages.

Article 87 of the Criminal Code also stipulates the concept of/parameters for “the preparatory acts for aanslag” by referring to the concept of the attempt Article 53 on attempted criminal acts (poging). Related to this, R. Soesilo stated that the aanslag regulated in Article 87 of the Criminal Code is only in the form of “implementing acts” and not “preparatory acts”, as referred to in Article 53 of the Criminal Code. R. Soesilo added that a person who is still carrying out “preparatory acts” (voorbereidings-handeling) for aanslag cannot be convicted by Article 87 of the Criminal Code and can only be punished under that article if the person has started to carry out the “implementing acts” (uitvoeringshandeling). This is in line with the opinion of Noyon and Langemeijer who state that the minimum requirement for aanslag according to Article 87 of the Criminal Code is not an act that is merely the “preparation for implementation”, but an act that manifests in the initiation of the implementing act to complete the crime intended to be committed.

The question emerges then on the acts that can be referred to as “the preparatory act” in Article 53 of the Criminal Code. MvT explained that what is meant by “implementation preparatory act/uitvoeringshandeling” is one that has such a direct relationship with the crime that is intended to be committed and marks the initiation of its implementation. In practice, the Hoge Raad and courts in Indonesia in their decisions basically state that “initiation of crime” must be linked to “uitvoering van het misdrijf” or the commission of the crime itself, so that it must be interpreted as “initiation of the attempt to commit the crime”. This concept is

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in line with van Bemmelen’s opinion which states that “the initiation” is exist when the perpetrator has created conditions which, according to human experience, can lead to a crime without further action.\textsuperscript{449} This is in line with Pompe’s view which states that “acts of performance” or the attempt are considered to exist when there are actions that allow a crime to be completed.\textsuperscript{450} The same view was conveyed by Kanter and Sianturi where “the initiation” has taken place when the intention of the perpetrator has been evident in an action which, according to reasonable judgment, is close to the reality of the completion of the crime.\textsuperscript{451}

Based on the description, it can be concluded several things as follows:

1) The formulation of Article 87 of the Criminal Code is not a definition of the word “treason/\textit{aanslag}” in the articles of the Criminal Code in the Chapter on Crimes Against the State and State Security. Article 87 of the Criminal Code is an expansion of the \textit{aanslag} action in these articles as the concept of “\textit{aanslag} (attack with violence or coercion) that is not finished” which requires the commencement of implementation;

2) The word “treason/\textit{aanslag}” in the articles of the Criminal Code in the Chapter on Crimes Against the State and State Security must still be interpreted as “attack with force or coercion” in the context of “attack (with force or coercion) which was completed”;

3) The concept of “initiation” in Article 87 of the Criminal Code is not “initiation” of any act with the intention of causing consequences in the articles that include the element of “treason/\textit{aanslag}”, but rather “initiation of an attack with violence or coercion (\textit{aanslag}) carried out to achieve the objectives set out in these articles;

4) The act of “initiation” can be considered if the perpetrator’s intention has already been evident in an action which, according to reasonable judgment, can lead to a criminal act. Therefore, the actions of “initiation of the implementation of \textit{aanslag}” which can be punished with reference to Article 87 of the Criminal Code are the actions of the perpetrators which, according to a reasonable judgment, can lead to \textit{aanslag} or attacks with violence or coercion.

5.3.6. Concept of “malicious conspiracy” in Article 110 paragraph (1) of the Criminal Code

In addition to the provisions regarding “initiation” above, the Criminal Code also formulates other acts related to articles that include the words “treason/\textit{aanslag}”. One of them is “conspiracy” to commit a crime in Articles 104, 106, 107 and 108 of the Criminal Code, as regulated in Article 110 paragraph (1) of the Criminal Code. The Criminal Code itself has explained the meaning of “conspiracy” in Article 88 of

\textsuperscript{449} P. A. F. Lamintang..., \textit{Ibid.}, p. 569-570.
\textsuperscript{451} \textit{Ibid.}, p. 322-323.
the Criminal Code, which reads “It is said that there is a conspiracy, if two or more people have agreed to commit a crime”. That is, a person can be punished under Article 110 paragraph (1) of the Criminal Code if s/he has agreed with another person to commit a crime or “evil act” according to Articles 104, 106, 107 and 108 of the Criminal Code.

In a closer look, Articles 104 and 106 of the Criminal Code which are the subject of discussion, are basically regulate criminal acts in the form of acts of aanslag (attacks with violence or coercion) carried out with the intent or purpose of causing the consequences specified in the articles namely killing, seize independence, or eliminating the ability of the President or Vice President to govern (Article 104 of the Criminal Code) and so that all or part of the country’s territory falls into the hands of the enemy or separates parts of the country’s territory (Article 106 of the Criminal Code). That is, these consequences are formulated as the direct objectives of the aanslag actions taken, not as consequences that must occur first so that the perpetrator can be punished. This is in line with the previous discussion regarding “intentional”, especially in the context of Articles 104 and 106 of the Criminal Procedure Code, that the consequences in these articles do not have to occur so that the perpetrator can be convicted, but enough if he is proven to have committed the aanslag, and aanslag is proven to have been carried out with the intent or purpose of causing the intended consequences.

Based on the above, it can be seen that the concept of “malicious conspiracy” in committing a crime according to Articles 104 and 106 of the Criminal Code must refer to the act of “aanslag” in these articles, so that Article 110 paragraph (1) of the Criminal Code, in relation to Articles 104 and 106 Criminal Code, must be read as “an agreement of 2 (two) people or more to carry out aanslag (attack with violence or coercion) where the said aanslag is aimed or intended to cause the consequences specified in Articles 104 and 106 of the Criminal Code”. The same thing applies to Articles 107 and 108 of the Criminal Code where “conspiracy” in Article 110 paragraph (1) of the Criminal Code must refer to the crimes regulated in those articles. The concept of “malicious conspiracy” which refers to the act of “aanslag” basically must also be applied to the act of preparing or facilitating a crime stipulated in Article 110 paragraph (2) of the Criminal Code, because this act is the same as “malicious conspiracy” as an act related to Article 104 and 106 of the Criminal Code. Thus, in relation to Articles 104 and 106 of the Criminal Code, Article 110 paragraph (2) of the Criminal Code must be interpreted as “the act of preparing or facilitating aanslag (attack with violence or coercion) where the aanslag is aimed or intended to cause the consequences specified in the Articles 104 and 106 of the Criminal Code”.

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From the descriptions above, it can be concluded that, according to Indonesian criminal law, a person who has the intent/objective: 1) to kill, seize independence, or nullify the ability of the President/Vice President to govern; and 2) so that all or part of the country's territory falls into the hands of the enemy or separates part of the country's territory, can only be punished if he commits the following actions:

1) Carry out aanslag (attack with violence or coercion) where the aanslag is aimed or intended to cause the consequences specified in Articles 104 and 106 of the Criminal Code. This action is referred to as “completed aanslag” and can be punished under Article 104 or 106 of the Criminal Code;
2) Initiating the implementation of an aanslag (attack with violence or coercion) which is carried out to achieve the objectives set forth in Articles 104 and 106 of the Criminal Code. This action can only be punished if the perpetrator has committed acts which, according to reasonable judgment, can cause an act of violence or coercion to occur. This action is also known as “incomplete aanslag” and can be punished under Article 104 or 106 of the Criminal Code juncto Article 87 of the Criminal Code;
3) Malicious conspiracy in the form of agreeing with other people to carry out aanslag (attack with violence or coercion) where the said aanslag is aimed or intended to cause the consequences specified in Articles 104 and 106 of the Criminal Code. This action can be punished under Article 104 or 106 of the Criminal Code juncto Article 110 paragraph (1) of the Criminal Code; and
4) Taking actions in order to prepare or facilitate an aanslag (attack with violence or coercion) where the said aanslag is intended or intended to cause the consequences specified in Articles 104 and 106 of the Criminal Code. This action can be punished under Article 104 or 106 of the Criminal Code jo. Article 110 paragraph (2) of the Criminal Code.


In the previous section, it was explained that the articles commonly used to punish political expressions, namely Articles 104 and 106 of the Criminal Code, were formulated in the chapter on “Crimes Against State Security” in the Criminal Code. According to General Comment No. 34, the application of criminal articles related to state/national security for an expression must be carried out very carefully and must be in line with the conditions for restricting the right to freedom of expression regulated in Article 19 paragraph (3) of the ICCPR. Thus, the articles above should only be applied if the acts of political expression have met the requirements as expressions that can be legally restricted according to Article 19 paragraph (3) of the ICCPR.

As has also been described in Chapter II, apart from having to be prescribed by law, Article 19 paragraph (3) of the ICCPR stipulates that restrictions on the right to freedom of expression can only be carried out for certain purposes, namely respecting the rights or reputation of others, protecting national security, public order, health, or public morals. In several of its judgments, the UN Human Rights Committee stated that these two conditions must be met cumulatively in order for a restriction on the right to freedom of expression to be legitimate. General Comment No. 34 of the ICCPR adds that these restrictions can only be made for purposes that are in accordance with their designation and must be directly related to the necessity that give rise to the restrictions themselves. Regarding Articles 104 and 106 of the Criminal Code, because these articles are formulated in the chapter “Crimes Against State Security”, it can be concluded that these articles are basically intended to “protect the interests of state/national security”, which is one of the goals of legal restrictions according to Article 19 paragraph (3) the ICCPR. Thus, every expression, including political expression, can only be restricted and punished under Articles 104 and 106 of the Criminal Code if the said expression is carried out with the aim of threatening or challenging national security.

The discussion on political expression is basically not only related to the right to freedom of expression, but must also be linked to the right to freedom of peaceful assembly as stipulated in Article 21 of the ICCPR. This is confirmed in General Comment No. 37 that the provisions that apply to an expression in the right to freedom of expression must also be applied to all forms of expression in an assembly. Moreover, most of the judgments related to Article 106 of the Criminal Code that have been described previously punish political expressions carried out by people in a meeting, protest, or demonstration, which are meetings that are protected in the right to freedom of peaceful assembly. In this regard, the Venice Commission explains that the right to freedom of peaceful assembly is related to the right to freedom of expression of the organizers and participants of an assembly. Thus, the discussion of political expression conveyed in an assembly (meeting or association) must also be reviewed from the perspective of the right

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453 This is also a part of the three-part test as a model used by various human rights institutions, including the UN Human Rights Committee and the European Court of Human Rights. See Chapter II.


455 UN Human Rights Committee, ICCPR General Comment 34..., Op. Cit., para. 22.

456 UN Human Rights Committee, ICCPR General Comment 37 “Article 21: Right to Peaceful Assembly”, CCPR/C/GC/37, 27 July 2020, para. 49.

457 Ibid., para. 6. See also Venice Commission, Guidelines on Freedom of Peaceful Assembly, 8 July 2019, para. 44.

458 Venice Commission..., Ibid., para. 4.
to freedom of peaceful assembly by taking into account the provisions related to the right to freedom of expression.

Similar to the right to freedom of expression, Article 21 of the ICCPR stipulates that the right to freedom of peaceful assembly can also be restricted, one of the reasons being national security. In the previous explanation, one of the forms of limiting rights for this reason in the regime of the right to freedom of expression is the application of Articles 104 and 106 of the Criminal Code to political expressions. Therefore, with the necessity to refer to provisions related to the right to freedom of expression, it can be concluded that the criminalization of political expression in an assembly with these articles must be seen in the context of limiting the right to freedom of peaceful assembly on the grounds of national/state security.

The right to freedom of peaceful assembly is directly related to the right to freedom of expression. General comments No. 37 of the ICCPR states that the fulfillment of the protection of the right to freedom of peaceful assembly depends on the protection of other rights, one of which is the right to freedom of expression. Several decisions of the European Court of Human Rights stated that the right to freedom of peaceful assembly is a *lex specialis* of the right to freedom of expression. In fact, the UN Special Rapporteur on the right to freedom of expression, Frank La Rue, by referring to the resolution of the Human Rights Council 12/16, stated that peaceful protests are part of the expression itself as a form of expression that cannot be limited. Therefore, the discussion regarding the right to freedom of peaceful assembly is still related to the right to freedom of expression which is the core of the discussion in this study.

### 5.4.1. The concept of national security as a limitation of the right to freedom of expression

Basically, the ICCPR and General Comment No. 34 does not further elaborate on the concept or definition of “national security” as the reason for limiting the right to freedom of expression according to Article 19 Paragraph (3) of the ICCPR. General Comment No. 34 only explains certain conditions that do not meet the limitation requirements in Article 19 Paragraph (3) of the ICCPR so that the reason for “national security” cannot also be used, namely:

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1) Using criminal provisions related to state/national security to suppress or withhold public information, which is a legitimate public interest and does not harm national security;

2) Prosecute (conduct legal proceedings) against journalists, researchers, environmental activists, human rights defenders, or other parties, for disseminating such public information;

3) Formulate information relating to the commercial sector, banking and scientific progress in criminal provisions related to state/national security;

4) One form of restriction that cannot use the reason of “national security” is the prohibition to issue statements to labor disputes, including holding a national strike.

The concept of “national security” is then elaborated in the Siracusa Principles, which have been previously explained in chapter II. In addition, this concept is also elaborated in the Johannesburg Principles which states that any restrictions on expression and information by the government for reasons of national security must be carried out with genuine objectives and demonstrable impact to protect legitimate national security interests. Matters related to “national security” as a limitation of rights, including the right to freedom of expression, according to these documents are as follows:

- Restriction of rights for reasons of national security can be justified if:
  - There are systematic human rights violations
  - Is done to protect the existence or existence of a nation/state, territorial integrity, or political independence, from the use of an attack (force) or threat of attack (threat of force);
  - Conducted in response to the use of attacks or threats of attack, whether from external sources, such as military threats, or internal sources, such as incitement to overthrow the government by force;
  - There is an effective mechanism for protection and remedy in the event of arbitrariness in the implementation of these restrictions;
  - The government can prove that an expression is intended to encourage violence, that expression can trigger violence, and there is a direct relationship between the expression and the possibility or occurrence of violence

- Restriction of rights based on national security cannot be justified if:
  - Made to impose unclear or arbitrary restrictions;

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463 See ARTICLE 19, The Johannesburg Principles..., Op. Cit., principle 1.2. Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.

• Done to protect interests unrelated to national security, including, for example, to protect the government from embarrassment or disclosure of government mistake, withholding information about the functioning of public institutions, forcibly imposing a certain ideology, or suppressing disturbances in industrial sector;
• Conducted to prevent local or relatively isolated threats to law and order;
• Done to suppress opposition or criticism of the use of reasons and/or the implementation of restrictions on said rights or to carry out repressive practices against citizens;
• Performed on expressions (not limited to expressions) as follows:
  • Done peacefully;
  • Advocating changes in government policies or the government itself without resorting to violence;
  • Is a criticism or insult to the nation, state, symbol, government, institutions, or public officials;
  • Is a criticism or insult to a foreign nation, country, symbol, government, institution or public officials;
  • Is an objection or defense of an objection on the basis of religion, conscience or belief;
  • Is an objection or defense of objections to conscription, certain conflicts, or threats or use of force to resolve international disputes;
  • Intended to inform alleged violations of international human rights standards or humanitarian law;
  • Performed in certain languages, including the languages of minority groups.

In addition to the above documents, the Special Rapporteur on the right to freedom of expression, Abid Hussain, stated that the right to freedom of expression and information can only be limited on grounds of “national security” in very serious cases where there is a direct political or military attack on the whole (territory) of the nation.⁴⁶⁵ The same thing was also expressed by Alexandre Charles Kiss who stated that restrictions on the right to freedom of expression cannot be based on “national security” if the restrictions are aimed solely at preventing riots, other forms of disturbance, or thwarting revolutionary movements that do not threaten the life of the entire nation.⁴⁶⁶ Furthermore, as cited by another Special Rapporteur on the right to freedom of expression, David Kaye, Alexandre Charles Kiss stated that the use of “national security” reasons must be limited to situations where the interests of the entire nation are at stake and exclude these restrictions in

⁴⁶⁵ UN General Assembly, Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution 1993/45, E/CN.4/1995/32 (14 December 1994), par. 48. “For the purpose of protecting national security, the right to freedom of expression and information can be restricted only in the most serious cases of a direct political or military threat to the entire nation.”

the interests of the government, certain regimes or power groups. From these opinions, it can be concluded that the reason “national security” can only be used to limit the right to freedom of expression in order to protect the interests of a nation from certain attacks on the nation’s territory.

5.4.2. The practice of limiting the right to freedom of expression for reasons of “national security” according to the European Court of Human Rights

In practice, there are several judgments of the European Court of Human Rights that discuss “national security” as a legitimate limitation of the right to freedom of expression. Before continuing the discussion, if we take a closer look, Article 106 of the Criminal Code basically regulates criminal acts that can cause the separation of an area from the territory of Indonesia, or in other words, crimes that threaten the territorial integrity of Indonesia. Meanwhile, as previously explained, territorial integrity or sovereignty is one of the goals of restrictions for reasons of national security according to human rights provisions. Therefore, because this section aims to examine the application of Article 106 of the Criminal Code, the elaboration in this section will only focus on the judgments of the European Court of Human Rights in cases related to the issue of “territorial integrity/unity” of a country.

7.0.0.1. Sürek and Özdemir v. Turkey Case

This case began when Kamil Tekin Sürek and Yücel Özdemir, who are the leaders and editors of the weekly publication “Haberde Yorumda Gerçek” (The Truth of News and Comments), published several things through this media in Istanbul, namely:

- 2 (two) results of interviews with the leadership of the Kurdistan Workers’ Party (PKK), an organization declared as a “terrorist organization” by the Turkish government, which mentions the Turkish government’s violence against Kurdish people with the aim of forcing the Kurdistan region to remain part of its territory Turkey. The results of the interview also stated that the aim of the PKK’s struggle was for the Kurdish people to have the right to their territory and identity and for Kurdistan to become a separate state from Turkey;
- The joint statement of the 4 (four) parties in Turkey, which essentially called for the Turkish government to withdraw its military forces from the Kurdistan region and give the Kurdish people the right to determine their own future, including to establish a separate state from Turkey.

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467 UN General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, A/71/373 (6 September 2016), par. 18. “National security”, undefined in the Covenant, should be limited in application to situations in which the interest of the whole nation is at stake, which would thereby exclude restrictions in the sole interest of a Government, regime or power group”.


469 The 4 (four) parties are The Central Committees of the Revolutionary Communist Party of Turkey (TDPK), the Communist Labor Party of Turkey (TKEP), the Turkish Organization for the Liberation of Northern Kurdistan (TKKKO), and the Communist Party/Marxist- Leninist Movement of Turkey (TKP/ML Hareketi). The 4 (four) parties are branded as “terrorist organizations” by the Turkish government.
Turkey's domestic court subsequently convicted Sürek and Özdemir on the grounds that the publications contained a “declaration of a terrorist organization” praising Kurdish terrorist activities and “spreading propaganda against the integrity of the State” by stating that the Kurdish people should form a separate State from Turkey, prohibited under Articles 6 and 8 of the Prevention of Terrorism Act 1991.470

At the European Court of Human Rights, Sürek and Özdemir essentially stated that the sentence violated their rights, one of which was the right to freedom of expression and was disproportionately imposed.471 On the other hand, the Turkish government basically believes that the punishment is in accordance with the principle of limiting the right to freedom of expression because it has been regulated in national law, namely Articles 6 and 8 of the Prevention of Terrorism Act 1991, which were formed to protect state interests such as territorial integrity, national unity, national security, and prevention of crime and disorder, imposed to achieve these goals, and has been proportionate.472 Based on these arguments, the European Court of Human Rights is basically of the opinion that:

- The punishment is a limitation on Sürek and Özdemir’s right to freedom of expression;
- The punishment met the requirements “prescribed by law” because it was based on national legal regulations, namely Articles 6 and 8 of the Prevention of Terrorism Act 1991;
- This punishment met the requirements of “legitimate aim” because the rules that became the basis for the punishment were formed with the aim of protecting state interests such as territorial integrity, national unity, national security, and preventing crime and disorder, and the punishment for Sürek and Özdemir was a limitation of rights to achieve these goals;
- The sentence does not meet the requirements of “necessary in democratic society” with the following reasons:
  - The words in the interview and joint statement were not constituted “incitement or can trigger to commit violence or cause hatred”;

470 Sürek was fined 100,000 Turkish Lira under Article 6 and 200,000 Turkish Lira under Article 8 of the Prevention of Terrorism Act 1991. Meanwhile, Özdemir was sentenced to a fine of 50,000 Turkish Lira under Article 6 and imprisonment for 6 months and a fine of 100,000 Turkish Lira for Article 8.

471 Sürek and Özdemir explained that they have no relationship with the PKK, did not praise or promote terrorist activities by the PKK, and that the publications are published based on the principles of objective journalism. In addition, Sürek and Özdemir also stated that the punishment was disproportionate because Sürek had no editorial responsibility for the publications and Özdemir felt that he was being punished only for his decision to publish these publications.

472 The Turkish government stated that Sürek and Özdemir had disseminated the propaganda of a separatist or terrorist group, so the sentence was imposed to protect the interests of the country as the objective of establishing these articles. In addition, the Turkish Government also stated that the actions of Sürek and Özdemir openly encouraged violence and provoked hostility and hatred among various groups in Turkish society, so that the punishment was proportional because it was in line with the "margin of appreciation".
• These publications constitute newsworthy content to enable the public to know the views of the opposition to government policies;
• Domestic courts have failed to pay sufficient attention to the public’s right to know different perspectives on the situation in Kurdish areas, notwithstanding the discomfort effect of these different perspectives for the authorities;
• The reasons for convicting Sürek and Özdemir are insufficient as limitations on the right to freedom of expression, even though they are relevant to these restrictions.

Based on these considerations, the European Court of Human Rights stated that the punishment was an unlawful restriction that violated Sürek and Özdemir’s right to freedom of expression.

7.0.0.2. **Özgür Gündem v. Turkey Case**

This case began when the Turkish police searched the offices of Özgür Gündem, a daily newspaper company in Istanbul and found some evidence indicating the involvement of some Özgür Gündem employees with the PKK organization. Turkish police also confiscated Özgür Gündem’s publications, including 12 (twelve) articles on reports on economic or social issues (such as the dam project and public health), comments on historical developments in the southeastern region of Turkey (Kurdistan region), statements condemning torture and the massacres in Turkey, calling for a democratic solution, and reports of the alleged destruction of villages in southeastern Turkey. Turkey’s domestic courts considered the 12 articles as a form of “spreading propaganda against the integrity of the State”, which is regulated in Article 8 of the Prevention of Terrorism Act 1991, and punished the personnel of Özgür Gündem

At the European Court of Human Rights, Özgür Gündem’s side basically stated that the search and punishment had violated their rights, one of which was the right to freedom of expression. On the other hand, the Turkish government is basically of the opinion that the punishment is in accordance with the principle of limiting the right to freedom of expression because it has been stipulated in national law, namely Article 8 of the Prevention of Terrorism Act 1991, which was established to protect state interests such as territorial integrity, national unity, security, national, and prevent crime and disorder (disorder), imposed to achieve these goals, and has been proportionate. Based on these arguments, the European Court of Human Rights is basically of the opinion that:
• The search and punishment measures against Özgür Gündem parties constitute a limitation on the right to freedom of expression;
• Same with the case of Sürek and Özdemir v. Turkey, this restrictive action has

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473 See European Court of Human Rights Judgment, Özgür Gündem v. Turkey..., Loc. Cit.
met the requirements of “prescribed by law” because it has been based on national legal rules, namely Article 8 of the Prevention of Terrorism Act 1991, and has met the requirements of “legitimate aim” because the rules that form the basis of the punishment were formed with the aim of protecting state interests such as territorial integrity, national unity, national security, and preventing crime and disorder, and these actions are seen as efforts to achieve these goals;

• The search did not meet the requirements of “necessary in democratic society” because there was no justification for the search and there was no explanation for the detention of everyone in Özgür Gündem’s office, including the cook, cleaners, heating technicians, and 40 (forty) people are not employees of Özgür Gündem, by the Turkish government;

• The sentence does not meet the requirements of “necessary in democratic society” with the following reasons:
  • The use of the term “Kurdistan” in these articles, implying that the region should or is separate from Turkey’s territory, and the claims of certain parties who raise this, may be highly provocative to the government. However, the public has a right to know a different perspective on the situation in southeastern Turkey (the Kurdish region), regardless of how displeasing that perspective may be to the authorities;
  • Despite the backdrop of serious (security) disturbances in the region, expressions that seem to support the idea of secession of the Kurdish entity must be considered as exacerbating the situation;
  • However, sometimes the use of various and derogatory terms is unreasonable to be construed as “advocating or inciting the use of force”.

Based on these considerations, the European Court of Human Rights stated that the search and punishment constituted a disproportionate and unjustifiable restriction as an attempt to achieve a legitimate goal, thus violating Özgür Gündem’s right to freedom of expression.

7.0.0.3. Sürek v. Turkey (No. 3) Case

This case began when the weekly publication “Haberde Yorumda Gerçek” (The Truth of News and Comments) published an article entitled “In Botan the poor peasants are expropriating the landlords!” which contains the PKK’s struggle in liberating the “Kurdistan” region in southeastern Turkey from the territory of Turkey, including land control by the PKK in rural areas and the H.E.P organization in urban areas. The article also stated that the PKK refused to hand over and distribute the land directly by the Turkish government because it should have been handed over to the Kurdish people first. For this article, the Turkish domestic court sentenced

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474 See European Court of Human Rights Judgment, Sürek v. Turkey (No. 3), (Application no. 24735/94), 8 July 1999.
Kamil Tekin Sürek\textsuperscript{475}, the head of the publication, on the grounds that the use of the word “Kurdistan” in the article to denote a certain part of Turkey’s territory and the mention of the PKK’s actions as a “national liberation struggle” was a form of “spreading propaganda against integrity of the State”, which is regulated in Article 8 of the Prevention of Terrorism Act 1991.

At the European Court of Human Rights, Sürek basically stated that the sentence violated his rights, one of which was the right to freedom of expression.\textsuperscript{476} Similar to the cases previously described, the Turkish government is essentially of the opinion that the sentence has complied with the principle of limiting the right to freedom of expression because it has been stipulated in national law, namely Article 8 of the Prevention of Terrorism Act 1991, which was established to protect state interests such as territorial integrity, national unity, national security, and prevention of crime and disorder, imposed to achieve these goals, and has been proportional.\textsuperscript{477} Based on these arguments, the European Court of Human Rights is basically of the opinion that:

- The punishment is a limitation on Sürek and Özdemir’s right to freedom of expression;
- The punishment met the requirements “prescribed by law” because it was based on national legal regulations, namely Article 8 of the Prevention of Terrorism Act 1991;
- This punishment met the requirements of “legitimate aim” because the rules that became the basis for the punishment were formed with the aim of protecting state interests such as territorial integrity, national unity, national security, and preventing crime and disorder (disorder), and the punishment for Sürek and Özdemir was a limitation of rights to achieve these goals;
- The sentence has met the requirements of “necessary in democratic society” with the following reasons:
  - Basically, the use of the term “Kurdistan” to identify a certain part of Turkey’s territory and the mention of the PKK’s actions as a “national liberation struggle” in the text is not sufficient reason to limit the right to freedom of expression, even though it is relevant to the purpose of the restriction;
  - On the other hand, by describing the word “struggle” with “war directed

\textsuperscript{475} Initially, Sürek was fined 100,000,000 Turkish Lira. However, taking into account Sürek's good behavior during the trial, the court reduced the fine to TRL 83,333,333 Turkish Lira.

\textsuperscript{476} Sürek stated that he had no editorial responsibility for the article and that the article itself is an objective news to inform the public, both from the government side, and from the PKK, regarding land reform and unemployment conditions in South-eastern Turkey, without expressing any support for terrorism activities. Sürek added that neither the writing, nor he himself, had anything to do with the PKK.

\textsuperscript{477} The Turkish government stated that Sürek as the publication’s lead contributed to the publication of the article, which openly encourages violence and provokes hostility and hatred among various groups in Turkish society. The Turkish government also stated that the punishment was proportional because it was in accordance with the “margin of appreciation”. 
against the forces of the Republic of Turkey”, the sentence “we want to wage a total liberation struggle” in the article is seen as a call to use armed force as a way to gain Kurdistan independence. This caused the article to be assessed as “able to incite violence” in the region, even though the use of violence was carried out in the context of necessary self-defense. The court stressed that the call was still incitement to violence;

• Thus, the sentence imposed has reason to be considered as an answer to “pressing social need” and the Turkish government has provided “relevant and adequate” reasons in imposing the sentence, so that it is proportional to the legitimate aim of restriction.

Based on these considerations, the European Court of Human Rights stated that the sentence was not a violation of the right to freedom of expression.

7.0.0.4. Karataş v. Turkey Case

This case began when Hüseyin Karataş who is a Kurdish person published a poem entitled “The song of a rebellion – Dersim” (Dersim – Bir İsyanın Türküsü) in Istanbul, which tells about the condition of the Kurdish people in the Kurdistan region. For this poem, Turkey's domestic court convicted Karataş for “spreading propaganda against the integrity of the State”, which was stipulated in Article 8 of the Prevention of Terrorism Act 1991, by using the word “Kurdistan” in the poem to refer to a certain region of Turkey. In addition, Karataş is also considered to have glorify the rebellion movement in the region by identifying the uprising as the Kurdish struggle for independence, which the domestic court considers this as separatist propaganda that undermines the unity of the Turkish nation and the territorial integrity of the Turkish State.

At the European Court of Human Rights, Karataş basically stated that the sentence violated his rights, one of which was the right to freedom of expression. The Turkish government basically believes that the punishment is in accordance with the principle of limiting the right to freedom of expression because it has been regulated in national law, namely Article 8 of the Prevention of Terrorism Act 1991, which was established to protect state interests such as territorial integrity, national unity, national security, and prevent crime and disorder (disorder),


479 A Turkish domestic court sentenced Karataş to imprisonment for 1 year 1 month 10 days and a fine of 111,111,110 Turkish Liras to be paid in instalments over 10 months.

480 Karataş stated that the poem is an expression of his thoughts, anger, feelings and joy through colorful language and contains some hyperbole.
imposed to achieve these goals, and has been proportionate. Based on these arguments, the European Court of Human Rights is basically of the opinion that:

- The punishment is a limitation of Karataş’s right to freedom of expression;
- The punishment met the requirements “prescribed by law” because it was based on national legal regulations, namely Article 8 of the Prevention of Terrorism Act 1991;
- This punishment has met the requirements of “legitimate aim” because the rules that form the basis of the punishment were formed with the aim of protecting state interests such as territorial integrity, national unity, national security, and preventing crime and disorder (disorder), and the punishment for Karataş is a limitation to achieve these purposes;
- The punishment does not meet the requirements of “necessary in democratic society” with the following reasons:
  - Basically, Karataş’ poetry can be interpreted as incitement to hatred, rebellion and the use of violence in readers. This is because the poem calls for self-sacrifice for “Kurdistan” and includes some very aggressive passages directed at Turkish authorities in figurative language;
  - The poem is a form of artistic expression which is also part of the right to freedom of expression. This is because the protection of the right to freedom of expression is not only related to the substance of the ideas and information expressed, but also the form in which they are conveyed;
  - Karataş is a private individual who expresses his views through poetry, which by definition is addressed to a very small audience, rather than through the mass media, thus limiting/reducing the potential impact on national security, public order, and territorial integrity, although some parts of the poem are very aggressive in tone and calls for the use of violence;
  - As an artistic expression and the limited potential impact, the poem is seen more as an expression of deep sadness in facing a difficult political situation rather than a call to rebellion.

Based on these considerations, the European Court of Human Rights stated that the punishment was a disproportionate and unjustifiable restriction as an attempt to achieve a legitimate goal, thereby violating Karataş’ right to freedom of expression.

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481 The Turkish government stated that Karataş’s poetry could be categorized as propaganda for the separatist group, namely the PKK, in the south-eastern region of Turkey. The Turkish government also stated that the punishment was proportional because it was in accordance with the “margin of appreciation”.
7.0.0.5.  Başkaya and Okçuoğlu v. Turkey Case

This case began when the publishing house owned by Mehemet Selim Okçuoğlu published a book by Fikret Başkaya, a professor of economics and journalist, entitled “Batılılaşma, Çağdaşlaşma, Kalkınma – Paradigmanın İflası/Resmi İdeolojinin Eleştirisine Giriş (Westernization, Modernization, Development – Collapse of a Paradigm/An Introduction to the Critique of the Official Ideology)”. A part of the book deals with the impact of Kurdish issues on Turkey’s 1919-1922 war of national independence, the problem of colonialization of the Kurdistan region, and the racial policies that occurred among the Kurdish people. For this, the Turkish domestic court convicted Başkaya and Okçuoğlu for identifying certain areas of the Republic of Turkey as “Kurdistan” and declared the Republic of Turkey to have designated these areas as “colony”, which was assessed as a form of “spreading propaganda against the integrity of the State”, prohibited in Article 8 of the Prevention of Terrorism Act 1991.

At the European Court of Human Rights, Başkaya and Okçuoğlu essentially stated that the sentence violated their rights, one of which was the right to freedom of expression, and was imposed disproportionately. On the other hand, the Turkish government basically believes that the punishment is in accordance with the principle of limiting the right to freedom of expression because it has been stipulated in national law, namely Articles 6 and 8 of the Prevention of Terrorism Act 1991, which were formed to protect state interests such as territorial integrity, national unity, national security, and prevention of crime and disorder, imposed to achieve these goals, and had been proportionate. Based on these arguments, the European Court of Human Rights is basically of the opinion that:


483 Initially, Başkaya was sentenced to 2 years in prison and a fine of 50,000,000 Turkish Lira and Okçuoğlu was sentenced to 6 months in prison and a fine of 50,000,000 Turkish Lira. However, taking into account the good behavior during the trial, the Turkish domestic court reduced Başkaya’s sentence to 1 year and 8 months in prison and a fine of 41,666,666 Turkish Lira and Okçuoğlu’s sentence to 5 months in prison and a fine of 41,666,666 Turkish Lira.

484 Başkaya and Okçuoğlu stated that the book contains academic analysis, and the author’s personal opinion on Kurdish issues and is presented in relatively moderate terms without associating the author with the use of force in the context of the Kurdish separatist struggle. The punishment is seen as a threat with the potential to discourage them or others from expressing or publishing similar ideas in the future. In addition, Başkaya and Okçuoğlu stated that the judicial process is not the right forum to discuss scientific studies published in a book, which are better left to intellectuals, academics or readers in general. Başkaya and Okçuoğlu are also of the view that they have been punished for publishing a study that does not reflect the State’s “official ideology”, but the author’s opinion and attempts to reveal the truth about the material discussed in the book.

485 The Turkish government stated that the passage of the book which portrayed Turkey as a colonialist power oppressing Kurdistan suggested that the author was trying to justify acts of terrorism by the PKK which aim to create a new state on Turkish territory. In other words, by providing moral support to the PKK’s terror campaign, the book could be seen as an act of “inciting violence”. The Turkish government also stated that the punishment had achieved a fair balance between the right to freedom of expression and the right of the people to be protected from the actions of armed groups, so that the punishment was proportional because it was in accordance with the “margin of appreciation”.


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The sentence was a limitation on Başkaya and Okçuoğlu’s right to freedom of expression;

The punishment met the requirements “prescribed by law” because it was based on national legal regulations, namely Article 8 of the Prevention of Terrorism Act 1991;

This punishment met the requirements of “legitimate aim” because the rules that became the basis for the punishment were formed with the aim of protecting state interests such as territorial integrity, national unity, national security, and preventing crime and disorder, and the punishment for Başkaya and Okçuoğlu was a limitation of rights to achieve these goals;

The sentence does not meet the requirements of “necessary in democratic society” with the following reasons:

Although the portions of the book in question contain strongly worded statements that could be seen as expressions of support for Kurdish separatism, these views cannot be categorized as “incitement to violence” nor can they be construed as “inciting to violence”;

Domestic courts have failed to pay sufficient attention to academic freedom of expression and the public’s right to know different perspectives on the situation in Turkey’s southeastern region, despite the displeasure of those perspectives to the authorities;

The reasons for convicting Başkaya and Okçuoğlu are insufficient as a limitation on the right to freedom of expression, even though they are relevant to these restrictions.

Based on these considerations, the European Court of Human Rights found that the sentence was an illegitimate restriction that violated Başkaya’s and Okçuoğlu’s rights to freedom of expression.

7.0.0.6. **Maraşli v. Turkey Case**

This case started when Recep Maraşli wrote an article entitled “Kurdistan: will it become a common colony of Europe?” in the weekly newspaper in Istanbul, “Newroz”. The article basically contains a critical assessment of the possibility that political developments related to the issue of Turkey’s integration into the European Union could affect the problems of the Kurdish people. Turkey’s domestic court convicted Maraşli because the use of the word “Kurdistan” in the article to identify certain areas of the Republic of Turkey is a form of propaganda for separatist groups, so the article is considered a form of “spreading propaganda against the integrity of the State” which is prohibited in Article 8 of the Prevention of Terrorism Act 1991.

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487 A Turkish domestic court sentenced Maraşli to 1 year 8 months and 10 days in prison and a fine of 111,111,111 Turkish Liras (equivalent to 847 Euros), which were paid in installments over 12 months.
Similar to other cases related to Kurdish issues, at the European Court of Human Rights, Maraşli basically stated that the punishment violated his rights, one of which was the right to freedom of expression, while the Turkish government basically stated that the punishment was in accordance with the principle of limiting rights. on freedom of expression. The European Court of Human Rights is essentially of the opinion that:
- The sentence is a limitation of Maraşli’s right to freedom of expression;
- The punishment met the requirements “prescribed by law” because it was based on national legal regulations, namely Article 8 of the Prevention of Terrorism Act 1991;
- The punishment has met the requirements of “legitimate aim” because the rules on which the punishment is based were formed with the aim of protecting territorial integrity;
- The punishment does not meet the requirements of “necessary in democratic society” with the following reasons:
  - Turkey’s domestic courts did not give sufficient consideration as justification in limiting Maraşli’s right to freedom of expression through the sentence imposed;
  - Although certain sections of the article paint a very negative picture of the Turkish State and thereby provide an adversarial narrative, the article does not encourage violence, armed resistance, or rebellion, nor constitute hate speech;
  - The existence of encouragement or invitations to commit violence, armed resistance, or rebellion, as well as the existence of hate speech are important considerations in assessing the conditions “necessary in a democratic society” in limiting the right to freedom of expression.

Based on these considerations, the European Court of Human Rights stated that the punishment was an illegal restriction that violated Maraşli’s right to freedom of expression.

7.0.0.7. Dmitriyevskiy v. Russia Case

This case began when Stanislav Mikhaylovich Dmitriyevskiy as the Chief Editor of the monthly issue “Pravo-Zashchita (Protection of Rights)” took 2 (two) articles from the internet, which contained the writings of Akhmed Zakayev (Deputy Prime Minister of the Government of the Chechen Republic of Ichkeria) to the Russian people and writings of Aslan Mashkadov (President of the Chechen Republic of Ichkeria 1997-2005) to the European Union parliament, which was later published in that issue. These writings contain the sufferings of the people of the Chechen Republic of Ichkeria as a result of the actions of the Russian government, including

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the deportation of the people of the Chechen Ichkeria Republic to Central Asia and Kazakhstan by Stalin in 1944, and calls on the Russian people to play a role in ending the suffering of the people of the Chechen Ichkerian Republic by not re-elect President Vladimir Putin. For this, the Russian domestic court sentenced Dmitriyevskiy for having committed “an act aimed at inciting hatred and hostility and degrading the dignity of an individual or group of individuals based on ethnicity, ethnicity, attitude towards religion, and membership of a social group, through the mass media”, which is prohibited based on Article 282 Paragraph (2) of the Russian Criminal Code.

At the European Court of Human Rights, Dmitriyevskiy basically stated that the sentence violated his rights, one of which was the right to freedom of expression. The Russian government is basically of the opinion that the punishment is in accordance with the principle of limiting the right to freedom of expression because it has been stipulated in national law, namely Article 282 Paragraph (2) of the Russian Criminal Code, which was established to protect the rights and interests of the Russian multinational population, maintain public order, and prevent the possibility of unlawful acts, and have been proportionate. Based on these arguments, the European Court of Human Rights is basically of the opinion that:

- The sentence was a limitation on Dmitriyevskiy's right to freedom of expression;
- To fulfill the requirements of “prescribed by law”, legal provisions used as restrictions must not only be regulated in national law, but must also meet certain qualities, such as:
  - Must be publicly accessible and predictable, formulated with sufficient precision to enable people to know about the actions being regulated and their consequences;

489 Dmitriyevskiy stated that the sentence did not meet the requirements of “prescribed by law” because it was the result of the inappropriate application of Article 282 Paragraph (1) of the Russian Criminal Code. This was because he considered that the court did not show the relationship between his actions and the article used because it did not determine which “groups” were protected by the article and did not explain which actions were considered “actions aimed at inciting hatred and hostility and degrading dignity”. Moreover, not a single witness considered him/herself insulted by these articles based on his race, ethnic origin, or membership in a social group. He also stated that the sentence was not subject to legal restraint on the grounds that it was imposed because he published articles highly critical of prominent politicians in Russia, including the President and his political group, and prevented him from exercising his right to freedom of expression. In addition, Dmitriyevskiy stated that the punishment is disproportionate because the protection of the right to freedom of expression includes shocking, offensive, and disturbing information and ideas, and those who are criticized must tolerate and accept such ideas, even if they conflict with political views, activities, beliefs and so on.

490 The Russian government stated that these articles had incited hatred and enmity and degraded the dignity of individuals or groups of individuals based on ethnicity, tribe, attitudes towards religion, and membership of a social group and Dmitriyevskiy published these articles with his authority as the chief editor. The Russian government also stated that such punishments are necessary in a democratic society and pursuing the legitimate goals of “protecting the rights and interests of the Russian multinational population, maintaining public order and preventing possible unlawful acts” that the articles may trigger, especially taking into account the situation and sensitivity of relations between Russia and the Chechen Republic of Ichkeria.
• If these provisions must be formulated in general so that they can keep up with the times and their application is left to practice, then the quality of law is achieved if these provisions are interpreted and applied strictly and consistently by domestic courts.

• Although domestic courts and the Russian government did not refer the sentence to judicial practice which interpreted the scope of Article 282 Paragraph (2) of the Russian Criminal Code, including what actions were punishable by that article, the European Court of Human Rights considered that the sentence might have met the requirements “prescribed by law”. because it has been based on national legal regulations, namely Article 282 Paragraph (2) of the Russian Criminal Code;

• This punishment met the requirements of “legitimate aim” because the rules on which the punishment was based were formed with the aim of protecting state interests such as territorial integrity, national security, and preventing crime and disorder (disorder), and the punishment for Dmitriyevskiy was a limitation of the right to achieve these goals, especially with the security situation in the Chechen Republic of Ichkeria;

• The punishment did not meet the requirements of “necessary in democratic society” with the following reasons:
  • Altogether, these articles should not be construed as an invitation to use violence, or encouraging violence by inflaming emotions, instilled prejudices, or irrational hatred. The article is seen as a criticism of the Russian Government and their actions in the Chechen Republic of Ichkeria;
  • Although they contain statements highly critical of Russia’s actions in the Chechen Republic of Ichkeria, the articles do not call for armed resistance or the use of armed force as a means to achieve national independence for the Chechen Republic of Ichkeria or to resort to terrorist attacks;
  • These articles did not send a message to the reader that violence is a necessary and justified act of self-defense against an aggressor;
  • It is doubtful that these articles have a harmful impact on territorial integrity because they are only published in certain areas where their circulation is limited, thereby significantly reducing the potential impact on national security, public safety or public order.

Based on these considerations, the European Court of Human Rights stated that the sentence was an illegal restriction that violated Dmitriyevskiy’s right to freedom of expression.
7.0.0.8. Stomakhin v. Russia Case

This case began when a monthly publication, Radikalnaya Politika (“Radical Politics”) published several articles criticizing the actions of the Russian government under the administration of President Vladimir Putin in the territory of the Chechen Republic of Ichkeria which caused sufferings to the residents of the region and the death of several prominent figures of Chechen Republic of Ichkeria. For these articles, a Russian domestic court convicted the owner and editor of Radikalnaya Politika, Boris Vladimirovich Stomakhin, because the articles were deemed to have “openly called for extremist activities through the mass media” (Article 280 Paragraph (2) of the Russian Criminal Code) and had committed “actions aimed at inciting hatred and hostility and degrading the dignity of individuals or groups of individuals based on ethnicity, tribe, attitude towards religion, and membership of a social group, through the mass media” (Article 282 Paragraph (1) of the Russian Criminal Code). This is because these articles:

− Using words and expressions aimed at creating public opinion justifying the violence perpetrated by troops of the Chechen Republic of Ichkeria, including against Russian troops;
− Using language that insults Russia as a State, the political regime in that country, as well as the Russian armed forces; and
− Calls Russia’s actions in the Chechen Republic an occupation (aggression) and has regarded the Russian Army as an occupying force.

At the European Court of Human Rights, Stomakhin basically stated that the sentence violated his rights, one of which was the right to freedom of expression, and was disproportionate. In essence, the Russian government is of the opinion that the punishment is in accordance with the principle of limiting the right to freedom of expression because it has been stipulated in national law, namely Article 280 Paragraph (2) and 282 Paragraph (1) of the Russian Criminal Code, which was established to protect state interests such as territorial integrity, national security, and public order, were imposed to achieve these goals, and were proportionate. Based on these arguments, the European Court of Human Rights is basically of the opinion that:

− The punishment was a limitation on Stomakhin’s right to freedom of expression;
− The punishment met the requirements “prescribed by law” because it was

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492 The Russian domestic court sentenced Stomakhin to 5 (five) years imprisonment and banned Stomakhin from practicing as a journalist for 3 (three) years.
493 Stomakhin stated that the punishment was disproportionate because he only printed his own publications and had limited distribution, so these articles did not pose a danger to the public and should have not caused such a severe punishment for him.
494 The Russian government stated that the articles contained public calls for extremist acts and clearly aimed to create hatred, hostility and insult to the human dignity of a person or group of people on the basis of ethnicity, attitude towards religion and membership of a social group.
based on national legal regulations, namely Article 280 Paragraph (2) and 282 Paragraph (2) of the Russian Criminal Code;
- The punishment met the requirements of “legitimate aim” because the rules that became the basis for the punishment were formed with the aim of protecting state interests such as territorial integrity, national security, and preventing crime and disorder, and the punishment for Stomakhin was a limitation on the right to achieve these goals, especially with the security situation in the Chechen Republic of Ichkeria;
- The sentence does not meet the requirements of “necessary in democratic society” with the following reasons:
  - In order to fulfill the requirements for “necessary in democratic society”, the government must show “relevant and adequate” reasons that the restrictions are made because of an “urgent social need” and are applied proportionally to achieve the goal of legal restrictions;
  - The Russian government has shown “relevant and adequate” reasons regarding the pressing social need in imposing these sentences because several of these articles promote, justify, and glorify terrorism and violence by:
    - Communicating to readers the idea that acts of violence and terrorism are necessary as justified acts of self-defense against attackers; and
    - Approve acts of violence and terrorism as a form of struggle or openly praise terrorist attacks that have killed dozens of civilians.
  - An important factor in assessing the proportionality of a restriction on the right to freedom of expression is the potential impact of the type of media used for that expression. In this case, the penalty was considered disproportionate because the publications containing the articles were printed by Stomakhin himself in very small numbers and circulated only to certain parties, so that the impact was considered insignificant and reduced the potential impact of the articles on the rights of others, national security, public security, or public order.

Based on these considerations, the European Court of Human Rights stated that the punishment was an illegitimate restriction that violated Stomakhin’s right to freedom of expression.

From the description of the cases above, it can be concluded that several things related to restrictions on the right to freedom of expression according to practice at the European Court of Human Rights, especially when associated with reasons of “protecting national security”, including “protecting territorial integrity”, include:
- To fulfill the requirements of “prescribed by law”, restrictions on the right to freedom of expression must meet the following conditions:
  - Regulated in the provisions of national law;
• The provisions of national law must be accessible to the public;
• The provisions of the national law must be formulated with sufficient precision to enable people to know the actions being regulated and their consequences;
• If these provisions must be formulated in general so that they can keep up with the times and their application is left to practice, then these provisions shall be interpreted and applied strictly and consistently by domestic courts;
• To fulfill the requirements for “legitimate aim” in the form of to protect legitimate national security interests, then:
  • Establishment of national legal provisions used as restrictions must be aimed at “protecting national security”, including “protecting territorial integrity”;  
  • The use of these national legal provisions must be intended to achieve the purpose of their formation, namely to “protect national security”, including “protect territorial integrity”;
• To fulfill the requirements for “necessary in a democratic society”, then:
  • Restricted expression must endanger “national security”, including “territorial integrity”;
  • Restrictions must be made based on “relevant and adequate” reasons related to “pressing social need” and applied proportionally to “protect national security”, including “protecting territorial integrity”. In this regard, the following provisions apply:
    • “Urgent needs” or pressing social needs are considered “relevant and sufficient” if the expression contains encouragement, solicitation, or incitement to commit violence, armed resistance, or rebellion, including as a form of self-defense, and/or the expression contains hate speech;
    • If the expression does not contain encouragement, solicitation, incitement, or hate speech, even if it uses offensive words or images, then there is no “relevant and sufficient” reason to indicate an “urgent need” and the expression cannot be limited. In other words, if there has been a restriction on said expression, including a penalty, then the restriction is an illegitimate restriction;
    • One of the assessments of the proportionality of the restriction on the right to freedom of expression is the type of media or the method used to convey said expression along with the potential impact of the use of said media on “national security”, including “territorial integrity”;
    • If the expression uses certain media or methods that are considered insignificant so as to reduce the potential impact on “national security”, including “territorial integrity”, such as is done in a certain place or on media whose circulation is limited, then the restrictions on said expression is disproportionate for the purpose of “protecting national security”, including “protecting territorial integrity”. In other words, if there has been a restriction on said expression, including a penalty, then the restriction is an illegitimate restriction;
• Such limitation does not eliminate the public’s right to know different perspectives on certain situations, conditions or policies, regardless of the displeasure of that perspective for the authorities;
• Protection of the right to freedom of expression is not only related to the substance of the ideas and information expressed, but also the form of delivery of these expressions, for example through writing, books, artistic expressions such as poetry, etc.

5.4.3. Political expression in the right to freedom of peaceful assembly

Apart from being linked to the right to freedom of expression, discussions on political expression must also be linked to the right to freedom of peaceful assembly as stipulated in Article 21 of the ICCPR. Basically, these provisions do not describe in detail the scope of the protection of the right to freedom of peaceful assembly. The detailed description is then regulated in ICCPR General Comment No. 37 which specifically addresses the right to freedom of peaceful assembly. Apart from that, there are also several decisions of the European Court of Human Rights which discuss issues related to the peaceful application of the right to freedom of assembly in practice. For this reason, this section will describe the right to freedom of peaceful assembly, particularly in relation to the exercise of political expression in an assembly, according to ICCPR General Comment No. 37 and the judgments of the European Court of Human Rights.

In principle, the ICCPR General Comment No. 37 stipulates that the right to freedom of peaceful assembly only protects non-violent gatherings by the people at the meeting.\(^{495}\) This is in line with several judgments of the European Court of Human Rights which state that the right to freedom of peaceful assembly only protects “peaceful meeting or assembly” and does not cover meetings, for example demonstrations, where the organizers and participants of the meeting have the intention to commit violence.\(^{496}\) The European Court of Human Rights added that guarantees for the protection of the right to freedom of peaceful assembly apply to all meetings/assemblies, unless the organizers and participants of the meeting/assembly have the intention to commit violence, incite violence, or reject the basic values of a democratic society.\(^{497}\)

ICCPR General Comment No. 37 then explains that 2 (two) stages of examination are needed to determine whether a person’s participation in a meeting/assembly is protected by the right to freedom of peaceful assembly, namely determining

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\(^{495}\) UN Human Rights Committee, ICCPR General Comment 37... , Op. Cit, para. 4.
\(^{496}\) See European Court of Human Rights Judgment, Stankov and The United Macedonian Organisation Ilinden v. Bulgaria, (Applications nos. 29221/95 and 29225/95), 2 October 2001, para. 77; Navalnyy v. Russia, (Applications nos. 29580/12 and 4 others), 15 November 2018, para. 98; dan Primov and Others v. Russia, (Application no. 17391/06), 12 June 2014, para. 155.
\(^{497}\) See European Court of Human Rights Judgment, Navalnyy v. Russia..., Op. Cit., para. 9
whether the meeting/gathering that is attended is of a “peaceful” nature (peaceful assembly) and determine whether there are restrictions that can be applied to the meeting/association or whether the restrictions imposed are legitimate restrictions.\textsuperscript{498} The description of each of these assessments is as follows:

\textbf{5.4.3.1. Requirements for a meeting/assembly to be a “peaceful assembly”}

ICCPR General Comment No. 37 explains these requirements by describing the concept of a meeting/assembly which can be referred to as “assembly” and “peaceful”. The concept of “assembly” is a meeting that involves more than 1 (one) person, both physically and virtually (online), with the aim of expressing oneself, conveying a position on a particular issue, or exchanging ideas.\textsuperscript{499} In addition to planned meetings, this concept also protects spontaneous meetings as a response to an event, including meetings that express things that are contrary to other meetings at the same time and place (counter-assemblies).\textsuperscript{500}

Meanwhile, the concept of “peaceful” is a meeting/assembly that does not involve acts of violence in the form of the use of physical force by participants against other people which can cause harm/injury, death, or serious damage to property\textsuperscript{501}, even though the assembly does not meet the requirements of according to national law.\textsuperscript{502} To determine that an assembly is not “peaceful”, the violence must originate from the participants of the assembly. The existence of acts of violence committed by provocateurs claiming to be participants or those in authority against the participants does not automatically make the meeting/association considered not “peaceful”.\textsuperscript{503} ARTICLE 19 conveys that the concept of “peaceful” includes demonstrations that have peaceful aims, but lead to violence or chaos by other parties.\textsuperscript{504} In this regard, the European Court of Human Rights stated that when participants in a meeting/assembly were involved in acts of violence with the authorities, certain checks were needed to find out who initiated the violence\textsuperscript{505} in order to determine whether the meeting/assembly could be called “peaceful”.

\textsuperscript{498} UN Human Rights Committee, ICCPR General Comment 37..., \textit{Op. Cit}, para. 11.
\textsuperscript{499} \textit{Ibid.}, paras. 12 dan 13.
\textsuperscript{500} \textit{Ibid.}, para. 14.
\textsuperscript{501} \textit{Ibid.}, para. 15.
\textsuperscript{502} \textit{Ibid.}, para. 16.
\textsuperscript{503} \textit{Ibid.}, para. 18.
\textsuperscript{505} See European Court of Human Rights Judgment, \textit{Primov and Others v. Russia...}, \textit{Op. Cit.}, para. 157. In this case, the European Court of Human Rights concluded that the acts of violence were started by the demonstrators by throwing stones at police officers and attacking them with iron bars, log, sticks and knives which injured several police officers. Given these facts, the European Court of Human Rights ruled that the use of firearms by police officers in response to attacks by demonstrators did not violate the right to freedom of peaceful assembly. See paras. 158, 159, dan 163.
The ICCPR General Comment No. 37 then added that acts of violence committed by some participants in an assembly should not be linked to other participants, organizers, or the assembly itself.\(^{506}\) ARTICLE 19 explains that a participant in an assembly can continue to enjoy the right to peaceful assembly if s/he remains peaceful even if the other participants are involved in violence or other punishable acts.\(^{507}\) This is in line with the decision of the European Court of Human Rights which stated that a participant in an assembly does not stop enjoying the right to assemble peacefully as a result of violence or other punishable actions committed by other participants during a demonstration, if the participant remains peaceful (does not participate in violence) in his/her own intentions or behavior.\(^{508}\)

This concept also applies to the relationship between acts of violence committed by participants in an assembly and the “peaceful” nature of the assembly. General Comment No. 37 states that acts of violence committed by participants in an assembly do not necessarily make the assembly not “peaceful”.\(^{509}\) Even so, if the violence actually occurs widely in an assembly, then participation in the assembly is no longer protected by the right to freedom of peaceful assembly. Thus, it can be concluded that some participants in an assembly can be considered to still have the right to peaceful assembly and the assembly can still be considered “peaceful” even though there are participants who commit violence and no longer have this right.

Further, General Comment No. 37 of the ICCPR stipulates that the behavior of a participant in an assembly can be considered as violence if the competent authority can provide credible evidence that:\(^{510}\)

- before or during the event, those participants are inciting others to use violence, and such actions are likely to cause violence;
- the participants have violent intentions and plan to act on them; or
- The participant performs several actions that can make the violence occur.

### 5.4.3.2. Legitimate restrictions on the right to freedom of peaceful assembly

One of the objectives of limiting the right to freedom of peaceful assembly according

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\(^{506}\) UN Human Rights Committee, ICCPR General Comment 37..., Op. Cit., para. 17.


\(^{508}\) See European Court of Human Rights Judgment, Primov and Others v. Russia..., Op. Cit., para. 155. In this case, the European Court of Human Rights concluded that the applicants were not involved in the incident of violence on 25 April 2006 in Mikindzha, which was carried out by other participants in the same demonstration. Therefore, the European Court of Human Rights determined that the applicants cannot be held responsible for the incidents of violence, although they are still responsible for other violent incidents in which the applicants were involved in the violence. See para. 161.


\(^{510}\) Ibid,
to Article 21 of the ICCPR is necessary in a democratic society to protect national security. In addition, with reference to provisions related to the right to freedom of expression, one form of limiting the right to peaceful assembly for this reason is the application of Articles 104 and 106 of the Criminal Code on political expression in an assembly. Because this chapter aims to analyze the criminalization of political expression under Articles 104 and 106 of the Criminal Code, this section will only describe the conditions for limiting the right to freedom of peaceful assembly with the aim of protecting national security.

General Comment No. 37 of the ICCPR states that restrictions on the right to freedom of peaceful assembly for reasons of national security (national security) can only be carried out when necessary to maintain the ability of the State to protect the existence of the nation, territorial integrity, or political freedom of the state from the use of an attack (force) or a factual threat of attack. The provision also stipulates that state/national security reasons cannot be used if the deterioration of state/national security itself is caused by suppression of human rights. In addition, General Comment No. 37 confirms that restrictions on the right to freedom of peaceful assembly, including for reasons of state/national security, cannot be used, either implicitly or explicitly, with the aim of:

1. Silencing the expression of parties who oppose the government politically;
2. Silencing calls for government, including to change democratic governance, the constitution, the political system, or self-determination;
3. Prohibit insulting the honor and reputation of officials or organs of the State.

Regarding the call for self-determination in an assembly, the European Court of Human Rights once decided on this matter in the case of Stankov and The United Macedonian Organization Ilinden v. Bulgaria. In this case, the Bulgarian

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511 Ibid., para. 42. See also Venice Commission..., Op. Cit., para. 137. “Restrictions on the right to freedom of assembly based on national security should be imposed only to protect the existence of the nation or its territorial integrity or political independence against violence, or the tangible threat of force...”.

512 UN Human Rights Committee, ICCPR General Comment 37..., Op. Cit., par. 49.

513 See also Venice Commission..., Op. Cit., par. 137. “A State responsible for such violations cannot invoke national security as a justification for suppressing political dissent or opposition of any kind.”

514 Basically, self-determination is a right protected in Article 1 of the ICCPR. According to UN General Assembly Resolution 1541(XV), the exercise of this right can be carried out in 3 (three) ways, namely declaring a territory as an independent sovereign state, a territory free or having no relationship with an independent state, or a territory joins an independent state. Initially, the right to self-determination only applied to the territories of the colonies. However, this right was later recognized as applicable to countries that did not have a colonial context, such as when West Germany and East Germany united in 1990 and when Yugoslavia separated from the territory of the Soviet Union, where it was stated that these things occurred because of the implementation of the right to self-determination. See Robert McCorquodale, “Self-Determination: A Human Rights Approach”, in The International and Comparative Law Quarterly, vol. 43, no. 4, 1994, pp. 859-861.

government prohibited the implementation of several actions that The United Macedonian Organization Ilinden would take on the grounds that these actions endangered the territorial integrity of Bulgaria because they attempted to separate the Pirin Macedonian region from Bulgarian territory. Meanwhile, Boris Stankov as the applicant in the case stated that the action or meeting would be carried out peacefully with the aim of commemorating Macedonian historical events.

In its consideration, the European Court of Human Rights stated that the fact that there was a group of people calling for autonomy or even asking for the separation of parts of the country’s territory, thereby demanding fundamental constitutional and territorial changes, does not automatically justify the banning of such actions or meetings. The European Court of Human Rights added that the act of demanding territorial changes in a statement or demonstration does not automatically become a threat to the territorial integrity and national security of the state. The European Court of Human Rights has also affirmed that in a democratic society based on the rule of law, political ideas opposing the existing order, whose realization is advocated by peaceful means, must be given appropriate opportunities for expression through the peaceful exercise of the right to freedom of assembly as well as by other legitimate means. Thus, it can be concluded that the reasons of state/national security, especially territorial integrity, cannot be the basis for limiting the right to freedom of peaceful assembly of an assembly that calls for/requests self-determination in the form of demands for separation of parts of the country territory, as long as the call is conveyed/advocated peacefully.

Further, General Comment No. 37 of the ICCPR states that the use of flags, uniforms, symbol and banners in a meeting/gathering must be considered as a form of legal expression and must not be restricted, even if the symbol is a painful reminder of the past. This is in line with the considerations of the European Court of Human Rights in the case of Müdür Duman v. Turkey, which basically states that the display of symbols related to political movements or entities, such as flags, which are able to express ideas or represent those who use these symbols, is a form of expression that is legal and protected. However, General Comment No. 37 of the ICCPR stipulates that the use of these symbols may be restricted when the symbols are directly related to acts of inciting others to commit discrimination, hostility or violence. Thus, as long as symbols associated with political movements or entities such as flags, uniforms, signs and banners are not used to incite others to discriminate, hostility or violence, the use of these symbols must be considered as a legitimate expression and cannot be limited.

517 European Court of Human Rights Judgment, Müdür Duman v. Turkey, (Application no. 15450/03), 6 October 2015.
518 UN Human Rights Committee, ICCPR General Comment 37…, Loc. Cit.
From these descriptions, it can be concluded several things related to the right to freedom of peaceful assembly, especially those related to the use of political expression in a meeting/assembly and the limitation of this right for reasons of national security, including:

- The right to freedom of peaceful assembly only protects a meeting/assembly, including the people in it, which is peaceful and non-violent gathering. The protection of the right to freedom of peaceful assembly does not apply if the organizers and participants of a meeting/assembly have the intention to commit violence, incite violence, or reject basic democratic values;
- There are 2 (two) assessment stages to determine whether a person's participation in a meeting/assembly is protected by the right to freedom of peaceful assembly, namely:
  - Determining whether the meeting/assembly that is attended is of a “peaceful” nature (peaceful assembly); and
  - Determine whether there are restrictions that can be applied to the meeting/assembly or whether the restrictions imposed are legitimate restrictions;
- The determination of a meeting/assembly having the nature of a peaceful assembly is carried out by taking into account the following matters:
  - To be categorized as an “assembly”, a meeting/association must involve more than 1 (one) person, both in the form of physical meetings, as well as virtual (online) meetings, both planned and spontaneous, with the aim of self-expression, conveying stance on a particular issue, or exchange of ideas;
  - To be categorized as “peaceful”, a meeting/assembly shall not involve acts of violence in the form of the use of physical force by participants against other people which can cause injury/injury, death, or serious damage to property;
  - In the event that the participants in the meeting/association are involved in acts of violence with the authorities, the meeting/assembly is still considered “peaceful” as long as the violence does not originate from the participants in the meeting/assembly. For this reason, certain examinations are needed to find out the party that started the violence in order to determine whether the meeting/assembly can be called “peaceful”;
  - In the event that the competent authority wishes to declare that a participant in the meeting/assembly commits violence, the competent authority must provide credible evidence that:
    - The participant incites other people to use violence before or during the meeting/gathering and this action has the potential to cause violence;
    - The participant has the intention to commit violence and plans to actualize the violence; or
    - The participant performs several actions that can cause the violence to
In the event of acts of violence by some participants in a meeting/assembly, then:

- Such acts of violence may not be associated with other participants, organizers, or the meeting/assembly itself;
- Participants who do not take part in violence and remain peaceful must be deemed to still have the right to peaceful assembly and cannot be held responsible for the violence or other punishable acts committed by other participants;
- The meeting/gathering cannot be immediately assessed as not “peaceful”, unless the violence actually occurred on a large scale in the meeting/assembly, so that participation in the meeting/assembly is no longer protected by the right to freedom of peaceful assembly;
- In the event that the act of violence is carried out by a provocateur acting on behalf of the participant or the authority to the participant, then the meeting/assembly is not automatically deemed not “peaceful”;
- The determination of whether a meeting/assembly can be restricted, especially for reasons of state/national security, is carried out by taking into account the following matters:
  - Such restrictions can only be made when necessary to maintain the ability of the State to protect the existence of the nation, territorial integrity, or political freedom of the state from the use of an attack (force) or a threat of attack that can be seen factually;
  - State/national security reasons cannot be used if the deterioration of state/national security itself is caused by suppression of human rights;
  - Restrictions on the right to freedom of peaceful assembly, including for reasons of state/national security, cannot be used, either implicitly or explicitly, with the aim of:
    - Silencing the expression of parties who oppose the government politically;
    - Silencing urges for the government, including to change democratic governance, the constitution, the political system, or self-determination;
    - Prohibit insulting the honor and reputation of State officials or organs;
  - With regard to calls for self-determination, reasons for state/national security, especially territorial integrity, cannot be used as a basis for limiting the right to freedom of peaceful assembly of a meeting/assembly calling for/asking for self-determination in the form of demands for the separation of parts of the country’s territory, as long as the call is conveyed/advocated peacefully;
  - The use of symbols related to political movements or entities, such as flags, uniforms, signs and banners, by participants in a meeting/assembly must be considered as a legitimate expression and cannot be restricted as long as it is not used to incite other people to discrimination, hostility, or violence.
5.5. Analysis on Judgments with the Word “Treason”

In the previous section, the concept of treason and political expression have been explained, both according to the right to freedom of expression and the right to freedom of peaceful assembly, including provisions related to restrictions on these rights. In addition, it has also been emphasized that the application of Articles 104 and 106 of the Criminal Code is a form of restriction for the reason of protecting national security. This section will focus on analyzing the application of these articles to political expressions described in the previous chapter according to the concept of “treason” in criminal law and restrictions for reasons of state/national security according to human rights provisions.

In general, Articles 104 and 106 of the Criminal Code cannot be applied to political expression in these cases because they are not in accordance with the concept of “treason” and do not meet the requirements for limiting an expression on the grounds of “protecting state/national security”. The description of this is as follows:

5.5.1. There were no attacks/threats of violence/force attacks or attack in the form of actions that could be equated with physical violence on political expressions prohibited under Articles 104 and 106 of the Criminal Code

As explained earlier, the word “treason” comes from the word “aanslag” which requires an attack that is forceful or an attack in the form of an act that can be equated with physical violence. With the form of intent of intentional with purpose (opzet als oogmerk), Articles 104 and 106 of the Criminal Code should only be applicable if there is an aanslag (attack with violence/coercion or an attack in the form of an act that can be equated with physical violence) which is actually carried out with the aim to kill, seize independence, or eliminate the ability of the President or Vice President to govern (in the context of Article 104 of the Criminal Code) or so that all or part of the country's territory falls into the hands of the enemy or separates parts of the country's territory (in the context of Article 106 of the Criminal Code). The same concept also applies to initiation (Article 87 of the Criminal Code), malicious conspiracy (Article 110 Paragraph (1) of the Criminal Code), and preparatory actions to facilitate (Article 110 Paragraph (2) of the Criminal Code) the occurrence of “treason”, which must be has a direct relationship with the occurrence of attacks that are violent or forceful or in the form of actions that can be equated with physical violence. Thus, the concept of using articles that include the word “treason” requires an attack with force or an attack in the form of an act that can be equated with physical violence, acts in the form of initiation and conspiracy to make an attack or action which can facilitate the occurrence of attacks with violence/force or attacks in the form of actions that can be equated
with physical violence.

In principle, the concept is similar to the conditions for limiting rights according to human rights provisions. Previously, General comments No. 34 and 37 of the ICCPR and the Siracusa Principles have regulated that one of the legitimate aims of limiting rights for reasons of state/national security is to protect the territorial integrity of the state from the use of attacks or threats of attack. One of the conditions for limiting rights stipulated in these provisions is necessary in a democratic society to protect the purpose of limiting legitimate rights. In the context of the goal to protect national security interest, restricted expressions must endanger “national security”, including “territorial integrity”, which means that the attack or threat of attack has actually occurred. This is also emphasized in the Johannesburg Principles which states that restrictions on rights for reasons of national security can be justified if they are carried out as a response to the use of attacks or threats of attack, one of which is against territorial integrity. Therefore, the application of Articles 104 and 106 of the Criminal Code which are restrictions on rights for reasons of state/national security must also refer to the concept that there must be an attack or threat of such attack.

Based on these matters, it appears that the application of articles that include the word “treason” (including Articles 104 and 106 of the Criminal Code) according to criminal law and human rights provisions related to restrictions on rights for reasons of national security both require the occurrence of an attack that is violent or coercion or threat of the attack. For “threats of attack”, basically this can also include acts in the form of initiation and conspiracy to carry out attacks or actions that can facilitate attacks in the context of criminal law. This is because the acts were committed before the required attack occurred and are directly related to the attack. Therefore, it can be concluded that **Articles 104 and 106 of the Criminal Code can only be applied if there is an attack that is violent/coercive in nature (including an attack in the form of an act that can be equated with physical violence) or a threat from the attack, such as the initiation and conspiracy to realize attacks or actions that can facilitate the occurrence of said attacks, which are aimed at achieving the objectives specified in these articles.**

In fact, there were no violent/coerced attacks, attacks in the form of acts that could be equated with physical violence, or threats from these attacks on political expressions that were punished under Articles 104 and 106 of the Criminal Code. From the description in the previous chapter, it can be seen that the political expressions that are punished under these articles are: 1) gave an individual statement as ready to behead the president; 2) prepared plans for the parade to commemorate the anniversary of the Republic of South Maluku (RMS) and
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type, print, and distribute the rally guidelines; and 3) using the Morning Star flag, shouting slogans and calling for the separation of Papua from the Republic of Indonesia.

When examined closely, none of these expressions took the form of violent/coerced attacks or attacks in the form of actions that could be equated with physical violence. For act number 1, indeed the statement contains words that describe a violent attack on the president. However, certain words cannot be seen as “attacks with violence or attacks in the form of actions that can be equated with physical violence” and the defendant himself never actually carried out or attempted to carry out the attack to decapitate the president as he said, so no violent attacks or attacks in the form of acts that could be equated with physical violence against the president occurred. Thus, the court should not convict the defendant under Article 104 of the Criminal Code.

In addition, even though the statement is intended to be referred to as “initiation” or “action that facilitates” the occurrence of violent attacks or attacks in the form of actions that can be equated with physical violence, the statement must certainly be measured qualitatively whether it can reasonably cause an attack with violence or attacks in the form of actions that can be equated with physical violence, or can be seen as threatening those attacks against the president, taking into account the condition of the defendant when making the statement. In fact, in this case, the defendant gave the statement alone and there was no tool or means that was reasonable or could actually have caused the violent attack to occur. Logically, these conditions are certainly not sufficient to cause an attack with violence in the form of an act that can be equated with physical violence against the president because it is almost impossible for the defendant himself without using certain tools or means to attack the president. Thus, the defendant’s actions were not reasonable enough to cause the attack with all of his condition, so that this cannot be considered as the initiation under Article 87 of the Criminal Code or actions that facilitate the occurrence of an attack with violence under Article 110 paragraph (2) of the Criminal Code.

For actions number 2 and 3, these actions also cannot be referred to as “attacks with violence/coercion or attacks in the form of actions that can be equated with physical violence” because they are only carried out with marches and speeches in a rally without being accompanied by other actions or invitations to carry out the attack. In fact, these expressions did not indicate a threat of an attack with violence/force or in the form of an act that could be equated with physical violence because they were only intended to commemorate the anniversary of an independence movement and call for the independence of its territory from Indonesia. Therefore, apart from not being seen as an attack with violence/coercion or an attack in the
form of an act that can be equated with physical violence, these expressions cannot be seen as an act which, according to a reasonable judgment, can cause, an agreement to commit, or actions in the context of preparing or facilitating the occurrence of an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence. Thus, these actions should not be punished under Article 106 of the Criminal Code, including Article 87 of the Criminal Code as the initiation, Article 110 paragraph (1) of the Criminal Code as conspiracy, and Article 110 paragraph (2) of the Criminal Code as a preparatory action to commit “treason” (aanslag) because the intention of making this expression was not to carry out an attack.

Similar conditions also occur in political expressions that are punished under Article 106 of the Criminal Code which is linked to Articles 87, 110 paragraphs (1) and 110 paragraphs (2) of the Criminal Code, including: 1) planning and participating in ceremonies commemorating the anniversary of the independence movement; 2) planning, gathering people, spreading news, and participating in raising the independence flag; and 3) attending fundraising meetings for the independence movement and compiling profiles of countries demanding independence. Examined closely, none of these expressions can be referred to as “threats of attack with violence/coercion or attacks in the form of actions that can be equated with physical violence” because they are only carried out in the form of activities or actions related to an independence movement that are not related to the occurrence of an attack by force/coercion or an attack in the form of an act that can be equated with physical violence, such as planning and agreeing to carry out or facilitating the occurrence of an attack by force/coercion or an attack in the form of an act that can be equated with physical violence. Thus, these expressions cannot be seen as actions which, according to a reasonable assessment, can cause, agreement to do, or actions in order to prepare or facilitate the occurrence of an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence, therefore they should not be punished under Article 106 of the Criminal Code which is linked to Articles 87, 110 paragraphs (1) and 110 paragraphs (2) of the Criminal Code.

Based on the above, it can be concluded that there were no attacks or threats of violent/coerced attacks or attacks in the form of actions that could be equated with physical violence in the political expressions that have been described. Therefore, these expressions cannot be referred to as “treason” (aanslag) so they should not be criminalized under Articles 104 and 106 of the Criminal Code, including those linked to Articles 87, 110 paragraph (1) and 110 paragraph (2) of the Criminal Code. In addition, the absence of attacks or threats of attacks indicates that the application of these articles to the expressions described constitutes an illegitimate restrictions of rights because it does not meet the requirements in
the form of necessary in democratic society for the purpose of protecting state/national security (to legitimate national security interest) in the form of territorial integrity which requires an attack or threat of attack.

5.5.2. Interpretation of “aanslag” become “makar/treason” has caused articles that contain the word “treason” do not fulfill the prescribed by law requirement
As previously explained, in order to fulfill the requirements of “prescribed by law”, restrictions on the right to freedom of expression must be regulated in provisions of national law that are accessible to the public and formulated with sufficient precision to enable people to know the actions being regulated and their consequences. As provisions governing these restrictions, Articles 104 and 106 of the Criminal Code are basically provisions of national law which can be accessed by the public. However, these articles are not formulated with sufficient precision so that it is not possible for people to know about the actions that are actually prohibited according to these provisions.

In the discussion of the previous point, it has been explained that Articles 104 and 106 of the Criminal Code are used to punish various forms of expression that do not contain attacks or threats of violent/forceful attacks or attacks in the form of actions that can be equated with physical violence. In fact, the element of “treason” in these articles comes from the word “aanslag” or attack by force/coercion or attack in the form of an act that can be equated with physical violence, so that acts that can be punished under these articles must be in the form of assault by violence/coercion or actions that can be equated with physical violence. This is basically because the Criminal Code does not define the element of “treason”, including not referring to the word “treason” to its origin, namely aanslag, so that there is no clear concept or definition regarding actions that can be called fulfilling the element of “treason”. This condition causes the judges to interpret the element of “treason” very broadly so that it also categorizes actions that do not contain attacks or threats of violent/forceful attacks or attacks in the form of actions that can be equated with physical violence as acts that fulfill the element of “treason”, which is basically contrary to the definition according to the origin of the word “treason” itself as aanslag.

More than that, the misinterpretation of the aanslag element into “treason” has caused the court to be inconsistent in applying 106 of the Criminal Code. Consistency in the application of a provision for restricting public rights is another requirement for the fulfillment of the “prescribed by law” requirement. This can be seen from how the court determined the article used to punish the act of “preparing, planning, and participating in the ceremony to commemorate the anniversary of the independence movement”. In several cases, the court punished
the act with Article 106 of the Criminal Code\textsuperscript{519}, which can be interpreted that the act was seen as a completed “treason” by the court. However, in several other cases, the court determined that these actions were still “initiation” to carry out “treason” actions and punished these actions with Article 106 which is linked to Article 87 of the Criminal Code.\textsuperscript{520} This means that in these other cases, the court categorizes the act as an unfinished “treason”, which is different from previous decisions. A similar condition occurred in the act of “using or raising the flag of an independence movement” where, in some cases, the court determined the act to be a completed “treason”\textsuperscript{521}, while in other cases, the court determined that the act was still in the form of “initiation” of “treason”, or unfinished “treason”.\textsuperscript{522}

Based on the above, it appears that the interpretation of the word “aanslag” in Articles 104 and 106 of the Criminal Code to the word “makar/treason” causes an unclear concept or definition of the act of “treason” itself. As a result, the courts punished various forms of expression that did not contain attacks or threats of forceful attacks or attacks in the form of acts that could be equated with physical violence under articles which basically required attacks or threats of attack. Moreover, the inaccuracy of the interpretation has caused inconsistency by the court in using these articles in the same form of expression. Thus, it can be concluded that the interpretation of the word “aanslag” in Articles 104 and 106 of the Criminal Code to the word “treason” causes these articles to not meet the requirements for restricting rights in the form of “prescribed by law”.

In the previous point it has been explained that the element of “treason” should refer to the origin of the word, namely “aanslag” or an attack that is violent or coercive (force) or an attack in the form of an act that can be equated with violence. This is basically in accordance with human rights provisions regarding restrictions on rights for reasons of national security which requires an attack or threat of attack. Therefore, so that the formulation of articles that include elements of “treason”, including Articles 104 and 106 of the Criminal Code, are precise and fulfill the requirements “prescribed by law” as well as comply with the concept of criminal law and fulfill the requirements for limiting rights with the legitimate aim of state/national security, then these provisions must be regulated to at least be interpreted, as follows:

- The whole word “treason” must be interpreted as “attack with force/coercion or attack in the form of an act that can be equated with physical violence”. Thus, acts that can be punished under articles that include elements of

\textsuperscript{519} See Ambon District Court Judgment No. 299/Pid.B/2014/PN.Amb and 300/Pid.B/2014/PN.Amb.


\textsuperscript{522} See Fakfak District Court Judgment No. 56/Pid.B/2020/PN.Ffk.
“treason”, such as Articles 104 and 106 of the Criminal Code, are attacks with violence/coercion or attacks in the form of actions that can be equated with physical violence that are intended or aimed to cause consequences specified in those articles;

• The concept of “initiation” of the act of “treason” in Article 87 of the Criminal Code must be interpreted as “the initiation of an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence”, which can also be referred to as “threat of attack with violence/coercion or attacks in the form of actions that can be equated with violence”. Thus, acts that can be punished with reference to Article 87 of the Criminal Code are actions that according to a reasonable assessment can cause an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence that is intended or intended to cause consequences specified in the articles that include elements of “treason”;

• The concept of “conspiracy” to carry out “treason” in Article 110 paragraph (1) of the Criminal Code must be interpreted as “conspiracy to carry out an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence”, which can also be referred to as “threats of attack with violence/coercion or attacks in the form of actions that can be equated with physical violence”. Thus, an act that can be punished with reference to Article 110 paragraph (1) of the Criminal Code is an agreement between 2 (two) or more parties to carry out an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence intended or intended to cause the consequences specified in the articles which include the element of “treason”;

• The concept of “actions in the framework of preparing or facilitating” an act of “treason” in Article 110 paragraph (2) of the Criminal Code must be interpreted as actions in the context of preparing or facilitating an attack with violence/coercion or an attack in the form of an act that can be equated with violence, physically intended or intended to cause the effects specified in the articles that include the element of “treason”;

5.5.3. Political expressions expressed are legitimate forms of expressions
In addition to analyzing political expressions described according to criminal law and provisions on limitations on human rights, these expressions must also be examined according to their forms to determine whether these expressions are legitimate. In general, all political expressions described are legitimate forms of expression because they called for peaceful self-determination, expressions carried out by people who are not responsible for the violence perpetrated in a meeting/assembly, and expressions that use legitimate symbols. The description regarding this matter is as follows:
5.5.3.1. The expressions were calls for self-determination which were done peacefully

From the political expressions described, it can be seen that all of these expressions are calls to separate an area from Indonesian territory, both carried out by the Republic of South Maluku (RMS) movement, as well as the movement calling for independence for Papua. According to UN General Assembly Resolution 1514 (XV), these actions constitute the exercise of the right to self-determination.\(^{523}\) As previously explained, calls for self-determination are expressions that are protected as long as they are carried out peacefully, i.e., do not involve acts of violence in the form of the use of physical force by participants against other people which can cause injury/injury, death or serious damage to goods.

At a closer look, most of these expressions did not involve any acts of violence, either towards other people or objects. This can be seen from the way these expressions were carried out, which were only in the form of attending meetings related to the independence movement, preparing for and participating in independence anniversary celebrations, as well as conducting political speeches in a protest where there were no other actions or invitations to carry out attacks or acts of violence. Thus, these political expressions should be considered legitimate and cannot be limited by the application of Article 106 of the Criminal Code.

5.5.3.2. The defendants were not responsible for violence committed by other participants of the meeting/assembly

In the cases that have been described, there were demonstrations involving violence between the participants and the authorities who secured it, as the case in judgment 30/Pid.B/2020/PN.Bpp. From the facts of the trial, it is evident that the act of violence was started by the actions of the protesters who destroyed and burned public facilities, government-owned offices, and community buildings and vehicles, which in the end this action spread to all of the demonstrations. With these facts, referring to the provisions on the right to freedom of peaceful assembly which have been explained, the demonstration cannot be called a peaceful assembly because it involves acts of violence that were started by the participants in the meeting/assembly and the violence spread throughout the meeting/assembly, so that the implementation of the demonstration can be limited, including by imposing criminal penalties.

However, from the judgment it appears that the defendant was only convicted because of his position as the person in charge and coordinator of the action that became chaotic, not as a participant in the violence. There was no evidence at

\(^{523}\) UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514 (XV), (14 Desember 1960), para. 2.
trial which stated that the defendant was the perpetrator of the act of violence or took part in the acts of violence committed by other participants. In fact, other provisions in the right to freedom of peaceful assembly state that acts of violence committed by demonstrators may not be linked to other parties, one of which is the organizer or person in charge of the demonstration itself. Participants who do not take part in violence and remain peaceful must be deemed to still have the right to peaceful assembly and cannot be held responsible for the violence or other punishable acts committed by other participants. Thus, the defendant in this case cannot be held responsible for the acts of violence that occurred during the demonstration and cannot be convicted under Article 106 of the Criminal Code.

Regarding the peaceful nature of the demonstration, basically there were important events in this case to determine whether the action was peaceful, but this was not proven in court. In the indictment, the public prosecutor explained that the defendant and his colleagues stated that the acts of violence that occurred were carried out by parties other than the demonstration participants and were not responsible for those actions. Unfortunately, this was not proven further during the trial and the court only directly acknowledged that the acts of violence were committed by participants in the action coordinated by the defendant. The fact whether the party carrying out the act of violence was part of the demonstration participants is important to determine whether the action is still peaceful in nature so that restrictions on rights during the demonstration could be tested, including punishment of the defendant. This relates to the provisions in the right to freedom of peaceful assembly which state that acts of violence committed by provocateurs who claimed as participants do not make a meeting/assembly automatically considered not “peaceful”.

Thus, if in this case it is proven that the perpetrators of the violent act were not the demonstration participants, but were provocateurs who claimed to be participants, then the demonstration must still be considered peaceful even though there was an act of violence. In this condition, apart from not being punished for not taking part in the act of violence, the accused also cannot be convicted on the basis of the violence that occurred because the demonstration must still be considered a peaceful assembly protected by Article 21 of the ICCPR. Moreover, there was evidence during trial which showed that the defendant and his colleagues as the person in charge of the protest had made and distributed leaflets to carry out a peaceful demonstration and prohibited the carrying of sharp weapons before the action was carried out, which shows that there was no intention of the defendant to involve violence in the demonstration. However, there is no evidence regarding the relationship between the party that committed the violence and the demonstration participants, which makes proving the peaceful nature of the demonstration vague and cannot be carried out optimally. Even so, the defendant
in this case cannot be held responsible for the act of violence that occurred in the demonstration because he did not take part in the act of violence and he should not be convicted under Article 106 of the Criminal Code.

5.5.3.3. The expressions used legitimate symbols
From the political expressions described, there are several cases that penalize the plan to use and raise the flag of an independence movement under Article 106 of the Criminal Code. In the previous point, it has been mentioned that according to General Comment No. 37 of the ICCPR, the use of symbols associated with political movements or entities, such as flags, uniforms, signs, and banners, must be considered as legitimate expressions and cannot be restricted as long as they are not used to incite others to discriminate, hostility, or violence. In fact, there was no evidence at trial that the use of the flag in these cases was intended to incite other people to discriminate, hostility or violence, but only as a form of expression in calling for or asking for self-determination in a parade commemorating the anniversary of the independence movement and demonstration action. Accordingly, the use of the flag in these cases must still be considered as a valid expression under General Comment No. 37 of the ICCPR and should not be convicted under Article 106 of the Criminal Code.

There was 1 (one) case in which the use of flag could be considered to have an intersect with acts of violence, namely the case in judgment No. 56/Pid.B/2020/PN.Ffk. In this case, the defendant and his colleagues raised the Morning Star flag all the way from Pikpik village to Fakfak City and carried sharp weapons when they were arrested. For the information, General Comment No. 37 of the ICCPR has regulated that the act of a person carrying objects which are or considered as weapons in a meeting/assembly is not necessarily sufficient to be considered as an act of violence by that person, unless the authorities can show that there is an intention to commit violence with these objects. In fact, there was no evidence during the trial in this case that the defendant used or attempted to use the sharp weapon he had brought to commit violence, either when he was raising the flag or when he was arrested by the authorities. Thus, the act of carrying the weapon has no connection with the flag-raising that was carried out, so that there was no act of violence whatsoever in the flag-raising action and the act could not be punished under Article 106 of the Criminal Code.

Based on the descriptions above, it can be concluded that the punishment of political expressions with articles on crimes against state security in Indonesia, especially Articles 104 and 106 of the Criminal Code, is an act that is in contrary to

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the teachings of criminal law regarding these articles and the concept of limitation on the right to freedom of expression according to human rights provisions. If this practice continues, the criminalization of these expressions has the potential to no longer only be seen as an error in the law enforcement process, but also as a form of repression or silencing of the implementation of political expression in the form of conveying opinions or views that are different from the state/government considering the majority of the implementation of these political expressions requested the separation of an area from Indonesian territory, which is different from the views of the Indonesian state/government to maintain the territorial integrity of Indonesia. In fact, both the Siracusa Principles, Johannesburg Principles, and General Comment No. 37 of the ICCPR, has prohibited restrictions on expression on the basis of state/national security with the aim of suppressing or silencing views/opinions that differ from the political stance of the state/government. For this reason, the practice of criminalizing political expressions that do not contain attacks (or threats of attack) in the form of coercion/violence or actions that can be equated with physical violence must be stopped immediately so that no more people shall be punished by inappropriate application of the law.

5.6. Conclusions and Recommendations

Based on previous elaboration, we conclude the following:

• **The political expressions described basically should not be punished under Articles 104 and 106 of the Criminal Code.** This is because there is no “attack with violence/coercion or attack in the form of actions that can be equated with physical violence” or “threats (initiation, conspiracy, or the act of preparing or facilitating an attack) attacks with violence/coercion or attacks in the form of actions which can be equated with physical violence” in the implementation of these political expressions, so that they do not fulfill the element of “treason/aanslag” in Articles 104 and 106 of the Criminal Code;

• **The application of Articles 104 and 106 of the Criminal Code to the political expressions described constitutes illegitimate limitation of rights** because they do not meet the following terms:
  • Articles 104 and 106 of the Criminal Code do not fulfill the requirements “prescribed by law”. This is because the word “treason” in these articles does not refer to the original word, namely “aanslag” so that these articles do not formulate precisely actions that constitute “treasons”. As a result, the court interpreted these articles very broadly so that it also punished expressions that did not meet these elements where there were no attacks or threats of attack. In addition, these conditions have caused the courts to apply these articles inconsistently for the same form of expression;
• The application of Articles 104 and 106 of the Criminal Code do not meet the requirements “necessary in a democratic society to legitimate national security interest”. This is because these articles apply to political expressions that are not carried out with attacks or threats of attack. In fact, restrictions with these conditions can only be made against attacks or threats of attacks on national security, one of which is territorial integrity, which is directly related to the purpose of regulating Articles 104 and 106 of the Criminal Code;

• So that the formulation of articles that include the element of “treason”, including Articles 104 and 106 of the Criminal Code, meet the requirements to legitimately restrict rights (“prescribed by law” and “necessary in democratic society to legitimate national security interest”) as well as in line with the concept of criminal law, these provisions must be regulated, at least interpreted, as follows:
  • The entire word “treason” must be interpreted as “attack by force/coercion or attack in the form of an act that can be equated with physical violence”. Thus, acts that can be punished with articles that include elements of “treason”, such as Articles 104 and 106 of the Criminal Code, are attacks with violence/coercion or attacks in the form of actions that can be equated with physical violence that are intended or aimed to cause consequences the consequences specified in those articles;
  • The concept of “initiation” of the act of “treason” in Article 87 of the Criminal Code must be interpreted as “the initiation of the execution of an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence”, which can also be referred to as “threat of attack with violence or coercion”. Thus, acts that can be punished with reference to Article 87 of the Criminal Code are actions that according to a reasonable assessment can cause an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence that is intended or intended to cause consequences specified in the articles that include elements of “treason”;
  • The concept of “conspiracy” to carry out “treason” in Article 110 paragraph (1) of the Criminal Code must be interpreted as “conspiracy to carry out an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence”, which can also be referred to as “threats of attack by force or coercion”. Thus, an act that can be punished with reference to Article 110 paragraph (1) of the Criminal Code is an agreement between 2 (two) or more parties to carry out an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence intended or intended to cause the consequences specified in the articles which include the element of “treason”;

• The concept of “actions in the context of preparing or facilitating” an act of “treason” in Article 110 paragraph (2) of the Criminal Code must be interpreted as actions in the context of preparing or facilitating an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence intended or intended to cause the effects specified in the articles that include the element of “treason”.

• The political expressions described are legitimate expressions and could not be limited because of the following:
  • The political expressions were calls for peaceful self-determination, which are protected by Article 21 of the ICCPR;
  • In protest asking for self-determination involving acts of violence, the accused did not take part in the acts of violence, so that their participation in these demonstrations was still protected by Article 21 of the ICCPR;
  • Political expressions are carried out using legitimate symbols because they are not used to incite others to commit violence. The presence of a defendant carrying a sharp weapon when using the symbol in the form of a flag does not make the use of the flag constitute a form of violence and must still be considered a legal expression as long as there is no evidence that the act of carrying a sharp weapon is related to the flag-raising being carried out or the sharp weapon is not used or attempted to be used to commit violence.

• The practice of prosecuting political expression that do not contain attacks (or threats of attack) in the form of coercion/violence or actions that can be equated with physical violence and/or in the form of legitimate expressions must be stopped immediately because they are not in accordance with the teachings of criminal law related to these articles and the concept of limiting the right to freedom of expression in accordance with human rights provisions, and has the potential to no longer only be seen as an error in the law enforcement process, but also as a form of repressing or silencing of the implementation of political expression in the form of conveying opinions or views that are different from the state/government.

Based on the description and analysis above, the recommendations that can be submitted are as follows:

1) The Supreme Court and the whole judiciary under its supervision
   • Interpret the element of “treason” in articles within the chapter “Crimes Against State Security” as aanslag, namely an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence. Thus, the Supreme Court and all below judiciaries should only be able to
impose sentences based on articles that include elements of “treason”, including Articles 104 and 106 of the Criminal Code, when the defendant is proven to have committed an act, including political expression, which is a violent attack/coercion or attacks in the form of actions that can be equated with physical violence, which are intended or intended to cause the consequences specified in the articles mentioned;

- Does not use Article 87 of the Criminal Code as a definition of the element of “treason” and interprets Article 87 of the Criminal Code as “initiation of an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence (aanslag)”. Thus, the Supreme Court and all below judiciaries should only be able to impose sentences based on articles that include elements of “treason”, including Articles 104 and 106 of the Criminal Code, which are in connection with Article 87 of the Criminal Code if it is proven that the defendant’s actions (including political expressions) is an act which, according to a reasonable assessment, can cause an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence that is intended or intended to cause the consequences specified in the articles which include the element of “treason”;

- Interpreting the concept of “malicious conspiracy” to carry out “treason” in Article 110 paragraph (1) of the Criminal Code as “conspiracy to carry out an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence (aanslag)”. Thus, the Supreme Court and all below judiciaries should only be able to impose a sentence based on Article 110 paragraph (1) of the Criminal Code if it is proven that the actions of the accused (including political expressions) constitute an agreement with another party to carry out an attack with violence/coercion or an attack in the form of an act of which can be equated with physical violence that is intended or intended to cause the effects specified in the articles that include the element of “treason”;

- Interpreting the concept of “actions in order to prepare or facilitate” an act of “treason” in Article 110 paragraph (2) of the Criminal Code as “actions in the context of preparing or expediting an attack with violence/coercion or an attack in the form of an act that can be equated with violence physically (anslag)”. Thus, the Supreme Court and all below judiciaries should only be able to impose a sentence based on Article 110 paragraph (2) of the Criminal Code if it is proven that the actions of the accused (including political expressions) were acts committed to prepare or facilitate an attack with violence/coercion or an attack in the form of actions that can be equated with physical violence that are intended or intended to cause the consequences specified in the articles that include elements of “treason”;
• For certain actions as follows, the Supreme Court and below judiciaries should:
  • Not impose criminal penalties on people who carry out political expressions in the form of calls for self-determination, both under Articles 106, 87, 110 paragraphs (1) and (2) of the Criminal Code, as well as other criminal articles, as long as the expression is carried out peacefully;
  • Not impose criminal penalties on participants in demonstrations asking for self-determination that involve acts of violence, both under Articles 106, 87, 110 paragraphs (1) and (2) of the Criminal Code, as well as other criminal articles, as long as the particular participant do not take part in the acts of violence;
  • Not impose criminal penalties on people who use legal symbols, such as flags or other symbols of a movement under Articles 106, 87, 110 Paragraphs (1) and (2) of the Criminal Code, or other criminal articles, as long as these symbols are not used to incite others to violence. This also applies if there is a person carrying a sharp weapon when using the legal symbol, but there is no evidence that the act of carrying the sharp weapon has anything to do with the use of the symbol or the sharp weapon is used or attempts to be used to commit/instigate other people to do something violence;

2) The Attorney General Office and the whole prosecutors below
  • Interpret the element of “treason” in the articles in the chapter “Crimes Against State Security” as an aanslag, namely an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence. Thus, the Attorney General's Office and all the Prosecutors below should only be able to submit case files to court and/or prosecute based on articles that include elements of “treason”, including Articles 104 and 106 of the Criminal Code, if the defendant is proven to have committed an act, including political expression, which is an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence, which is intended or intended to cause the consequences specified in these articles;
  • Does not use Article 87 of the Criminal Code as a definition of the element of “treason” and interprets Article 87 of the Criminal Code as “beginning of the implementation of an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence (aanslag)”. Thus, the Attorney General's Office and all the Prosecutors below should only be able to submit case files to court and/or prosecute based on articles that include elements of “treason”, including Articles 104 and 106 of the Criminal Code, which are in connection to Article 87 of the Criminal Code if
it is proven that the actions of the accused (including political expressions) constitute acts which, according to a reasonable assessment, can lead to an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence which is intended or intended to cause the consequences specified in the articles that include elements of “treason”;

• Interprets the concept of “malicious conspiracy” to carry out “treason” in Article 110 paragraph (1) of the Criminal Code as “conspiracy to carry out an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence (aanslag)”. Thus, the Attorney General’s Office and all the Prosecutors under it should only be able to submit case files to court and/or carry out prosecutions based on Article 110 paragraph (1) of the Criminal Code if it is proven that the defendant’s actions (including political expressions) were an agreement with another party to carry out an attack with violence/coercion or attacks in the form of actions that can be equated with physical violence that are intended or intended to cause the consequences specified in the articles that include elements of “treason”;

• Interpreting the concept of “actions in order to prepare or facilitate” a “treason” in Article 110 paragraph (2) of the Criminal Code as “actions in the context of preparing or expediting an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence (aanslag)”. Thus, the Attorney General’s Office and all Prosecutors under it should only be able to submit case files to court and/or carry out prosecutions based on Article 110 paragraph (2) of the Criminal Code if it is proven that the actions of the accused (including political expressions) were actions taken to prepare or facilitate an attack by force/coercion or attack in the form of an act that can be equated with physical violence that is intended or intended to cause the consequences specified in the articles that include the element of “treason”;

• For certain actions as follows, the Attorney General’s Office and all the Prosecutors under it should:
  • Not transfer case files to court and/or prosecute people who carry out political expressions in the form of calls for self-determination, both with Articles 106, 87, 110 paragraphs (1) and (2) of the Criminal Code, as well as other criminal provisions, as long as the expression is done peacefully;
  • Not submit case files to court and/or prosecute demonstrators asking for self-determination involving acts of violence, both under Articles 106, 87, 110 paragraphs (1) and (2) of the Criminal Code, as well as other criminal provisions, as long as these participants not take part in the act of violence;
• Not transfer case files to court and/or prosecute people who use legal symbols, such as flags or other symbols of a movement, both with Articles 106, 87, 110 paragraphs (1) and (2) of the Criminal Code, or other criminal articles, as long as the symbol is not used to incite other people to commit violence. This also applies when there is a person carrying a sharp weapon when using the legal symbol, but there is no evidence that the act of carrying the sharp weapon has anything to do with the use of the symbol or the sharp weapon is used or attempts to be used to commit/instigate other people to do violence;

3) **Legislator**

• Revise the word “treason” in the articles in the chapter “Crimes Against State Security”, either through legislation that changes the current Criminal Code, or through new legislation, or at least strictly regulates the explanation of the word “treason” in the current Criminal Code, becomes “attack with violence/coercion or an attack in the form of an act that can be equated with physical violence”. Thus, the words of Articles 104 and 106 of the Criminal Code, or articles in the new criminal law which read the same, are as follows:

  • **Article 104 of the Criminal Code**
    **Attacks with violence/force or attacks in the form of acts that can be equated with physical violence** with the intent to kill, or to seize independence, or to diminish the ability of the President or Vice President to govern, shall be punishable with...

  • **Article 106 of the Criminal Code**
    **Attacks with violence/coercion or attacks in the form of acts that can be equated with physical violence** with the intention that all or part of the territory of the state, shall be punishable with...

• In the event that the method chosen is to regulate the elucidation of the word “treason” in the current Criminal Code, then the wording of the elucidation is as follows:

  “What is meant by “treason” in the articles in the chapter “Crimes Against State Security” is **attacks by force/force or attacks in the form of actions that can be equated with physical violence.**”

• Adjusting Article 87 of the Criminal Code or other articles in the new criminal legislation which reads the same as the change in the word “treason” and the concept of “initiation” in that article as “initiation of an attack with violence/coercion or an attack in the form of an act that can equated with physical violence (aanslag)”, so the article reads as follows:
“It is concluded that there was an attack with violence/coercion or an attack in the form of an act that could be equated with physical violence, if the intention for that has been evident from the initiation (as referred to in Article 53) to carry out the attack.”

- Stipulates firmly that the articles in the chapter “Crimes Against State Security” cannot be applied, at least to these parties including:
  - Individuals who call for peaceful self-determination;
  - Demonstration participants who request for self-determination and do not take part in the acts of violence that occurred during the demonstration;
  - Individuals who use certain symbols, such as flags or other symbols of a movement, as long as it is proven that these symbols are not used to incite others to commit violence, including people who carry sharp weapons when using these symbols as long as there is no evidence that their actions carrying a sharp weapon has a relationship with the use of this symbol.
CHAPTER VI

CONCLUSION AND RECOMMENDATION
This research has analyzed various criminal provisions related to expression as well as an analysis of various court judgments using human rights standard and norms regarding freedom of expression. In the previous chapters, especially Chapter III and Chapter IV and Chapter V, specific conclusions and recommendations have been described. Conclusions and Recommendations in this chapter are general conclusions and recommendations, which are summarized as follows:

1. Freedom of opinion and expression is an indispensable condition for human development, essential for the society as well as the foundation of a free and democratic society. Freedom of expression is also an important condition for the realization of the principles of transparency and accountability which are important for the promotion of human rights protection, as well as being the basis for the full enjoyment of other human rights.

2. International human rights law strongly recognizes and guarantees the right to freedom of opinion and expression. These rights cover a broad range of rights, namely the right to seek, receive and impart information and ideas of any kind, regardless of the frontiers used, whether orally, in writing, or in printed form, works of art or through other media of one's choice. The forms of expression include general expression, political expression, religious expression, symbolic expression, and artistic expression. Certain forms of expression are also heavily protected, for example expressions of criticism of officials or public bodies. All public officials, including those holding high political positions such as heads of state, are legitimate subjects for criticism.

3. Freedom of expression is a right that can be limited subject to permissible limitations/restrictions. All forms of restriction in order to be said to be legitimate (justified) must fulfill a three-part test, which are specifically prescribed by law, for permissible purposes, and the limitation must be proportional and necessary in a democratic society. Any form of restriction on freedom of expression must not jeopardize the enjoyment of the right to freedom of opinion and expression itself.

4. In line with international human rights law, Indonesian laws and regulations also recognize and guarantee the right to freedom of opinion and expression. These rights are fundamental rights and are guaranteed in the constitution, the 1945 Indonesian Constitution, and various other laws in Indonesia, including the Human Rights Law, the Press Law and the ICCPR (Law No. 12 Year 2005).
5. Criminal law on the one hand is an instrument to protect human rights including protecting expression and on the other hand is an instrument to limit certain actions. The position of criminal law in human rights is interrelated and complementary because there are similarities in principles and values between the two, for example the principle of proportionality, necessity, and the principles of truth and fairness. The regulation and application of criminal laws requires a balance in the context of their public functions, namely providing guidance or clarity to citizens about actions that are prohibited by law and maintaining public order in a democratic society.

6. The criminal provisions in the Criminal Code are provisions that limit certain actions that intersect with the enjoyment of rights, including the expression of citizens. Criminal acts regarding defamations, hate speech and hostility, and treason are criminal provisions which, on the one hand, are intended to protect certain rights and interests, but on the other hand have the potential to violate human rights that have been recognized and guaranteed if applied arbitrarily.

7. An analysis of the criminal provisions related to defamations, hate speech and hostility as well as crimes against state security in the Criminal Code and the ITE Law shows:

a. Most of the provisions still use the past paradigm, which is more focused or aims to maintain public order and maintain public power and means of control for the public. New legal products that were enacted after the reformation, for example the provisions in the ITE Law, are also still strongly formulated with the same paradigm and objectives as the provisions in the Criminal Code.

b. All criminal provisions analyzed, namely Article 310, Article 311, Article 136, and Article 157 of the Criminal Code; Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law; and Article 104 and Article 106 of the Criminal Code, have the following weaknesses:

1) The provisions are formulated vaguely and broadly without adequate explanation and this is contrary to the principle of clarity (lex certa) in criminal law. For example regarding the understanding of the elements of a criminal act related to defamation (Article 27 paragraph 3 of the ITE Law), the phrase “causing hatred” and the phrase “spreading information” (Article 28 paragraph 2 of the ITE Law) which can be interpreted broadly both in the context of
“spreading” or “dissemination”. SKB UU ITE should be appreciated because it provides additional scope and explanation and stricter formulation guidelines for Article 27 paragraph (3) of the ITE Law and Article 28 (2) of the ITE Law.

2) there is a translation error in the Indonesian Criminal Code from the original definition in the Dutch Criminal Code which affects its application, namely regarding the word “makar”, which is currently understood as “treason”, which in the Dutch Criminal Code comes from the word “aanslag” or an attack that is serious or contains violent elements. This translation error has an impact on the broad and multi-interpretation interpretation of the word “makar”.

3) a number of provisions are regulated and formulated very subjectively to respond to certain actions and are based on subjective effects, for example feelings of being insulted or one's dignity and reputation being attacked as well as formulations that emphasize the subjective impact that certain actions generate hatred or hostility.

8. Analysis of judgments in criminal cases of defamations, hate speech and hostility as well as crimes against state security, especially those containing the word “treason” shows various problems, namely:

a. Inaccurate interpretation of the elements of a crime, which among other things originates from the formulation of regulations that are unclear, loose and have multiple interpretations. In terms of guidelines for clearer interpretations, for example in the SKB UU ITE, they have not been implemented properly either. In the context of interpretation, there is also no uniform interpretation in the criminal justice system because the jurisprudence of the highest court is not binding on either the decisions of the same court or lower courts.

b. Courts often do not consider human rights protection, especially in relation to the defendant’s right to expression. In the event that the defendant’s defense contain argument that the prosecuted action were a form of exercise of freedom of expression, the panel of judges did not consider it adequately. In a number of cases, for example the “treason” case, the judge acknowledged that the defendants had freedom of expression, but the decision did not give adequate
consideration nor assessing the importance of freedom of expression. 
c. Judgments are also often did not provide balanced argumentation 
basis between the interests of protecting national security and 
the interests of protecting freedom of expression as an important 
constitutional right in a democratic society as mandated by the 
constitution. In various judgments, the right to freedom of expression 
has not been seen as a fundamental right which must be protected 
when it intersects with the protection of other interests.
d. When considering the defense of freedom of expression, the 
arguments and considerations regarding freedom of expression are 
often inadequate and inconsistent with the norms and standards 
guaranteeing the right to freedom of expression. The interpretation of 
whether an expression must be protected or could be restricted had 
not used the standards and norms of restrictions or testing indicators, 
for example using the three-part test model. This is for example 
the provisions on defamation, which are intended to protect the 
reputation of others (although international human rights standards 
suggest that defamation cases shall not be prosecuted) are instead 
used to protect the reputation of public officials and state agencies/ 
institutions especially those institutions are state institutions such as 
the president and the police as well as protecting business institutions 
such as corporations.

9. Analysis of the judgments also shows that there are problems with the 
competence of law enforcers, including judges. Two issues related to these 
competencies, namely competency in developing legal reasoning in judgments 
and the lack of knowledge and understanding of human rights norms and 
standards in international and national human rights legal instruments (legal 
sources).

Recommendation: [Detailed elaboration is available in Annex 1]
1. The right to freedom of opinion and expression that has been recognized 
and guaranteed in Indonesian legislation and international human rights law 
must be understood as a fundamental right that is very important in nation 
development, social life, and the functioning of democracy in Indonesia. This 
right must be given high protection, including in the event of contestation of 
protection between rights in the criminal justice process.

2. Indonesian laws and regulations that recognize and guarantee the right to 
freedom of opinion and expression have very strong positions, especially 
since this right is recognized and guaranteed in the 1945 Constitution which 
is a constitutional right. In the event that an expression is accused of being
CONCLUSION AND RECOMMENDATION

a criminal act, the legal provisions that recognize and guarantee the right to freedom of expression must be considered or positioned on an equal footing with the provisions of the criminal law.

3. Interpretation of the scope and limits of freedom of expression in law enforcement and criminal justice processes must comply with international human rights standards regarding freedom of expression. The panel of judges and other law enforcers need to apply the three-part test, which was formulated based on Article 19 the ICCPR, to assess whether an expression is a legitimate expression, is higher to be protected, or is an expression that deserves a criminal penalty. This test also includes applying a form of punishment that is proportionate to the responsibility of the defendant by considering its impact on the aspect of protecting citizens’ expression.

4. The application of the protection of freedom of expression in the criminal justice process must be carried out in a balanced manner in line with considerations related to the application of the elements of a criminal act. In the event that the defendants stated that their actions were the exercise of freedom of expression, the panel of judges and other law enforcers also need to pay close attention to the protection of said right of expression.

5. Regarding regulation, it is necessary to amend and repeal a number of provisions in articles related to defamations, hate speech and hostility as well as treason:

a. The orientation of criminal law needs to be adapted to the development of a democratic climate and the protection of human rights and modern criminal law. The old paradigm of criminal law that focuses more on maintaining “public order” and maintaining public power and means of control for the public must be abandoned and formulate criminal law provisions that protect citizens’ rights, support human development and facilitate democratic life and human rights protection.

b. Criminal acts of defamation, hate speech and hostilities as well as criminal acts of treason need to be reformulated with clearer and stricter formulations to avoid loose and broad interpretations that impact on violations of freedom of expression. This is for example by tightening the formulation of criminal provisions that do not merely facilitate feelings of being insulted or one’s dignity or reputation attacked or feelings that give rise to hatred or hostility. Each element of a crime also needs to be given an adequate elucidation to ensure that its application is not excessive and violates freedom of expression. Apart from that, the resolution of cases
related to freedom of expression needs to be carried out with alternative non-criminal solutions and avoiding or the use of imprisonments.

c. Article annulment is also need to be carried out against Article 27 (3) of the ITE Law because it is essentially similar to the provisions in the Criminal Code.

6. Related to the application and interpretation of the elements of a crime:
   a. Interpretation of the elements of a crime must be more accurate and strict accompanied by adequate legal arguments. In the absence of uniform interpretation of the elements of a crime, judges have considerable authority in interpreting while still guided by the intent of the existing provisions and within the limits of the criminal provisions formulated.

   b. The interpretation of the elements of a crime, in matters relating to the issue of freedom of expression, must be accompanied by an interpretation of the scope of protection for the right to freedom of expression. This is for example an expression that is considered as a defamation that must be examined carefully, for example whether there is a public interest and who is the target of the expression. Human rights standards and norms regulate, among other things, that it cannot be considered as a defamation if it is an opinion or criticism of public officials and public institutions. Likewise with accusations of treason, it must be tested whether the act is related to the implementation of political expression which should be protected.

7. With regard to the interpretation and application of human rights norms, the panel of judges and other law enforcers need to adequately describe the argument for the protection of rights, which in this context is the right to freedom of expression, by:
   a. Using references to human rights norms in national and international human rights law, both in the form of hard and soft laws.
   b. Using a three-part test method, namely: (1) whether restrictions on freedom of expression are prescribed by law; (2) whether the restriction has one of the legitimate purposes based on the permissible restriction; (3) whether restrictions are needed in a democratic society and are carried out proportionally.

8. Increasing the competence of law enforcers, including judges, related to competence in building legal reasoning and competencies related to knowledge and understanding of human rights norms and standards both regulated in national law and in international human rights law.
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Indonesia, PNPS Law No. 1 Year 1965 on the Prevention of Religious Abuse and/or Blasphemy

Indonesia, Presidential Decree No. 85 Year 1998 on Granting Amnesty and Abolition to Several Convicts Involved in Certain Crimes

Indonesia, Law No. 2 Year 1999 on Political Party

Indonesia, Law No. 3 Year 1999 on General Election

Indonesia, Law No. 39 Year 1999 on Human Rights

Indonesia, Law No. 40 Year 1999 on Press

Indonesia, Law No. 12 Year 2005 on the Ratification of the International Covenant of Civil and Political Rights

Indonesia, Law No. 14 Year 2008 on Public Information Transparency

Indonesia, Law No. 40 Year 2008 on The Elimination of Race and Ethnic Discrimination

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Indonesia, Joint Decree of Ministry of Communication and Information Technology No. 229 Year 2021, Attorney General No. 154 Year 2021, and Chief of Indonesian Police No. KB/2/VI/2021 on Implementation Guidelines of Certain Articles in Law No. 11 Year 2008 on Electronic Information and Transaction as amended by Law No. 19 Year 2016


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IV. Other Countries


C. International Human Rights Instruments and United Nations Documents


UN Human Rights Council. (2010). Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue. A/HRC/14/23


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The Constitutional Court of the Republic of Indonesia, Judgment No. 50/PUU-VI/2008

The Constitutional Court of the Republic of Indonesia, Judgment No. 31/PUU-XIII/2015

The Constitutional Court of the Republic of Indonesia, Judgment No. 76/PUU-XV/2017
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Ambon District Court, Judgment No. 297/Pid.B/2014/PN.Amb
Ambon District Court, Judgment No. 299/Pid.B/2014/PN.Amb
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Medan District Court, Judgment No. 151/Pid.Sus/2021/PN.Mdn.
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Muaro District Court, Judgment No. 45/PID.B/2012/PN.MR.
Pandeglang District Court, Judgment No. 28/Pid.Sus/2018/PN.Pdl
Pangkalpinang District Court, Judgment No. 231/Pid.Sus/2018/PN.Pgp.
Pekalongan District Court, Judgment No. 259/Pid.Sus/2019/PN.Pkl.
Pekan Baru District Court, Judgment No.465/Pid.Sus/2017/PN.Pkl.
Poso District Court, Judgment No. 262/Pid.Sus/2017/PN.Pso
Rote Ndao District Court, Judgment No. 36/Pid.B/2008/PN.RND.
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The Supreme Court of the Republic of Indonesia, Judgment No. 804 K/Pid/2014
The Supreme Court of the Republic of Indonesia, Judgment No. 806 K/Pid/2014
The Supreme Court of the Republic of Indonesia, Judgment No. 500 K/Pid.Sus/2016
The Supreme Court of the Republic of Indonesia, Judgment No. 1252 K/
IV. Foreign Court Judgments
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Interview with LeiP Senior Researcher, Arsil
ANNEXES
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<th>Crime</th>
<th>Article</th>
<th>General Recommendation</th>
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<tr>
<td>Defamation</td>
<td>Article 207</td>
<td>Revoked</td>
<td>1. Element of “defaming” shall be interpreted as “attacking the dignity or reputation of an individual by accusing something.” An important element is the existence of accusation from the defendant so that the utilization of Article 207 of the Criminal Code become in line with the construction of slander and libel in Article 310 of the Criminal code. Moreover, this will also clarify the distinction between Article 207 and Article 315 of the Criminal Code – on minor defamation which does not require the element of accusation; 2. The application of the element of “attacking honor or reputation” must be seen in the context of the events surrounding the defamation to the authorities. The mere use of grammatical interpretation of the defendant’s actions cannot be used to convict the defendant; 3. The element “accusing something” must be interpreted as conveying an accusation only in the context of duty and function of the authority as part of the Government. Accusation related to personal life of a public official shall be subject of Article 310 or Article 311 of the Criminal Code when it is conducted offline, or Article 27 paragraph (3) when it is conducted online; 4. A public institution, from any point of view, cannot be equated with the individual and therefore cannot have a reputation. Thus, Article 207 of the Criminal Code cannot be applied in defaming a public body. 5. The offense in Article 207 of the Criminal Code must be treated as a complaint offense – can only be prosecuted based on complaint from the victim. 6. In the event of a conflict between rights protected and rights not protected by the ICCPR, recognition and consideration should be given to the fact that the ICCPR strives to protect the most fundamental rights and freedoms. In this context, freedom of expression is a fundamental freedom that has a very high level of protection, so it is important for the Court to give strong considerations regarding the importance of protecting freedom of expression before giving criminal conviction in defamation cases.</td>
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<tr>
<td>Defamation</td>
<td>Article 207</td>
<td>Revoked</td>
<td>References:</td>
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<td></td>
<td></td>
<td>Interpretation more strictly and accurately</td>
<td>1. Article 28E paragraph (3) and Article 28F of the 1945 Constitution</td>
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<td>2. Article 14 and Article 23 paragraph (2) of the Human Rights Law</td>
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<td>4. Article 19 of the ICCPR</td>
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<td>5. UN Human Rights Committee, General Comment No. 34</td>
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<td>6. Siracusa Principles</td>
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<tr>
<td>Defamation</td>
<td>Article 310 paragraph (1) of the Criminal Code (also applies to Article 310 Paragraph (2) and Article 311 of the Criminal Code as graver offense compared to Article 310 paragraph (1) of the Criminal Code)</td>
<td>Interpreted more strictly and accurately</td>
<td>1. Element of “intentionally” shall interpreted in the context intentionality as a goal (oogmerk);</td>
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<td>2. The element of &quot;attacking someone’s honor or reputation by accusing something&quot; must be proven together with the element “intentionally” and the proof of both must be treated in a series of actions;</td>
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<td>3. The element “a person” in the formula must be understood as an individual human being and not a corporation or legal entity;</td>
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<td>4. The application of element “with clear intention to give publicity thereof” shall be treated on an equal footing such as the element intention, however need to be connected specifically with the existence of intent for the accusation from the Defendant to be publicly known;</td>
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<td>5. The application of the element of &quot;attacking honor or reputation&quot; must look at the context of the events surrounding the occurrence of slander, libel, or calumny. The mere use of grammatical interpretation of the defendant’s actions cannot be used to convict the accused;</td>
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<td>6. In the event that the defendant is proven guilty, the court must also consider the degree of necessity and the proportionality of the sentence imposed on the defendant. As far as possible, imprisonment is not imposed and replaced by other forms of punishment. Arguments and considerations about this depend on the characteristics of each case. However, certain situations to consider include:</td>
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<td>a. When the defendant already clarified or have not withdrawn his/her accusation (both verbally and in writing), through the same medium where s/he conveyed the accusation, then imprisonment shall be avoided.</td>
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<td>b. When the defendant has not made clarifications nor withdrawn his/her accusations (both verbally and in writing), then sentencing can be avoided by applying Article 14a or Article 14c of the Criminal Code so that the court can impose general and specific conditions for the defendant to make clarifications or withdraw his accusations or other special conditions.</td>
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<td>Article 310 paragraph (1) of the Criminal Code (also applies to Article 310 Paragraph (2) and Article 311 of the Criminal Code as graver offense compared to Article 310 paragraph (1) of the Criminal Code)</td>
<td>Interpreted more strictly and accurately</td>
<td>References: 1. Article 28E paragraph (3) and Article 28F of the 1945 Constitution 2. Article 14 and Article 23 paragraph (2) of the Human Rights Law 3. <em>Memorie van Toelichting</em> Chapter XVI on Defamation, Criminal Code 4. Article 19 of the ICCPR 5. General Comment No. 34 of the ICCPR 6. Siracusa Principles</td>
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<td>Article 27 paragraph (3) of the ITE Law</td>
<td>Revoked</td>
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<td>Interpreted more strictly and accurately</td>
<td>1. Interpretation of elements of crime shall refer to interpretation of Article 310 and Article 311 of the Criminal Code and refers to the guidelines of the SKB UU ITE for Article 27 paragraph (3) of the ITE Law; 2. The intent of element “intentionally” is intent with a goal or the existence of <em>animus juriandi</em>; 3. The meaning of element “distributing”, “transmitting”, and “make accessible” shall be interpreted as the elements “to be publicly known”; 4. The meaning of element “contain defamation,” interpreted similar to the meaning in Article 310 and Article 311 of the Criminal Code 5. Shall not be categorized as defamation if it is an opinion or critic to public official and public institutions, as well as legal entities such as corporations.</td>
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<td>References: 1. Article 28E paragraph (3) and Article 28F of the 1945 Constitution 2. Article 14 and Article 23 paragraph (2) of the Human Rights Law 3. SKB UU ITE 4. Article 19 of the ICCPR 5. General Comment No. 34 of the ICCPR 6. Siracusa Principles</td>
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<td>Hate and Hostility Speech</td>
<td>Article 28 paragraph (2) of the ITE Law</td>
<td>Interpreted more strictly and accurately</td>
<td>1. The phrase &quot;causes hatred or hostility&quot; must be interpreted as an invitation or incitement to discriminate, violence or hostility. In interpreting this element, the position and influence of the speaker on his audience also needs to be considered, as required in the Rabat Plan of Action. 2. The elements of &quot;intentionally&quot; and the elements of &quot;aimed at&quot; must be interpreted in the context of relation to the perpetrator’s motives, whether s/he really has the intention (<em>mens rea</em>) to commit the crime of spreading information that causes hatred and hostility. 3. The term “group” in “inter-group” shall be interpreted as unchangeable identity of a group, such as ethnic, race, religion by referring to the initial meaning of “group” based on Article 156 of the Criminal Code. Moreover, referring to the development, the meaning of “group” also could include vulnerable groups who need to be protected based on ethnic, gender, sexual orientation, as elaborated in the UN Strategy and Plan of Action on Hate Speech.</td>
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| Hate and Hostility Speech | Article 28 paragraph (2) of the ITE Law | Interpreted more strictly and accurately | References:  
1. Article 28E paragraph (2) dan Article 28F of the 1945 Constitution;  
2. Article 29 of the UDHR;  
3. Article 19 paragraph (3) of the ICCPR;  
4. Article 20 paragraph (2) of the ICCPR;  
5. Article 14 of the Human Rights Law;  
6. Article 55 UU of the Human Rights Law;  
7. Rabat Plan of Actions;  
8. Siracusa Principles;  
| Treason             | All Articles that include elements of "treason", at least Articles 104 and 106 of the Criminal Code | Amendment                        | The element of "treason" is changed to "attack with violence/coercion or attack in the form of actions that can be equated with physical violence"  
References:  
1. *Memorie van Toelichting* (MvT) of Article 104 and 106 of the Criminal Code;  
2. Article 28E Paragraph (3) of the 1945 Constitution;  
3. Article 23 Paragraph (2) Law No. 39 Year 1999;  
4. Article 19 Paragraph (3) of the ICCPR;  
5. General Comment No. 34 of the ICCPR;  
6. Siracusa Principles;  
7. Johannesburg Principles. | Article 104 of the Criminal Code: Assault by force/coercion or attack which can be equated with physical violence with the intent to kill, or to seize independence, or to diminish the ability of the President and/or Vice President to govern, shall be punishable by death or life imprisonment or a maximum imprisonment of twenty years |
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<td>Treason</td>
<td>All Articles that include elements of &quot;treason&quot;, at least Articles 104 and 106 of the Criminal Code</td>
<td>Amendment</td>
<td>The element of “treason” is changed to “attack with violence/coercion or attack in the form of actions that can be equated with physical violence” References: 1. <em>Memorie van Toelichting</em> (MvT) of Article 104 and 106 of the Criminal Code; 2. Article 28E Paragraph (3) of the 1945 Constitution; 3. Article 23 Paragraph (2) Law No. 39 Year 1999; 4. Article 19 Paragraph (3) of the ICCPR; 5. General Comment No. 34 of the ICCPR; 6. Siracusa Principles; 7. Johannesburg Principles.</td>
<td>Article 106 of the Criminal Code: Attacks with force/force or attacks that can be equated with physical violence with the intention that all or part of the country's territory falls into the hands of the enemy or separates parts of the country's territory is punishable by life imprisonment or a maximum imprisonment of twenty years.</td>
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<tr>
<td>Article 87 of the Criminal Code</td>
<td>Amendment</td>
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<td>1. Replacing the word &quot;treason&quot; with &quot;attack with force/coercion or attack in the form of an act that can be equated with physical violence&quot;; 2. Adding the element &quot;to carry out the attack&quot; to describe the relationship between the intention and the initiation of the implementation and the attack/ aanslag that was carried out. References: 1. <em>Memorie van Toelichting</em> (MvT) of Article 104 and 106 of the Criminal Code; 2. Article 28E Paragraph (3) of the 1945 Constitution; 3. Article 23 Paragraph (2) Law No. 39 Year 1999; 4. Article 19 Paragraph (3) of the ICCPR; 5. General Comment No. 34 Human Rights Committee; 6. Siracusa Principles; 7. Johannesburg Principles.</td>
<td>Article 87 of the Criminal Code: &quot;An attack occurs with violence/coercion or an attack in the form of an act that could be equated with physical violence, if the intention has been evident by the initiation of implementation (as referred to in Article 53) to carry out the attack.&quot;</td>
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| Article 110 Paragraph (1) of the Criminal Code | Interpreted more strictly and accurately | Interpreting the concept of "malicious conspiracy" to carry out "treason" in Article 110 Paragraph (1) of the Criminal Code as "conspiracy to carry out an attack with violence/coercion or an attack in the form of an act that can be equated with physical violence (aanslag)" | References:  
1. *Memorie van Toelichting* (MvT) of Article 104 and 106 of the Criminal Code;  
2. Article 28E Paragraph (3) of the 1945 Constitution;  
3. Article 23 Paragraph (2) of Law No. 39 Year 1999;  
4. Article 19 Paragraph (3) of the ICCPR;  
5. General Comment No. 34 UN Human Rights Committee;  
6. Siracusa Principles;  
| Article 110 Paragraph (2) of the Criminal Code | Interpreted more strictly and accurately | Interpreting the concept of "actions in order to prepare or facilitate" a "treason" as regulated in Article 110 Paragraph (2) of the Criminal Code as "actions in the context of preparing or facilitate an attack with violence/coercion or an attack in the form of an act that can be equated with violence physically (aanslag)" | References:  
1. *Memorie van Toelichting* (MvT) of Article 104 and 106 of the Criminal Code;  
2. Article 28E Paragraph (3) of the 1945 Constitution;  
3. Article 23 Paragraph (2) of Law No. 39 Year 1999;  
4. Article 19 Paragraph (3) of the ICCPR;  
5. General Comment No. 34 UN Human Rights Committee;  
6. Siracusa Principles;  
## Annex 2. Table of Judgments on Political Expressions and Crimes Against State Security

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<tr>
<th>Judgment Number</th>
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<th>Convicted Actions</th>
<th>Articles</th>
<th>Conviction/Length of Imprisonment</th>
<th>Courts’ Main Argument</th>
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</thead>
<tbody>
<tr>
<td>819 K/Pid/2003</td>
<td>Stefi Likumahuwa</td>
<td>Preparing the flag of the <em>Republik Maluku Selatan</em>/the Republic of South Maluku (RMS) to be then hoisted up during the commemoration of the RMS's independence proclamation</td>
<td>106 in conjunction with 55 para. (1) point 1 in conjunction with 53 of the Criminal Code</td>
<td>3 years</td>
<td><em>Judex Facti</em> have been correct in their decision</td>
</tr>
<tr>
<td></td>
<td>Adrian Tomasoa</td>
<td></td>
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<tr>
<td>1151 K/Pid/2005</td>
<td>Christine E.S. Kakisina/Manuputty alias Mei</td>
<td>1. Receiving calls from the RMS’s figures; 2. Attending the RMS’s flag hoisting ceremony; 3. Attending a gathering and praying together for goals and objectives of the RMS; 4. Instructing other people to prepare foods and beverages for the RMS's ceremony</td>
<td>106 in conjunction with Article 55 para. (1) point 1 of the Criminal Code</td>
<td>2 years and 6 months</td>
<td>The defendant’s action has met the requirements for &quot;Makar&quot;</td>
</tr>
<tr>
<td>1693 K/Pid/2005</td>
<td>Yusak Pakage</td>
<td>Attending a meeting and declaring that he will invite people to attend the Morning Star flag hoisting ceremony whilst the Morning Star flag is not the national flag of Indonesia</td>
<td>110 para. (1) in conjunction with 106 of the Criminal Code</td>
<td>10 years</td>
<td><em>Judex Facti</em> have been correct in their decision</td>
</tr>
<tr>
<td>1694 K/Pid/2005</td>
<td>Moses Holago</td>
<td>Attending a meeting discussing fundraise to support separation of Papua Province from Indonesia and formation of governmental structure of West Papua</td>
<td>110 para. (1) in conjunction with 106 of the Criminal Code</td>
<td>4 years</td>
<td>Petition to appeal has past the deadline</td>
</tr>
<tr>
<td>1827 K/Pid/2007</td>
<td>Semuel Waileruny</td>
<td>Sending messages containing plan for the RMS's flag hoisting ceremony during the commemoration of the RMS’s independence day</td>
<td>110 para. (2) point 4 of the Criminal Code</td>
<td>3 years</td>
<td><em>Judex Facti</em> have been correct in their decision</td>
</tr>
<tr>
<td>1977 K/Pid/2008</td>
<td>Yakobus Pigai</td>
<td>Sending messages containing instructions to raise the Morning Star flag, recording the flag hoisting, and singing and dancing to keep the flag from being taken down in commemoration of West Papuan independence</td>
<td>106 in conjunction with Article 55 para. (1) point 1 of the Criminal Code</td>
<td>5 years</td>
<td>The short message sending and flag hoisting recording proved that the defendant was involved in raising the Morning Star flag</td>
</tr>
<tr>
<td>Judgment Number</td>
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<tr>
<td>1889 K/Pid/2009</td>
<td>Michael Pattisinay</td>
<td>Preparing materials to sew up the RMS flag to be then unfurled at the commemoration of National Family Day</td>
<td>-</td>
<td>Not Guilty</td>
<td>The defendant’s actions were not proven</td>
</tr>
<tr>
<td>2157 K/Pid. Sus/2010</td>
<td>Septinus Rumere alias Sept</td>
<td>Hoisting the Morning Star flag in his own yard</td>
<td>106 of the Criminal Code</td>
<td>2 years</td>
<td><strong>Judex Facti</strong> have been correct in their decision</td>
</tr>
<tr>
<td>2212 K/Pid/2010</td>
<td>Luther Wrait</td>
<td>1. Arranging and inviting the masses to unfurl pamphlets/banners during a rally as well as the hoisting of the Morning Star flag; 2. Shouting slogans for independence and it is associated with banners or pamphlets containing separatism</td>
<td>106 in conjunction with 56 point 1 of the Criminal Code</td>
<td>2 years</td>
<td><strong>Judex Facti</strong> have been correct in their decision</td>
</tr>
<tr>
<td>38/Pid.B/2011/PN.Wmn</td>
<td>Obeth Kosay</td>
<td>Registering themselves as members of the 1000 TPN/OPM Team whose purpose is to visit the President of the Republic of Indonesia in order to ask for independence of the Papua Province from the Republic of Indonesia;</td>
<td>106 in conjunction with Article 55 para. (1) point 1 of the Criminal Code</td>
<td>8 years</td>
<td>The intent and initiation of the crime have been manifested in the formation of the 1000 TPM/OPM Team led by Dani Tani Tabuni whose aim is to go to Jakarta to meet the President of the Republic of Indonesia in order to ask for independence and separation from Indonesia. The team members had reached 500 people, where everyone had registered themselves and submitted a head shot photo to make an identification card. Hence, the element of &quot;makar&quot; with the intention to make all or part of the country's territory falls into the hands of enemy or to separate part of the country's territory from others have been fulfilled;</td>
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<tr>
<td>Toelaga Kilungga alias</td>
<td>Registering themselves as members of the 1000-TPN/OPM Team in order to ask for</td>
<td>106 in conjunction with Article 55 para. (1) of the Criminal Code</td>
<td>The intent and initiation of the crime have been manifested in the formation of the 1000 PPM/OPM team led by Dani and Tabuni, whose aim is to go to the Republic of Indonesia in order to ask for the recognition of the Republic of Papua in order to separate part of the country's territory from others. The defendant's action was very dangerous for the integrity of the Republic of Indonesia and since 2002, he has been the Secretary-General of the West Melanesian State Organization.</td>
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<tr>
<td>Wombi Tabuni</td>
<td>the independence of the Republic of Indonesia and separation from Indonesia;</td>
<td>8 years</td>
<td>1. The act of carrying out a worship and the WAETA traditional dance (namely going around and raising their hands up) while singing and shouting for the word “Freedom” is a real act of “makar” (aanslag). What the defendant did by raising the Morning Star flag in Theys Eluay field, while it has been acknowledged that the flag has been used as a symbol of the Free Papua Movement, can fulfill the elements of Article 106 of the Criminal Code.</td>
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<tr>
<td>Ali Wenda</td>
<td>Wombi Tabuni's role is to visit the President of the Republic of Indonesia;</td>
<td>2 years and 6 months</td>
<td>2. The attempt to raise the Morning Star flag carried out by the defendants was then failed not because of the will of the defendants but because of the actions of the police officers who stopped the act of the defendants by arresting the defendants, thereby fulfilling the element of “attempt.”</td>
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<tr>
<td>Meki Tabuni</td>
<td>The team members reached 500 people, where everyone had registered themselves and</td>
<td>3 years</td>
<td>The team members had reached 500 people, where everyone had registered themselves and submitted a head shot photo to make an identification card. Hence, the element of “makar” with the intention to make all or part of the country’s territory falls into the hands of enemy or to separate part of the country’s territory from others have been fulfilled.</td>
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<tr>
<td>Darius Kogoya</td>
<td>Hoisting up the Morning Star flag in Theys Eluwai field,</td>
<td>5 years</td>
<td>The intent and initiation of the crime have been manifested in the formation of the 1000 PPM/OPM team led by Dani and Tabuni, whose aim is to go to the Republic of Indonesia in order to ask for the recognition of the Republic of Papua in order to separate part of the country's territory from others. The defendant's action was very dangerous for the integrity of the Republic of Indonesia and since 2002, he has been the Secretary-General of the West Melanesian State Organization.</td>
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<tr>
<td>Timur Wakerwa</td>
<td>Delivering a political speech about the independence of the Republic of West Melanesia or West Papua, on the anniversary of the independence day of the Republic,</td>
<td>5 years</td>
<td>The intent and initiation of the crime have been manifested in the formation of the 1000 PPM/OPM team led by Dani and Tabuni, whose aim is to go to the Republic of Indonesia in order to ask for the recognition of the Republic of Papua in order to separate part of the country's territory from others. The defendant's action was very dangerous for the integrity of the Republic of Indonesia and since 2002, he has been the Secretary-General of the West Melanesian State Organization.</td>
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<td>1059 K/Pid/2012</td>
<td>Selpius Bobi</td>
<td>Holding the 3rd Congress of Papuan People and arranging a profile of the West Papua State</td>
<td>106 in conjunction with 55 para. (1) point 1 in conjunction with 53 of the Criminal Code</td>
<td>3 years</td>
<td>Judex Facti have been correct in their decision</td>
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<tr>
<td></td>
<td>August Makbrawen Sananay Kraar</td>
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<td></td>
<td>Dominikus Sorabut</td>
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<td>Edison Kladius Waromi</td>
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<td>Forkorus Yaboisembut</td>
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<tr>
<td>116/ Pid.B/2013/ PN.SRG</td>
<td>Obet Kremadi alias Obed Kamesrar</td>
<td>Attended a meeting which discuss a plan to raise the Morning Star flag</td>
<td>110 para. (1) in conjunction with 106 of the Criminal Code</td>
<td>1 year and 6 months</td>
<td>1. The presence of the defendant at the meeting which discuss plan to raise the Morning Star flag fulfilled the elements of &quot;conspiracy&quot; and was a form of initiation of &quot;makar&quot;;</td>
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<td>2. &quot;Makar&quot; is a translation of the word &quot;aanslag&quot; which is translated as &quot;attack&quot;. Aanslag is not always interpreted as &quot;using physical violence&quot;, but it is sufficient if the nature of the attack is carried out in an act that actually threatens or undermines the territorial integrity of the Republic of Indonesia;</td>
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<td>3. If the plan is successful, the raising of the flag would clearly attack the sovereignty and territorial integrity of the Republic of Indonesia because the aim of the flag hosting is the proclamation of independence of the federal state of West Papua.</td>
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</table>
| 117/ Pid.B/2013/ PN.SRG | Antonius Saruf | Attended a meeting which discuss a plan to raise the Morning Star flag | 110 para, (1) in conjunction with 106 of the Criminal Code | 1 year and 6 months | 1. The presence of the defendant at the meeting which discuss plan to raise the Morning Star flag fulfilled the elements of "conspiracy" and was a form of initiation of "makar";
2. "Makar" is a translation of the word "aanslag" which is translated as "attack". Aanslag is not always interpreted as "using physical violence", but it is sufficient if the nature of the attack is carried out in an act that actually threatens or undermines the territorial integrity of the Republic of Indonesia;
3. If the plan is successful, the raising of the flag would clearly attack the sovereignty and territorial integrity of the Republic of Indonesia because the aim of the flag hosting is the proclamation of independence of the federal state of West Papua. |
| 118/ Pid.B/2013/ PN.SRG | Hengky Mangamis | Attended a meeting which discuss a plan to raise the Morning Star flag | 110 para, (1) in conjunction with 106 of the Criminal Code | 1 year and 6 months | 1. The presence of the defendant at the meeting which discuss plan to raise the Morning Star flag fulfilled the elements of "conspiracy" and was a form of initiation of "makar";
2. "Makar" is a translation of the word "aanslag" which is translated as "attack". Aanslag is not always interpreted as "using physical violence", but it is sufficient if the nature of the attack is carried out in an act that actually threatens or undermines the territorial integrity of the Republic of Indonesia;
3. If the plan is successful, the raising of the flag would clearly attack the sovereignty and territorial integrity of the Republic of Indonesia because the aim of the flag hosting is the proclamation of independence of the federal state of West Papua. |
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<tr>
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</table>
| 119/ Pid.B/2013/ PN.SRG | Yordan Magablo | Attended a meeting which discuss a plan to raise the Morning Star flag | 110 para. (1) in conjunction with 106 of the Criminal Code | 1 year and 6 months | 1. The presence of the defendant at the meeting which discuss plan to raise the Morning Star flag fulfilled the elements of "conspiracy" and was a form of initiation of "makar";  
2. "Makar" is a translation of the word "aanslag" which is translated as "attack". Aanslag is not always interpreted as "using physical violence", but it is sufficient if the nature of the attack is carried out in an act that actually threatens or undermines the territorial integrity of the Republic of Indonesia;  
3. If the plan is successful, the raising of the flag would clearly attack the sovereignty and territorial integrity of the Republic of Indonesia because the aim of the flag hosting is the proclamation of independence of the federal state of West Papua. |
| 291/ Pid.B/2014/ PN.Amb | Ferdinand Petty alias Enang | Planning and attending the RMS's anniversary ceremony | 106 in conjunction with 55 para. (1) point 1 of the Criminal Code | 1 year | 1. The defendant's action, which is planning to hold the RMS's anniversary ceremony, was a conspiracy for "makar";  
2. The defendant's objective in his action was to establish the RMS State within the territory of the Republic of Indonesia with the aim of becoming a sovereign and independent country, but it wasn't achieved as intended not because his own will. Thus, there has been an initiation of the crime as explained in Article 87 of the Criminal Code in conjunction with Article 53 of the Criminal Code. In this case, "makar", in accordance with Article 106 of the Criminal Code, has been fulfilled. |
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<tr>
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<td>297/ Pid.B/2014/ PN.Amd</td>
<td>Paul Lodwyk Krikhoff alias Obgker</td>
<td>Blowing a trumpet for the RMS's anniversary ceremony</td>
<td>106 in conjunction with 55 para. (1) point 1 of the Criminal Code</td>
<td>3 years and 6 months</td>
<td>The defendant's act of blowing a trumpet and singing gospel songs, and then followed by being involved in a parade with supporters of the RMS was a provocative attempt by the defendant which he had prepared beforehand. It was done in order to gain sympathy from the people, so that the people give support to the defendant's intention to separate the RMS from Indonesia.</td>
</tr>
</tbody>
</table>
| 299/ Pid.B/2014/ PN.Amb | Butje Manuhutu alias Abut | Attending the RMS's anniversary ceremony and holding the RMS's flag | 106 in conjunction with 55 para. (1) point 1 of the Criminal Code | 1 year | 1. An act of "makar" can be said to have occurred if there was an element of intent and there was an initiation of the crime with the aim that all or part of the country's territory falls into the hands of the enemy or separates part of the country's territory. Also in the act of "makar", it is not necessary to use armed violence or it is not synonymous with violence;  
2. The defendant arranged plans for the parade to celebrate the 64th anniversary of the RMS which was done as a follow-up to instruction from dr. ALEX MANUPUTTY, the leader of the RMS in exile while the defendant was also invited by witness SIMON SAIYA Alias MON. These all are part of the defendant's struggle to materialized the RMS as a sovereign country. |
<p>| 300/ Pid.B/2014/ PN.Amb | Mathias Rionses Mehldan | Typing, printing, and distributing parade guidebooks for the RMS anniversary ceremony | 106 in conjunction with 55 para. (1) point 1 of the Criminal Code | 1 year | The defendant's actions were clearly an act of participating in the struggle to establish the RMS Government in the Maluku Region, so the element of &quot;makar&quot; has been fulfilled. |</p>
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<tr>
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<td>307/Pid.B/2014/PN.Amb</td>
<td>William Lawalata alias Ebeng</td>
<td>Producing banners for the RMS’s anniversary ceremony</td>
<td>106 in conjunction with 55 para. (1) point 1 of the Criminal Code</td>
<td>3 years and 6 months</td>
<td>1. An act of “makar” can be said to have occurred if there was an intention and there was an initiation of the crime with the aim that all or part of the country's territory falls into the hands of the enemy or to separate part of the country's territory. Also, in the act of “makar”, it is not necessary to use armed violence or it is not synonymous with violence; 2. The defendant's act, which was producing a banner for the celebration of the 64th anniversary of the RMS (Republic of South Maluku), was a follow-up to instruction from dr. ALEX MANUPUTTY (the RMS leadership in exile) and it has met the elements of &quot;makar&quot;.</td>
</tr>
<tr>
<td>802 K/Pid/2014</td>
<td>Oktovianus Warnares alias Otis</td>
<td>Raising the Morning Star flag and forcing others to attend the flag hoisting ceremony</td>
<td>110 para. (1) in conjunction with 106 in conjunction with 55 para. (1) point 1 of the Criminal Code and Art. 1 para. (1) Emergency Law No. 12/1951 in conjunction with 55 para. (1) point 1 of the Criminal Code</td>
<td>7 years</td>
<td>The defendant's act has disturbed the peace of other people (who were forced to attend the ceremony). There was a person who was hit by a stray bullet from the Armed Forces apparatus as a result of the defendant’s actions, and the defendant himself coordinated this action.</td>
</tr>
<tr>
<td>804 K/Pid/2014</td>
<td>Markus Sawias</td>
<td>Raising the Morning Star flag and forcing others to attend the flag hoisting ceremony</td>
<td>110 para. (1) in conjunction with 106 in conjunction with 55 para. (1) point 1 of the Criminal Code</td>
<td>4 years</td>
<td>The defendant's act has disturbed the peace of other people (who were forced to attend the ceremony). There was a person who was hit by a stray bullet from the Armed Forces apparatus as a result of the defendant’s actions, and the defendant himself coordinated this action.</td>
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<tr>
<td></td>
<td>Yohanes Boseren</td>
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<td></td>
<td>Not Guilty</td>
<td>The indictment is null and void</td>
</tr>
<tr>
<td>Judgment Number</td>
<td>Defendants' Name</td>
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<tr>
<td>806 K/Pid/2014</td>
<td>George Simyapen</td>
<td>Raising the Morning Star flag and forcing others to attend the flag hoisting ceremony</td>
<td>110 para. (1) in conjunction with 106 in conjunction with 55 para. (1) point 1 of the Criminal Code and Art. 1 para. (1) Emergency Law No. 12/1951 in conjunction with 55 para. (1) point 1 of the Criminal Code</td>
<td>4 years and 6 months</td>
<td>The defendant's act has disturbed the peace of other people (who were forced to attend the ceremony). There was a person who was hit by a stray bullet from the Armed Forces apparatus as a result of the defendant's actions, and the defendant himself coordinated this action.</td>
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<tr>
<td>Jantje Wamaer</td>
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<td>110 para. (1) in conjunction with 106 in conjunction with 55 para. (1) point 1 of the Criminal Code</td>
<td>4 years</td>
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</tr>
<tr>
<td>Yoseph Arwakon</td>
<td></td>
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<td>110 para. (1) in conjunction with 106 in conjunction with 55 para. (1) point 1 of the Criminal Code</td>
<td>2 tahun 6 bulan</td>
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| 121/Pid.B/2018/PN.Wmn | Solak Alitnoe alias Solak A. Dabi | Planning a thanksgiving event for the inauguration of Defendant I as the Commander in Chief of Kordap XI Yalimo which will then be followed by hoisting up of the Morning Star flag | 106 in conjunction with 55 para. (1) point 1 of the Criminal Code | 3 years and 6 months | 1. The crime of "makar" in Article 106 does not require real evidence regarding separation of parts of the territory from the Republic of Indonesia. It is considered sufficient when it is supported by evidence regarding the intention or initiation of acts to make parts of Indonesia separate or to materialize that part of the territory of the state is independent and is separated from Indonesia. The required evidence is considered sufficient when there is an attempt to separate some areas out of Indonesia;  
2. The actions of the defendants who were going to hold a thanksgiving event for the inauguration of Defendant I as the Commander in Chief of Kordap XI Yalimo which then be followed by the raising of the Morning Star flag had shown that the defendants had done it on purpose. |
<p>| 1116/Pid.B/2019/PNJKT.PST | Hermawan Susanto alias Wawan | Shouting the following remarks: &quot;I'm from Poso, ready to cut Jokowi's head, in the name of Allah...&quot; during a rally in front the Bawaslu's offices | 104 in conjunction with 110 para. (2) point 1 of the Criminal Code | 10 months 5 days | The defendant's remarks reflected a serious and real inward attitude to carry out beheading against President Joko Widodo because he came a long way and he also mentioned God's name in his remarks |</p>
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<tr>
<td>1305/Pid.B/2019/PNJKT.PST</td>
<td>Arina Elopere alias Wenebita Gwijangge</td>
<td>Holding the Morning Star flag and decorating her face with the Morning Star painting during the rally in front of the State Palace protesting the attack on the Papuan students dormitory and the &quot;monkeys&quot; remarks directed at Papuan students in Surabaya</td>
<td>106 in conjunction with 55 para. (1) point 1 of the Criminal Code</td>
<td>9 months</td>
<td>1. The use of the Morning Star flag is a symbol intended for separation from the Republic of Indonesia; 2. The raising of the Morning Star flag is unconstitutional form of freedom of expression because it is a form of denial against the integrity of the Republic of Indonesia; 3. &quot;Makar&quot; does not need to be seen as a form of physical attack using weapons and/or psychological pressure/terror, but it can be a form of attitude (verbally and symbolically) that opposes and does not recognize the integrity of Indonesia; 4. The use of the Morning Star flag is an expression of acknowledgment to go against the agreement of the Indonesian nation that it should have the Red and White flag, thus indicating the defendant's intention to separate Papua from the Republic of Indonesia.</td>
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<td>56/Pid.B/2020/PN.Fkr</td>
<td>Eli Tigitigeria alias Elia Tigitigeria</td>
<td>1. The defendant was involved in the plan to raise the Morning Star flag in the capital of Fakfak Regency. The flag was planned to be hoisted at the Fakfak Regency House of Representatives offices, at the Fakfak Regency Government Office, and the Fakfak Regency Pepera Building in commemoration of Organisasi Papua Merdeka/Free Papua Movement (OPM)'s birthday; 2. During the trip to the capital of Fakfak Regency, the defendant waved the Morning Star flag tied to a piece of wood while shouting the words &quot;Free Papua&quot;; 3. The defendant brought a sharp weapon during the event.</td>
<td>106 in conjunction with 55 para. (1) point 1 of the Criminal Code</td>
<td>1 year</td>
<td>The defendant's actions – joining as a member of the TPNPB (West Papua National Liberation Army), attending meetings related to the OPM, all the way from Pkpir village to Fakfak City while carrying the Morning Star flag and sharp weapons and shouting &quot;Free Papua&quot; – is a series of initiation of the act of &quot;makar&quot; itself. The act of &quot;makar&quot; does not need to be seen as a form of physical attack using weapons and/or psychological pressure/terror, but it can be a form of behavior (verbally and symbolically) that opposes and does not recognize the integrity of the Republic of Indonesia. Hence, the element of &quot;makar&quot; has been fulfilled.</td>
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<tr>
<td>Judgment Number</td>
<td>Defendants’ Name</td>
<td>Convicted Actions</td>
<td>Articles</td>
<td>Conviction/Length of Imprisonment</td>
<td>Courts’ Main Argument</td>
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<td>211/ Pid.B/2020/ PN.Amb</td>
<td>Abner Litarahuputty Alias Ape</td>
<td>The defendant, as deputy chairman of the RMS, came to the Maluku Provincial Police to ask for release of the RMS’s fighters who were detained and then he unfurled the RMS’s flag and shouted “Mena Muria” as an expression of mutual agreement to take responsibility for the RMS’s sympathizers who previously had been arrested and convicted and it is also an expression to demand that the RMS’s sovereignty be restored by the Republic of Indonesia;</td>
<td>110 para. (1) in conjunction with 55 para. (1) point 1 of the Criminal Code</td>
<td>3 years</td>
<td>1. The defendant's actions – gathering people, spreading the news, and raising the flag – were more than a conspiracy because they appertain to the initiation of the crime indicted;</td>
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<td>2. The defendant had done actions which harm legal interest of the state;</td>
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<td>3. The defendant's actions by coming to the Maluku Regional Police with the aim of requesting the return of the RMS's sovereignty had evidently shown that the Defendant consciously knew and wanted to separate Maluku from the territory of Indonesia.</td>
</tr>
<tr>
<td>212/ Pid.B/2020/ PN.Amb</td>
<td>Simon Victor Taihuttu alias Mon</td>
<td>The defendant, as the chairman of the RMS, came to the Maluku Provincial Police to ask for release of the RMS's fighters who were detained and then he unfurled the RMS's flag and shouted “Mena Muria” as an expression of mutual agreement to take responsibility for the RMS's sympathizers who previously had been arrested and convicted and it is also an expression to demand that the RMS's sovereignty be restored by the Republic of Indonesia;</td>
<td>110 para. (1) in conjunction with 55 para. (1) point 1 of the Criminal Code</td>
<td>2 years</td>
<td>1. The defendant's actions – gathering people, spreading the news, and raising the flag – were more than a conspiracy because they appertain to the initiation of the crime indicted;</td>
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<td>2. The defendant had done actions which harm legal interest of the state;</td>
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<td>3. The defendant's actions by coming to the Maluku Regional Police with the aim of requesting the return of the RMS’s sovereignty had evidently shown that the Defendant consciously knew and wanted to separate Maluku from the territory of Indonesia.</td>
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<td>30/Pid.B/2020/ PN.Bpp</td>
<td>Hengki Hilapok alias Hengki alias Frengki Hilapok</td>
<td>1. The defendant was the coordinator and person in charge of a rally at the Governor of Papua's offices protesting against acts of racism against Papuan students in Surabaya and demanding Papuan self-determination through a referendum; 2. During the rally, the masses acted anarchically in the form of destroying and burning public facilities, government-owned offices, public buildings, and vehicles. Apart from that, the masses raised the Morning Star flag and tore, damaged, and burned the Red and White flag; 3. Prior to the rally, the defendant and other coordinators had distributed leaflets stating that participants of the rally must act peacefully, not anarchic, not carrying sharp weapons, etc.</td>
<td>106 in conjunction with 55 para. (1) point 1 of the Criminal Code</td>
<td>10 months</td>
<td>1. The defendant made a leaflet which read: it is forbidden to carry sharp objects, participants are prohibited from carrying out anarchic actions, and all universities’ executive body are required to maintain security. He also gave copies of the leaflets to Mr. DOLVIUS ISAGE to be distributed to each regional coordinator and community so that people are participating in the rally; 2. The defendant was one of the coordinators and persons in charge of the rally in which anarchist acts occurred, including raising the Morning Star flag and lowering the Indonesian Red and White flag; 3. Based on TAP MPR 8/1998 which revoked TAP MPR 4/1993 concerning Referendums and Law 6/1999 which revoked Law 5/1985 concerning Referendums, the room for referendums in Indonesia's law is no longer exists.</td>
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<tr>
<td>Judgment Number</td>
<td>Defendants' Name</td>
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<td>34/Pid.B/2020/PN.Bpp</td>
<td>Irwanus Uropmabin</td>
<td>1. The defendant, as the security coordinator of the rally, did not attempt to call for the riots or anarchic actions carried out by the participants to stop, or to stop the masses's action. Instead, the defendant along with other rally participants returned to the Governor of Papua's offices and then raised the Morning Star flag and shouted slogans related to Papuan independence; 2. The defendant was one of the people in charge of the rally because the masses gathered as a result of the leaflets being produced and distributed.</td>
<td>106 in conjunction with 55 para. (1) point 1 of the Criminal Code</td>
<td>10 months</td>
<td>1. Political expression that call for a referendum are not ordinary political expressions, but is a form of &quot;makar&quot; and provocation which are unconstitutional because the Decree of the MPR 8/1998 had revoked Decree of the MPR 4/1993 concerning Referendums, and Law 6/1999 had revoked Law 5/1985 concerning Referendums, so that the Indonesian constitution and legislation do not recognize and recognize Referendum. Thus, the room for a referendum on Indonesia's law is no longer exists and the invitation for a referendum violates Article 106 of the Criminal Code, namely &quot;makar&quot; with the intent to separate parts of the territory of the Republic of Indonesia; 2. The Defendant and his colleagues with real intentions driven by a common desire to reject racism also asked for a referendum or self-determination for the Papuan people in his speech by shouting Papuan slogans, which were answered by the rally participants with: &quot;Freedom&quot;. The demand was then declared in a statement of joint stance as the beginning. They also cited the UN General Assembly resolution number 1514 and frame it as the right to self-determination for the Papuan people; 3. Racist remarks directed at Papuan students in Surabaya had become a trigger for various of rallies by Papuan people in cities around Indonesia. The protest then widened to a demand for an independence or to separate Papua from Indonesia. The protest against the racist acts must be delivered through a constitutional mechanism so that i can avoid itself from becoming a &quot;makar&quot; or anarchist acts.</td>
</tr>
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Annex 3. Table of Judges’ Interpretation of the Elements of “Treason” and Their Considerations on the Defendant’s Actions

<table>
<thead>
<tr>
<th>Judgment</th>
<th>Definition of “Makar/Treason”</th>
<th>Considerations on the Defendant’s Action</th>
<th>Type of action</th>
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</thead>
<tbody>
<tr>
<td>38/Pid.B/2011/PN.Wmn</td>
<td>The most important element of the treason to carry out an action, namely the intention and the beginning of implementation</td>
<td>The intent and beginning of the implementation had been manifested in the formation of the 1000 TPM/OPM (Independent Papua Army/Independent Papua Organisation) Team led by Dani Tani Tabuni whose aim is to go to Jakarta to meet the President of the Republic of Indonesia to ask for independence and separate from the Unitary State of the Republic of Indonesia whose members reach 500 people, where everyone who registered and submitted a photo to get an identification card.</td>
<td>Initiation of implementation</td>
</tr>
<tr>
<td>1.116/Pid.B/2013/PN.SRG 2.117/Pid.B/2013/PN.SRG 3.118/Pid.B/2013/PN.SRG 4.119/Pid.B/2013/PN.SRG</td>
<td>In treason, the most important thing is that the perpetrator has a purpose for his/her actions, even if the goal to be achieved is not fulfilled. What is punishable is not not the results or consequences, but the existence of an intent or specific purpose that makes the perpetrator punishable. The element of “treason” cannot be separated from the consideration of the preceding element of “malicious conspiracy”, which means that in considering the element of “treason” the treason itself does not need to be fulfilled, but only by the manifestation of defendant's intent through malicious conspiracy to commit “treason.”</td>
<td>The defendant’s presence in a meeting to plan the raising of Bintang Kejora (Morning Star) flag raising has fulfilled the element of “malicious conspiracy” and was an initiation of “treason”. When the plan succeed, the flag raising was obvious attack against the sovereignty and unity of the Republic of Indonesia’s territory since the purpose of the flag raising is the declare the independence of West Papua Federal State.</td>
<td>Malicious conspiracy</td>
</tr>
<tr>
<td>Judgment</td>
<td>Definition of “Makar/Treason”</td>
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<td>291/Pid.B/2014/PN.Amb</td>
<td>Treason has been committed when the intent and the initiation with the purpose that a part or the whole territory of the state falls to hand of the enemy or separate a part of the state territory. The conduct of an individual or a group of person who has different idealism than the State sovereigntyidealism, such as separating a region from the Republic of Indonesia, although not through armed force, is still a treason. Moreover, in treason it is not necessary to use armed force or violence.</td>
<td>The defendant’s conduct that planned the South Maluku Republic (RMS) initiation commemoration is a malicious conspiracy to treason. The unfinished action to establish the RMS state within the territory of Republic of Indonesia with the purpose to separate it from the Republic of Indonesia and become a sovereign and independent state, was not due to the willingness of the Defendant. Therefore, the initiation of implementation of treason had occurred.</td>
<td>Initiation of implementation</td>
</tr>
<tr>
<td>307/Pid.B/2014/PN.Amb</td>
<td>Treason could be done in two ways: violence and peace.</td>
<td>The defendant’s action in producing banner for the commemoration of RMS initiation was an initiation of implementation of treason.</td>
<td>Initiation of implementation</td>
</tr>
<tr>
<td>297/Pid.B/2014/PN.Amb</td>
<td>For the Defendant’s action to be punished, the requirement is that the intent to conquer the whole or parts of the state under foreign government or the intent to separate a part of the state was fulfilled through the initiation of implementation.</td>
<td>The defendant’s action to blow the trumpet and sang gospel songs followed by rally of the supporters of South Maluku Republic (RMS) was a provocative attempt from the Defendant who had prepared it beforehand to be implemented and collect sympathy and further to gain support for his/her intent to separate the region from the Republic of Indonesia.</td>
<td>Initiation of implementation</td>
</tr>
<tr>
<td>299/Pid.B/2014/PN.Amb</td>
<td>Treason could be said to be committed when the intent and initiation of implementation had occurred with the intent to cause the whole or parts of territory of the State to fall to the hands of the enemy or separate parts of the territory. Moreover, in treason, armed violence or violence is not necessary.</td>
<td>The defendant’s action who sat as “marinyo” or the public communication in South Maluku Republic (RMS) who prepared the rally to commemorate the upcoming birthday of RMS is a part of his/her advocacy for the manifestation of RMS as a sovereign state. By assessing the defendant’s intent and the occurrence of initiation of implementation, the Panel of Judges concluded that treason has been committed.</td>
<td>Treason</td>
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<td>300/Pid.B/2014/PN.Amb</td>
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<td>The defendant’s action in typing, printing, and disseminating rally guidelines for the commemoration of RMS birthday was an obvious participation in the struggle to manifest the Government of RMS in Maluku territory, therefore the elements of treason had been fulfilled.</td>
<td>Treason</td>
</tr>
<tr>
<td>Judgment</td>
<td>Definition of &quot;Makar/Treason&quot;</td>
<td>Considerations on the Defendant’s Action</td>
<td>Type of action</td>
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<td>121/Pid.B/2018/PN.Wmn</td>
<td>From the perspective of criminal law, the notion of treason is a form of crime that can disrupt state security. Attempts to take over part or all the territory of a country and put it under a foreign government or separation of parts of the territory constituted treason. Treason occurred once the intent of the perpetrator becomes apparent with the initiation. Treason does not need concrete evidence regarding the separation of some areas from the Unitary State of the Republic of Indonesia, but is sufficiently supported by evidence regarding the intention or initiation of implementation to make parts of the Unitary Republic of Indonesia separated or to manifest that part of the territory of the country is independent and separated from the Unitary State of the Republic of Indonesia.</td>
<td>The actions of the defendants who were going to hold a thanksgiving event for the inauguration of Defendant I as the Commander in Chief of Election Region XI Yalimo and continued with the raising of the Morning Star flag had shown the deliberation of the defendants’ action. Treason do not adopt the provisions on attempt of crime therefore the failure to complete a particular offense intended by treason will be punished the same as the completion of the offense. Thus, whether the State of Free Papua/West Papua is established, will not eliminate the unlawful nature of the actions committed by the defendants.</td>
<td>Initiation</td>
</tr>
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<td>294/Pid.B/2012/PN.Jpr</td>
<td>Treason or aanslag is an act that intends to overthrow a legitimate government or an act that intends to hand over part or all of the country’s territory to another government or an act that wish to separate all or part of the territory from the country of origin. The act of carrying out the worship and WAETA traditional dance, namely walking around and raising hands while singing and shouting for the word “Independence” is a real act of treason (aanslag).</td>
<td>What the defendant did by raising the morning star flag in the Theys Eluay field and it has been acknowledged that the morning star flag has been used as a symbol of the Free Papua Organization (OPM) fulfills the elements of Article 106 of the Criminal Code. The Morning Star flag-raising activity was cancelled not because of the will of the defendants but because of the actions of the police officers who stopped the actions of the defendants by arresting the defendants, thereby fulfilling the “attempt”.</td>
<td>Attempt/initiation</td>
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<td>211/Pid.B/2020/PN.Amb</td>
<td>Treason or aanslag should not always be interpreted as a criminal act of violence, since what is meant by the word “treason” in Article 106 of the Criminal Code is actually any action taken by someone to harm the legal interests of the State, regarding the territory integrity of the State.</td>
<td>The actions of the Defendant who gathered people, spread the news, and raised the flag were more than a malicious conspiracy because they had initiated the performance of crime. The defendant’s act of coming to the Maluku Regional Police with the aim of reclaiming RMS’ sovereignty, namely from Maluku to the far southeastern Maluku, was an act that harmed the interests of the law of the State and threatened the territorial integrity of the Unitary State of the Republic of Indonesia and showed that the Defendant knew and wanted to separate Maluku from the territory of the Unitary State of the Republic of Indonesia.</td>
<td>Initiation</td>
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<td>212/Pid.B/2020/PN.Amb</td>
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<td>1305/Pid.B/2019/ PN.JKT.PST</td>
<td>Treason does not need to be seen as a form of physical attack using weapons and/or psychological pressure/terror, but a form of behavior that opposes and does not acknowledge the integrity of Unitary State of the Republic of Indonesia, verbally and symbolically.</td>
<td>The actions of the Defendant in the demonstration in front of the State Palace on 28 August 2019 were classified as treason. The use of the Morning Star flag is an expression of acknowledgment that in contrary to the agreement of the Indonesian nation whose flag is Red and White, singing and shouting slogans about &quot;Free Papua&quot; and &quot;Papua is Not Red and White&quot;, as well as shouting &quot;Referendum and Free Papua&quot; simultaneously with the protest participants indicated the intention of the defendant to separate Papua from the Unitary State of the Republic of Indonesia.</td>
<td>Treason</td>
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<td>56/Pid.B/2020/ PN.Ffk</td>
<td>Treason does not need to be seen as a form of physical attack using weapons and/or psychological pressure/terror, but a form of behavior that opposes and does not recognize the integrity of the Unitary State of the Republic of Indonesia verbally and symbolically.</td>
<td>The Defendant’s act in joining as a member of the TPNPB (West Papua National Liberation Army), attending meetings held related to Free Papua Organization (OPM), all the way from Pikpik village to Fakfak City carrying the Morning Star flag and weapons while shouting &quot;Free Papua&quot; were a series of initiation of treason.</td>
<td>Initiation</td>
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<td>30/Pid.B/2020/ PN.Bpp</td>
<td>Did not make any interpretation, instead only referred to Article 87 of the Criminal Code, Indonesian Dictionary, and the Constitutional Court Judgment No. 7/PUU-XV/2017.</td>
<td>The defendant was one of the coordinators and persons in charge of a protest in which anarchist acts occurred, including raising the Morning Star flag and lowering the Indonesian red and white flag. In contrary, the defendant made leaflets which read: it is forbidden to carry sharp objects. It is forbidden to carry out anarchic actions, and all university Student Executive Bodies (BEM) are required to maintain security, and gave them to Mr. DOLVIUS ISAGE to be distributed to each regional coordinator and the community with the aim of participating in the demonstration volume 2; Based on TAP MPR (Declaration of the People’s Consultative Assembly) 8/1998 which revoked TAP MPR 4/1993 on Referendum and Law 6/1999 which revoked Law 5/1985 on Referendum, there are no more opportunity for referendum within Indonesian positive law.</td>
<td>Treason</td>
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<td>34/Pid.B/2020/PN.Bpp</td>
<td>Treason is considered to have occurred (voltoooid delict) before the act actually occurred. Treason only needs to fulfill the elements of intent/purpose (voornemen) and the initiation element. The definition of intent in <em>Memorie van Toelichting</em> (MvT) is a conscious will aimed at committing certain crimes. Meanwhile, the initiation of implementation is when the action proves the strong will of the perpetrator to carry out his/her actions; Treason is not synonymous with violence (geweld). Treason is in the form of all kinds of acts with the intention of a part or all of the territory of the Republic of Indonesia falling into the hands of the enemy or its territory being separated from the unitary territory of the Republic of Indonesia. The form of the act can vary as long as it is an act of implementation in order to achieve a certain purpose; Political expressions with the nature to invite for a referendum are not ordinary political expressions, but are a form of treason and provocation that are unconstitutional. This is because the TAP MPR 8/1998 had revoked TAP MPR 4/1993 on Referendum, and Law 6/1999 had revoked Law 5/1985 on Referendum, so that the Indonesian constitution and laws do not recognize and acknowledge referendum. Thus, there are no more opportunity for referendum within Indonesian positive law, and the invitation for a referendum is a violation of Article 106 of the Criminal Code on treason with the intention of separating parts of the territory of the Unitary State of Republic of Indonesia;</td>
<td>The Defendant and co-Defendant with factual intention were driven by a common desire to eliminate racism, but also requested for a referendum or self-determination for the Papuan people, by shouting the slogans of Papuan which were responded by the demonstration participants with Independence in a demonstration speech which was then stated or put in a joint statement as the initiation, up to positioning the UN General Assembly Resolution 1514 as the right of self-determination for the Papuan people;</td>
<td>Treason</td>
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