

BASIC RIGHTS TO EXPRESS OPINION IMPLICATION THE CRIME OUTRAGEOUSLY

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ABSTRACT

Criminal contempt criminal provisions intended to protect the dignity and honor of every person not only officials or state institutions . Understanding outrageous including defamation. Incitement is very broad sense, not only accuse someone doing something bad, even though that's not its purpose but only criticism or comments in order to become better in the future . The provisions of criminal contempt is often misused in the application to violate the constitutional rights of citizens. The absence of clear limits on insult and defamation in the Criminal Code leads to multiple interpretations in the application level. Given the provision / good rule is to ensure that these rules are not misused for other purposes except for the purpose for the rule itself (lex stricta) . On one side there is a provision of the Criminal Code on defamation that is often applied to citizens who exercise their rights guaranteed by constitutional to issue opinions or thoughts in the form of protest or criticism of government policies or ruler. As a democratic country, Indonesia guarantees freedom of expression of its citizens in the form of protest or criticism. In carrying out these basic rights must be in accordance with applicable law with the aim to uphold the values of unity, and maintain public order. That is the fundamental right of expression does not mean freedom to freely according to his own will or without any restrictions. However, the basic rights in the 1945 Constitution does not provide clear boundaries and detail when criticism and protest against government policies can be categorized as a criminal offense insult. Therefore, needs to be studied further, namely, what the concept of insult or defamation in the Criminal Code, what limits the basic rights of expression guaranteed by constitutional, and any court decision relating to defamation.

Introduction

Since the reform movement that managed to depose President Soeharto, lovers of the life of a democratic society should be grateful because the right to issue opinions / thoughts and the right to organize in the form of delivering criticism or protests against government policies have a place that is guaranteed by the Constitution of 1945. The right to express their opinions very useful generate participation in the wider community to come together to improve and supervise the performance of the government. Criticism or protest is a fundamental right to submit demands to the government should not be inhibited because of constitutional Article 28 states that freedom of thought and conscience is a human right that can not be reduced role in any circumstances. This means that all organs of government must achieve the objective as the regulation contained a fundamental right set forth in order to achieve legal certainty. Violations of the rules that have been made by those who are authorized to create legal uncertainty.

In the state system that recognizes the existence of democracy, the right to expression, the right to obtain information and convey information by using all available channels are carried by individuals / citizens can not be avoided anymore. However, in the implementation of such rights is often restricted to achieve a balance between the fundamental right to the protection of individuals, citizens, and the state. Those rights are fundamental rights that are classic. What is referred to as a fundamental right that is both classic by W. Duk, distinguishes between classical basic rights and basic social rights , as quoted by Peter Mahmud Marzuki, states as follows " The basic rights that are classics there is an obligation for the government for not doing anything to protect human and citizens' basic social rights while in fact there is the obligation of governments to do something Segal in protecting human and citizens.¹

Of the opinion contained the sense that there is a government's obligation not to do something to protect human and people, should not make laws that negate these rights but must respect . This differs from the definition of basic social rights which it put an obligation on the government to do everything for the sake of protecting human and peoples

Rights is something that is inherent in man by nature and because of this the necessary legal rights to safeguard the continued existence of the rights in the pattern of social life . Law as a cultural product to give any inherent substantial human beings who are in social life . The rules are made must not be robbing person and contrary to human existential aspect. Therefore, sanctions against any person who rallied as stated in the articles on defamation in the Criminal Code is clearly a law that deprives a person of the most basic essentials.

Controversy over the application of the articles of insult and defamation apparent from the number of citizens who apply for the right of judicial review of provisions relating to defamation in the Criminal Code to the Constitutional Court (MK), as an insult to the president and vice president, insult to General Authorities and insult offenses as set forth in Chapter XVI raises issues in relation to criminal law requiring legal settlement. In addition, the application of the articles on defamation pose special problems in the criminal law that must be resolved legally. How should the law enforcement agencies to apply the provisions of

¹Peter Mahmud Marzuki, Pengantar Ilmu Hukum (edisi revisi), Kencana Media Group, Jakarta, 2012, h. 168-169.

defamation in a case relating to the right to expression guaranteed by constitutional Article 28. This provision aims to regulate the life of the nation and the state in order not to harm the public will have an impact on the country itself. A number of cases relating to the right to pull out of government policies have been charged with using the articles on defamation contained in the Criminal Code, one case of insult against the president conducted by *Eggi Sudjana*, and *Pandapotan Lubis*. However, these provisions have been declared by the Court has no binding legal force. The Court of consideration can be concluded that the legal rules are made must not conflict with the existent aspects and also may not deprive individuals of life related to the physical aspect. When is the right to expression, the right to obtain information and convey information by using all available channels are carried by individuals / citizens categorized as an insult or defamation?

Article insults contained in Article 310-321 of the Criminal Code, namely chapter insult intended in his personal qualities. Article 207 Penal Code Article insults addressed to the president or vice president as officials. This provision is often used by law enforcement agencies in taking action against a person, unilaterally interpreted according to taste and the law enforcement officers often referred to as "rubber article" against someone who issued a critique of government policy. This provision is clearly a law that deprives an individual basis and is a violation of human rights.

The existence of such article will eliminate the people's control over government policy, so that individuals who are critical of government policies can be categorized as a criminal offense insult. The number of cases associated with the use of the basic rights guaranteed by constitutional in its implementation used by law enforcement officials to cases related to insult and defamation, clearly the legal rules depriving basic rights, therefore the provisions of humiliation deny the existence of conflict with the nature of humanity itself. From the above explanation issue in this paper is the concept and parameters of the right to issue an opinion in the crime of insult. Therefore, the subject matter is relevant to study it can be formulated as follows: Is the right to issue opinions can categorize as a criminal offense insult, when a criticism or protests against government policies can be categorized as a criminal offense insult.

ii. Right To Issue Opinion Guaranteed By Law

Why the right is placed as something very precious. The existence of rights can not be separated from the nature of humanity itself, which is created by God, as stated by Peter Mahmud that the right is a package in the creation of humans as beings that have physical aspect and existential aspects. Recognized or not by the law of the right to remain there as a part of human existence itself. Furthermore, Article 1 of Law No. 39 of 1999 on Human Rights said that human rights are a set of rights inherent in the nature and existence of human as a creature of God Almighty and the own grace that must be respected, upheld and protected by the state law, government and everyone for the respect and protection of human dignity”.

From the provisions of the Act and opinion Mahmud Peter can be said that the legal protection in accordance with the rights of every individual for the purpose of protecting the conflict or to create equality in a society that feels more equitable.

System of constitutional law recognizes human exist to basic rights such as the right to expression and the right not to be prosecuted based on retroactive law is a human right that is inherent from birth. In social life, in the public interest is considered to be poured in the general regulation with the aim of interests were protected. But any democratic as social life of the state and nation, it is not possible the rules that can accommodate all these interests.² Furthermore, Peter Mahmud Marzuki stated as follows:

"Man has the will. Freedom of the will is what distinguishes between humans and animals and other living things. What do the animals is based on instinct or instinct, but what the human being is based on the will or intention. The freedom of the will on the one hand and the fact that humans are physically vulnerable creature that makes human creates social rules as a means of integrating the group in the face of other groups in order to survive in this group³

Rights is something that is inseparable from the nature of humanity itself, and can be implemented for these rights must be incorporated into the legislation. The rule of law in the form of legislation contains rules of a general nature is guidelines for individuals to behave in social life, both in the individual and in the relation fellow with the community. In constitutional stated that depriving a person's basic rights guaranteed by the Constitution is a violation of human rights will lead to legal uncertainty. The provisions of the articles on defamation in the Criminal Code is contrary to the physical aspects of basic rights, namely, the right to expression and the right to organize. Application of the crime of contempt of the Criminal Code is the criminalization of the basic rights inherent in human beings. Therefore, the article of insult and defamation are clearly the rule of law made by those who are authorized to make rules that are general have taken away a person's basic rights guaranteed by the constitution and is a violation of human rights will lead to legal uncertainty. In addition, the provisions of the articles on defamation in the Criminal Code is contrary to the physical aspects of basic rights, namely, the right to expression and the right to organize. In this regard Peter Mahmud states that such regulations and the implementation of such rules give rise to legal certainty, and allow for *predictability*⁴

Definition of rights can be found in the theory of the nature of the rights, which focuses on the theory of the will to the will or choice and the other theory or theories interests of expediency.⁵ The position of the right is not only in the civil law alone but

²Peter Mahmud Marzuki, Loc.cit

³Peter Mahmud Marzuki, Ibid.

⁴Peter Mahmud Marzuki, Ibid., h.137

⁵ Peter Mahmud Marzuki, Ibid., h. 150

covers all aspects of the law. Laws are made because of the rights with the intention to defend the public interest rather than the interests of individuals in order to maintain a balance between respect for human rights with the protection of individual rights, the citizens and the state.

Humans are social beings cultured, born to live free with their rights inherent in human nature, the common good, so that the social gap can not be justified, therefore, necessary to safeguard the continued existence of legal rights in the pattern of social life. One of the rights that are naturally inherent in human beings is the right to issue an opinion in the sense of a restriction of freedom to do all that does not harm others, so in using their right-but shall not exceed the limits set by other community members to enjoy their rights. These limits are not defined in the law, but because of the right to issue legal opinions it is necessary to safeguard the continued existence of the rights in the pattern of social life. One of these rights is the right not to be prosecuted based on retroactive law in accordance with the principle of legality. Deviations to this would cause legal uncertainty.

The right to expression should be in accordance with the values and norms. Critical attitude a person is defined as social criticism is a manifestation of the right to issue a mind that government action is not distorted and according to the rules is a manifestation of the role that is balanced between the interests of individuals, society and the state for not doing deviations. The government does not need to be allergic to criticism. Of criticism is an expression of the community's disappointment over government policy must be understood as an evaluation of the achievement of objectives. Forms of participation of the individual against the policies that have been taken by the government has been controversial in its implementation which give rise to the impression of criminalization.

Definition of defamation offense has been developed in accordance with the values that exist and live in the community, thereby defamation can not be used to inhibit freedom of expression, in the form of criticism and protest against government policies, or official authority. Article defamation in the Criminal Code is very vulnerable to be used by the holders of power and law enforcement agencies dealing with Article 27 and 28D (1) and Article 28F of the 1945 Constitution was inevitable therefore necessary restrictions on the aforementioned article by seeking a balance between freedom is a fundamental right man with the protection of individuals, society and the State. Additionally, freedom of expression should be limited by moral, paying attention not to violate the procedures and should not harm others in order to maintain the integrity of national unity.

Moral and ethical element to be put forward in the speech in order to bring public order, national security, public morality, and ensuring the rights of the community. Freedom of expression should not be done freely without regard to further restrictions exist. Therefore, the role of law enforcement officers is needed in order to maintain public security and order together to avoid humiliation in the Penal Code chapter and impress their criminalization. Limitations or parameters of freedom of expression guaranteed by the 1945 Constitution is something that should agreed by the parties so that deviations to the rules that have been created by those authorized to make rules lead to legal uncertainty. So far the government should not create rules that negate this fundamental right because it would hamper the efforts of communication, information, right to express thoughts verbally, in writing and expression of the attitude that is guaranteed by Article 28, 28E paragraph (2) and (3) of the 1945 Constitution. The provisions of article should be interpreted as an insult formal it will limit the right to issue opinions.

III. The Implication Of Right To Issue An Opinion In Crime Of Insult

In Chapter II is set on Crimes Against the dignity of the President and Vice-President, in which there are articles 134 and 136bis and Article 137 of the Criminal Code relating to defamation against the President, then in Chapter VIII regulate Crimes Against Sovereign General, and Article foremost is Article 207 of the Criminal Code, then the Chapter XVI of the Criminal Code on defamation, which includes regulated insult against individuals, including defamation. In practice articles on defamation in the Criminal Code be retained because it is considered as a crime that is plaguing the society and is an act that is against the law. This crime is considered incompatible with the tradition or culture that upholds the tradition and culture of the east, is a form of injustice, in violation of courtesy and including defamation prohibited by religious norms.

The sense of humiliation is demonizing others, slander means to tell a lie or untrue to someone who then distributed with the intention of vilifying people. The definition of a good name, said essentially "blackened" means stain, defame the good name of the means to make it worse, tarnished or ugly.⁶ In addition, to clarify rumors in Eggi Sudaja case is the right to information guaranteed by the constitution. Setting the crime of insult in the Criminal Code is intended as efforts to protect the rights of individuals and citizens against arbitrariness actors are not responsible for the use of their basic rights.

The application of the Criminal Code insult against someone who criticized government policies can create legal uncertainty for causing multiple interpretations of whether a criticism or protests against government policies is a form of insult or defamation. When a protest or criticism of government policy can be qualified as a criminal offense insult, does not need to be resolved amicably to find a solution. Are the protests, statement or opinion is criticism or insult against the president or vice president may inhibit communication and acquisition of information as guaranteed by Article 28F of the 1945 Constitution person has the right to issue an opinion which is something inherent in humans either on the physical aspect as well existent aspect that is guaranteed by law. Practice has been controversial because of the basic rights may be subject to existing defamation in the Criminal Code, so that the use of such rights must be balanced with the reason for not annihilate each other among fellow human

⁶Description of Sriyanto present to the Court as aexpert witness of Eggi Sudjana

beings. Reason why that restrict human freedom in the use of basic rights. The use of reason led to the freedom of the will does not negate the freedom of the will of others.⁷

Libel is defamation or insult another person, attacking the reputation or honor of others and spread public knowledge so that can be done orally or in writing, drawing and so on. Understanding is a demeaning insult or denigrate others. In the case of Eggi Sudaja, clarify the rumors are all things that convey a message through the media and so on, which one to listen to someone who is not known for certain, and the second and third is not there at the time delivered rumors, rumors could be true and not⁸. Clarifying the right to information as guaranteed by Article 28F of the constitutional provision which states that everyone has the right to communicate and obtain information ... and convey information by using all available channels in accordance with the legal principles set forth by Feurbach in theory *vom psychologischen zwang* her. Legal rules are made must not conflict with human acknowledge aspects and also may not deprive individuals of life related to the physical aspect.

According to R. Susilo, insult is attacking the honor and reputation of a person. Honorary who attacked the honor of the good name of honor is not in the sexual field. There are six (6) kinds of humiliation, which is despised orally, despised by letter, slander, insult lightly, pitted be libelous, the allegation is slander. slander means the words lie or without justification distributed with the intention of vilifying others, tarnish or harm another person's name.⁹ Defamation derived from the word that means blackened stain, defame the good name of the means to make it worse, tarnished or ugly.¹⁰

Meaning humiliation associated with Article 310-321 of the Criminal Code, namely chapter of insults aimed at the personal qualities and Article 207 of the Criminal Code in terms of insults addressed to the president or vice president as officials. This provision is considered contrary to the Constitution because it restricts the freedom to express opinions and are often used by law enforcement officials to cases of protests over government policies. Therefore, the provisions of this insult as the criminalization of freedom of expression.

Article humiliation in Article 310 of the Criminal Code mentioned by intentionally attacking the honor or reputation of a person with the accused committed a special action with the aim to broadcast allegations to the general public ". Use of this article should take into consideration the development of the basic social values in a democratic society because it has an important role and value of the underlying formulation of the rights possessed by every individual. The value of information and the formation of public opinion is difficult to separate, so that the law is necessary to maintain the viability of the nation, so that the necessary laws are in line adjustment.

Submission information is unbalanced and tendentious is a character assassination, usage rights are unwarranted, without any purpose without a pedestal right to harm others with the intent to disruption of the person. The right to expression is telling the truth even though pose a risk, but it must be done in objectivity, and delivered with extreme caution so as not to cause undesirable effects or interfere with the rights of others. Humans are required to convey the truth with all the risks that would be faced in a way that does not harm others. Impartial information and are based on information that is precise and accurate and true but also issue an opinion educating people for freedom itself but to the rule of law and the values of truth. The word will play an important meaning in writing the accuracy of the theme and presentation of the facts and information that is not correct. The mention anything rubbing is solely to humiliate, harass and defame.

The use of defamation of the Criminal Code is a reflection of a nation's civilization, so the existence of defamation can be seen from the absence of provisions in the Penal Code norms and application of these norms by the public prosecutor. Therefore, its existence should be limited so as not to be used to inhibit criticism and protest against government policies. In addition, the article is an insult to legal uncertainty due to multiple interpretations that are contrary to the right to freedom of thought expressed verbally, in writing and expression guaranteed by Article 28, 28E paragraph (2) and (3) of the 1945 Constitution Implementation of Article 28 E Paragraph (3) UUD 1945 is necessary to distinguish between criticism, defamation and slander and insult so that democracy can only function and be * a dead letter ". Criminal Code adheres to the principle of opportunity, whether the person acts committed an insult / defamation or criticism / protest is the authorized public prosecutor or a criminal court judge, depending on the public prosecutor whether to charge or not.

Rights to express their opinions in public is not allowed to be used to harm others, but there is an obligation to respect the rights and freedoms of others and morals that must be put forward in order to realize the integrity and unity of the nation and order in society. Therefore the basic right of the individual to express their opinions in the form of criticism / protest becomes necessary to make corrections, evaluation and assessment as the embodiment of the use of basic rights such as the realization of public reforms in order to achieve better results. Community participation should be increased with the use of these basic rights as a means to control and balance against the power of the run, so that deviations can be reduced in order to realize the fulfillment of public welfare that includes, well-being in the areas of economic, social and cultural subjects.

IV. Conclusion And Suggestion

⁷Peter Mahmud Marzuki, Loc.Cit.

⁸Description of Effendi Gozali, present of the Court as expert wittnes

⁹ R. Soesilo, Kitab Undang-undang Hukum Pidana (KUHP) Serta Komentar-komentarnya Lengkap Pasal Demi Pasal, Politea, Bogor, 1996, h. 25

¹⁰Description of Sriyanto, Loc.cit

1. Conclusion

The right to expression is something that is inherent in man either on the physical aspect and the existent aspect guaranteed by law. Critical attitude associated with the use of such rights must be placed in a relation of legal protection in accordance with the rights of every individual, community and country. so the use of such rights must be balanced with the reason for not annihilate each other among fellow human beings.

Criticisms to the government related to the performance and responsibilities in the expanding tasks assigned by the community. Therefore, the provision of criticism to the government must be understood as a manifestation on public participation in order to realize the welfare of society.

Practice, there has been a controversy for the basic rights inherent to the human being can be subjected to defamation in the Criminal Code giving rise to legal uncertainty. The existence of multiple interpretations in their application to someone who threw a criticism or protests against government policy can be charged with defamation in the Criminal Code impede the right to expression guaranteed by Article 28F of the 1945 Constitution.

2. Suggestion

Criticism or protests against government policies is a form of participation of the wider community to unite fix the work and responsibilities of the holders of power. In criticism should be based on the values that exist in society and law is necessary to maintain the viability of the nation and the State.

The right to issue an opinion that can be either criticism or protests against government policies must be done correctly, based on the fact that the objective and must be delivered is delivered with extreme caution so as not to cause undesirable effects or interfere with the rights of others. Therefore, the use of criticism or protest conducted by tendentious is a character assassination that could harm others.

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