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The Urgency to Use the Rabat Plan of Action in the Hate Speech Offense

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Abstract

The broad spectrum of hate speech makes it difficult for law enforcement officials to identify which speech can be punished. This difficulty creates uncertainty in law enforcement and potentially triggers injustice. Therefore, this article emphasizes the importance of assessing the multidimensional aspects accommodated in the Rabat Plan Action instrument to determine hate speech. The Rabat Plan of Action instrument is one of the international human rights instruments drafted to handle acts of hate speech without regard to the right to freedom of expression. The Rabat Plan of Action has six elements: context, position and status of the speaker, intention, content and form of speech, range, and possibility and potential for harm. In this article, Rabat Plan of Action was applied to the case of Bambang Tri Mulyono, who believed that President Joko Widodo's diploma was fake and his speech had been uploaded on a YouTube video. The simulation results confirm that the Rabat Plan of Action can effectively provide directions for extracting legal facts and related events so that law enforcement officials can find clues in determining the occurrence of hate speech. Based on these results, the Rabat Plan of Action should be adopted at the national level to complement the legal instruments for handling acts of hate speech.

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Introduction

Freedom of expression has been universally acknowledged as an integral component of human rights. However, it is susceptible to misuse as a vehicle for disseminating hate speech. In such instances, it becomes imperative for nations to exercise regulatory measures that curtail this right, preventing its abuse and the violation of other rights and freedoms.

Currently, there is no globally accepted common definition of hate speech. However, for legal sanctions to be appropriately applied, it is essential to establish clear parameters that distinguish between expressions constituting hate speech and those falling within the ambit of freedom of expression. Consequently, an international instrument known as the Rabat Plan of Action has been developed to aid law enforcement officials in discerning whether an expression qualifies as hate speech, subject to punitive measures, or simply falls within the realm of freedom of expression.

The Rabat Plan of Action will deconstruct the social impact caused by various expressions. This is especially relevant in the context of changing political and media landscapes, wherein statements made by public servants or politicians have a higher social impact than statements made by regular people.¹ Audrey Fino contends that, in the lack of a universally accepted definition of hate speech, the Rabat Plan of Action could potentially become an anomaly if not equipped by a robust legal framework and an integrated and systematic approach within the realm of human rights, criminal law, and humanitarian law.²

Within the context of Indonesia, incidents of hate speech on social media have seen an increase. Data provided by the Biro Pembinaan dan Operasional Badan Reserse Kriminal Polri³ indicates that, in 2021, there were 14 recorded cases, while, in the first half of 2022 (January-May), this number surged to 33 instances of hate speech. One of the more recent and prominently publicized cases involved allegations against Bambang Tri Mulyono (Bambang), who made disparaging remarks about President Joko Widodo on the Gus Nur 13 Official YouTube account.⁴ In the uploaded video, Bambang asserted that President Joko Widodo's academic credentials were fraudulent, even taking an oath, 'bermubahala,' under the guidance of Sugik Nur Rahardja (Gus Nur), the channel's owner.

Bambang contended that President Joko Widodo had utilized a counterfeit diploma when registering as a presidential candidate during the 2019 general election. Subsequently, Bambang initiated legal proceedings against President Joko Widodo, alleging an unlawful act related to the use of the forged diploma. This lawsuit was

¹ Judit Bayer, 'High-Impact Hate Speech by Persons of Authority: A Lower Threshold Needed?' (2021) 61 *Hungarian Journal of Legal Studies* 269 <<https://akjournals.com/view/journals/2052/61/3/article-p269.xml>>.

² Audrey Fino, 'A Critique of the UN Strategy and Guidance on "Hate Speech": Some Legal Considerations' (2023) 41 *Netherlands Quarterly of Human Rights* 190 <<http://journals.sagepub.com/doi/10.1177/09240519231211815>>.

³ Pusiknas Bareskrim Polri, 'Berani Unggah Ujaran Kebencian, Siap-Siap Dihukum 6 Tahun Penjara' (pusiknas.polri.go.id, 2022) <https://pusiknas.polri.go.id/detail_artikel/berani_unggah_ujaran_kebencian,_siap-siap_dihukum_6_tahun_penjara> accessed 9 November 2022.

⁴ Rahel Narda Chaterine and Novianti Setuningsih, 'Penggugat Ijazah Jokowi Jadi Tersangka Ujaran Kebencian Dan Penistaan Agama' (*Kompas.com*, 2022) <<https://nasional.kompas.com/read/2022/10/13/20412831/penggugat-ijazah-jokowi-jadi-tersangka-ujaran-kebencian-dan-penistaan-agama>> accessed 6 January 2023.

registered under case number 592/Pdt.G/2022/PN Jkt.Pst.⁵ However, the lawsuit was later withdrawn,⁶ as Bambang himself was arrested as a suspect for various offenses, including religious blasphemy, hate speech, and the dissemination of fake news. These charges were brought in accordance with the provisions stipulated in Article 156a, letter of the Indonesian Criminal Code (KUHP), Article 28, paragraph (2), in conjunction with Article 45A, paragraph (2) of the Electronic Information and Transactions Law (ITE Law), and Article 14 of Law Number 1 of 1946 concerning Criminal Regulations.

Several salient aspects of this case, such as the presence of religious elements, the utilization of social media (specifically YouTube), and the dynamics of power relationships, render it an intriguing subject for analysis using the Rabat Plan of Action framework. This article aims to elucidate the utilization of the Rabat Plan of Action assessment criteria in analyzing the case and endeavors to offer guidance to law enforcement officials in determining whether Bambang's actions can be legally categorized as acts of hate speech, potentially rendering them subject to the provisions of Article 28, paragraph (2), in conjunction with Article 45A, paragraph (2) of the ITE Law. It is important to note that Bambang's case is currently under the process of witness examination in a court of law, and, therefore, the analytical conclusions in this article are not preemptive and remain independent of any court decision. Nevertheless, this article can serve as a valuable reference for law enforcement officials in the application of the Rabat Plan of Action framework when confronted with similar anomalies in cases involving hate speech, often perceived as encroachments on the right to freedom of expression.

Research Method

The author compiled this article using normative juridical research methods with statutory, conceptual, and case study approaches. Marzuki claims that this research

⁵ Ardito Ramadhan, Dian Erika Nugraheny and Novianti Setuningsih, 'Jokowi Digugat Soal Ijazah Palsu, Istana: Kalau Tak Disertai Bukti, Gugatan Mengada-Ada' (*Kompas.com*, 2022) <<https://nasional.kompas.com/read/2022/10/04/18123041/jokowi-digugat-soal-ijazah-palsu-istana-kalau-tak-disertai-bukti-gugatan>> accessed 10 January 2023.

⁶ Rahel Narda Chaterine and Aryo Putranto Saptohutomo, 'Jadi Tersangka Ujaran Kebencian, Bambang Tri Mulyono Dan Sugik Nur Dijerat Pasal Berlapis' (*Kompas.com*, 2022) <<https://nasional.kompas.com/read/2022/10/13/21014291/jadi-tersangka-ujaran-kebencian-bambang-tri-mulyono-dan-sugik-nur-dijerat>> accessed 10 January 2023.

methodology is carried out by locating legal rules, legal principles, or legal doctrines that are used to produce new arguments, theories, or conceptions as recommendations to solve the legal difficulties faced.⁷

Legal material is collected through library research or literature studies related to the legal issues being studied, especially the Bambang hate speech case and the Rabat Plan of Action instrument. Legal material regarding the Bambang case comes from various reports in the national electronic media in Indonesia.

Based on the legal materials obtained, the hate speech case experienced by Bambang will be simulated based on six aspects of the Rabat Plan of Action assessment, the results of which can be used as a reference for handling the case by law enforcement officials in a more practical manner.

The Hate Speech Case of Bambang and Hate Speech Regulations in Indonesia

In late 2022, Bambang initiated a legal case concerning President Joko Widodo's alleged falsification of his elementary, middle, and high school certificates. Subsequently, Bambang was arrested and identified as a suspect. He was held at the Rumah Tahanan Bareskrim Polri Jakarta⁸ on charges related to hate speech and blasphemy. Based on police report Number LP/B/0568/IX/2022 Bareskrim Polri dated 29 September, 2022, Bambang and Gus Nur were involved in spreading hate speech and religious blasphemy through two video contents uploaded on the Gus Nur 13 Official YouTube account belonging to Gus Nur,⁹ entitled: (i) GUS NUR: MUBAHALAH BAMBANG TRI DI BAWAH AL-QUR'AN -BLOKO SUTO- SEKARANG SIAPA YG PENDUSTA? PART 1; dan (ii) SIAPA YANG MENGHAMILI ISTERI BAMBANG TRI? ANAK SIAPAKAH ITU? YA ALLAH -JAHAT SEKALI- PART II.¹⁰ These videos are no longer accessible through the Gus Nur 13 Official YouTube account but can be found on the Bloko Suto Channel YouTube account, also owned by Gus Nur. In these videos, Bambang expressed

⁷ Peter Mahmud Marzuki, *Penelitian Hukum* (Pranada 2008) 35.

⁸ Rahel Narda Chaterine and Dani Prabowo, 'Polri Tahan Sugik Nur Dan Bambang Tri Mulyono Di Rutan Bareskrim Polri' (*Kompas.com*, 2022) <<https://nasional.kompas.com/read/2022/10/17/11243081/polri-tahan-sugik-nur-dan-bambang-tri-mulyono-di-rutan-bareskrim-polri>> accessed 10 January 2023.

⁹ *ibid.*

¹⁰ *ibid.*

his belief, based on research he conducted at Joko Widodo's school¹¹ and during college,¹² that President Joko Widodo's school diploma was counterfeit. Bambang also claimed that additional evidence would be presented in the forthcoming book 'Jokowi Undercover 2', which was under development.

In response to Bambang's statements, Gus Nur invited him to engage in a 'mubahala oath' under the Quran to alleviate the perceived burden of being frequently labeled as mentally unstable and a liar. Bambang accepted this invitation and followed Gus Nur's pronouncement of the oath. At the video's conclusion, Bambang emphasized his intention not to harbor hostility toward anyone due to his statements in the video. He sought a fair evaluation of his statements by various concerned parties. Gus Nur, on the other hand, asserted that the video conversation aimed to elicit responses from the public and relevant parties regarding Bambang's allegations about President Joko Widodo's diploma, which he believed to be forged. The legal proceedings in Bambang's case remain ongoing, with the examination of witnesses from the defendant scheduled for a later stage.¹³

In Indonesia, hate speech on social media is governed by Article 28, paragraph (2) and Article 45A, paragraph (2) of the ITE Law. These provisions penalize intentional dissemination of information intended to incite hatred or hostility based on ethnicity, religion, race, or inter-group relations. Offenders may face up to six years in prison and/or a maximum fine of 1 billion rupiahs. It's important to note that these laws address information dissemination rather than prohibiting hate speech, which is defined under Article 20, paragraph (2) of the International Covenant on Civil and Political Rights.¹⁴

¹¹ Bambang stated that former students were forced to admit to being classmates of President Joko Widodo, the discrepancy between the timing of certificate issuance and the school period. See Gus Nur, "Part 1 - Perdana Bambang Tri Podcast Dengan Gus Nur - Mubahalah - Jokowi Itu Pembohong!!", Bloko Suto Channel, dipublikasikan tanggal 27 September 2022, video: 15.41-17.15, 18.03-19.30, and 19.58-20.48, available at <https://youtu.be/pCzUVVREtY>, accessed 13 January 2023.

¹² Bambang stated that President Joko Widodo did not understand the passing grade mechanism, there was recognition from the supervisor, and even during lectures, President Joko Widodo had used someone else's identity, namely on behalf of Hari Mulyono, including using someone else's diploma photo. See Gus Nur, "Part 1 - Perdana Bambang Tri Podcast Dengan Gus Nur - Mubahalah - Jokowi Itu Pembohong!!" video: 25.44-26.15, 26.50-27.10, and 29.15-29.30, accessed 13 January 2023.

¹³ Pengadilan Negeri Surakarta, case register Number 319/Pid.Sus/2022/PN Skt, *RI melawan Bambang Tri Mulyono*, (2022). See Pengadilan Negeri Surakarta, 'Sistem Informasi Penelusuran Perkara' (PN Surakarta, 2023), <http://sipp.pn-surakarta.go.id/index.php/detil_perkara#> accessed 19 February 2023.

¹⁴ Indonesia has ratified the International Covenant on Civil and Political Rights and legalized it through Undang-Undang Nomor 12 Tahun 2005.

The UN Office of the High Commissioner on Human Rights (OHCHR) recommends caution in punishing hate speech,¹⁵ given its diverse manifestations. Differentiating between forms of expression poses challenges for law enforcement, potentially leading to uncertainty and injustice. This issue must be weighed against the fundamental right to freedom of opinion and expression, enshrined in Article 19 of the Universal Declaration of Human Rights. To address these complexities, experts worldwide have developed the Rabat Plan of Action as an evaluative tool.

Rabat Plan of Action and Simulation of its Use in the Bambang Case

The Rabat Plan of Action, adopted by the OHCHR,¹⁶ provides guidelines for evaluating whether an action qualifies as hate speech that can be subject to criminal charges. It constitutes a criminal offense when all of these criteria are met: *context of the statement, speaker's position or status, intent to incite audience against target group, content and form of the statement, extent of its dissemination, and likelihood of harm, including imminence.*¹⁷

The *context of the statement*, focuses on assessing the situation and conditions that generally took place when the speaker carried out his actions and occurring a social and political context. This shows how vulnerable the utterances of hate speech are based on social and political perspective. Context assessment will see how hate speech has an influence, tends to trigger, or is very likely to incite discrimination, hostility, or

¹⁵ OHCHR is the UN High Commissioner for Human Rights, and reports to the UN Secretary-General. See United Nation Human Rights, 'High Commissioner', <https://www.ohchr.org/en/about-us/high-commissioner>, accessed 15 February 2023. OHCHR recommendations are contained in the *Annual Thematic Reports 2012 A/67/357 Hate Speech and Incitement to Hatred*, which also recommends how to combat hate speech effectively by not limiting the right to freedom of opinion and expression, <https://daccess-ods.un.org/tmp/2304637.43209839.html>, accessed 15 February 2023. See United Nations, *United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences*, September 2020, <https://www.un.org/en/genocideprevention/hate-speech-strategy.shtml>, accessed 15 February 2023.

¹⁶ United Nation Human Rights, "Rabat Plan of Action", <https://www.ohchr.org/en/freedom-of-expression>, accessed 20 February 2023. The Rabat Plan of Action is the result of conclusions and recommendations on a series of activities by world thinkers organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR) during the period February 2011 to October 2012 in Vienna, Europe; Nairobi, Africa; Bangkok, Asia; Santiago de Chile, America; and ending in Rabat, Morocco.

¹⁷ United Nations General Assembly, "Annual report of the United Nations High Commissioner for Human Rights A/HRC/22/17/Add.4 - Addendum - Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred," (United Nation Digital Library, 2013), <https://digitallibrary.un.org/record/746343>, accessed 20 February 2023.

violence against the intended target. Therefore, this context aspect is closely related to the aspect of intention.

In Bambang's case, he claimed that, based on his research, President Joko Widodo's diploma for the 2019 Presidential Election was fake. This speech, in the political context, has implications for the President's legitimacy and election accountability. Notably, during the video's upload, Indonesia was grappling with post-pandemic recovery¹⁸ and political discussions about extending the President's term for up to three unconstitutional terms,¹⁹ contributing to a busy media landscape covering social, political, and economic issues. Based on the video, both Bambang and Gus Nur cast doubt on President Joko Widodo's legitimacy because Bambang's claim about the fake diploma remains unchallenged.²⁰ While the overall context supports Bambang's speech, law enforcement officials must delve into the video's background to gain a more comprehensive understanding of the context and Bambang's intentions as the speaker during the trial.

Furthermore, it is necessary to assess *the position and status of the speaker*. The aspect will identify how are the speaker's identity and influence in society, in terms of how Bambang's position is when making speeches and his position and influence on the audience of Gus Nur 13 Official YouTube account, which is used as a medium for dissemination. The position and influence of the speaker's position will show how likely hate speech will be accepted and trusted by the audience. Therefore, law enforcement officials who process cases must assess whether the speaker knows his behavior and understands the consequences of what he has said, including assessing in terms of the speaker's intention.

In this case, Bambang's position in the video is in the capacity of an ordinary citizen, not as a public official, political figure, educator, or public figure. However there

¹⁸ Kementerian Koordinator Bidang Perekonomian, *Siaran Pers HM.4.6/575/SET.M.EKON.3/10/2022: Tak Hanya Bersiap Hadapi Krisis Global, Indonesia Juga Tengah Menuju Endemi Covid-19*, Jakarta, 11 October 2022, <https://www.ekon.go.id/publikasi/detail/4616/tak-hanya-bersiap-hadapi-krisis-global-indonesia-juga-tengah-menuju-endemi-covid-19>, accessed 25 February 2023.

¹⁹ Tatang Guritno, 'Wacana Perpanjangan Jabatan Presiden Tiga Periode, Dilawan Demokrat, Diingatkan Nasdem' (*Kompas.com*, 2022) <<https://nasional.kompas.com/read/2022/08/30/07092931/wacana-perpanjangan-jabatan-presiden-tiga-periode-dilawan-demokrat>> accessed 25 February 2023.

²⁰ Gus Nur, "Part 1 - Perdana Bambang Tri Podcast Dengan Gus Nur - Mubalah - Jokowi Itu Pembohong!!" Bloko Suto Channel, dipublikasikan tanggal 27 September 2022, video: 12.05-13.54, available at <https://youtu.be/pCzUVVREtY>, accessed 25 February 2023.

have been several incidents that questioned President Joko Widodo's identity involving Bambang. In 2017, Bambang was convicted of a hate speech case against President Joko Widodo for posting content (images and writing) on his Facebook social media related to a book he wrote, based on Court Decision Number 47/Pid.Sus/2017/PN Blora dated 29 May 2017.²¹ Bambang's book, 'Jokowi Undercover Melacak Jejak Sang Pemalsu Jatidiri Prolog Revolusi Kembali ke UUD 45 Naskah Asli', contains information about President Joko Widodo which mentions some background information that differs from the identity reported by President Joko Widodo to the Komisi Pemilihan Umum.²² In addition, Bambang has also sued President Joko Widodo for having committed an unlawful act in the form of making untrue statements and/or providing false documents in the form of diplomas.²³ In the end, the lawsuit was withdrawn because Bambang was detained because of this hate speech case. Therefore law enforcement officials need to carry out an in-depth assessment of aspects of the speaker's position and status during the trial as well as their relation to the aspect of intention.

The intention aspect will assess whether the speech can fulfill the element of incitement to discriminate, hostility, or violence. The existence of negligence or carelessness/negligence in utterance is insufficient as a reason or basis to make an act of hate speech or merely an act of distributing or circulating speech material. Therefore, determining the intent or intentions of the speakers becomes very difficult and also depends on the experience of law enforcement officials. Law enforcement officials can assess the intention of Bambang by looking at the tendency of the response given by the audience in the comments section. Identification was carried out by paying attention to the trend of the number of positive and negative comments on the video in question, including how the host of the show, Gus Nur, reacted. In the video, Gus Nur's response

²¹ Rosana, 'Vonis 3 Tahun Penjara Untuk Penulis Buku Jokowi Undercover' (*Pengadilan Negeri Blora*) <<http://pn-blora.go.id/main/index.php/berita/berita-terkini/937-vonis-3-tahun-penjara-untuk-penulis-buku-jokowi-undercover>> accessed 26 February 2023.

²² Rezki Alvionitasari, 'Buku Jokowi Undercover, Polri Telusuri Penggerak Penulis' (*Tempo.co*, 2017) <<https://nasional.tempo.co/read/832478/buku-jokowi-undercover-polri-telusuri-penggerak-penulis>> accessed 26 February 2023.

²³ Pengadilan Negeri Jakarta Pusat, Putusan Nomor 592/Pdt.G/2022/PN Jkt.Pst, *Bambang Tri Mulyono melawan Ir.. H. Joko Widodo selaku Presiden RI, dkk*, (2022). Lihat pada Pengadilan Negeri Jakarta Pusat, "Sistem Informasi Penelusuran Perkara," http://sipp.pn-jakartapusat.go.id/index.php/detil_perkara, accessed 26 February 2023.

also doubted the legitimacy of President Joko Widodo's diploma, so it was more toward a negative response by stating that ,if Bambang's statement was true, then Indonesia was led by a President who had falsified data from the start so that his position, including his policies, were invalid.²⁴

Through the ongoing trial, it is also necessary to assess Bambang himself, how he feels about the legitimacy of President Joko Widodo's diploma, and what Bambang's interest is in this matter and assessing *the content and form of speech*, namely by classifying the content of the utterance, such as whether voicing concern, promoting or expressing beliefs, or in the form of utterances that discredit or disgrace the target of the utterance. Meanwhile, regarding the form of utterances, assisted by linguists, it can be classified whether the utterances are in the form of criticism, accusations, the spread of fake news, disinformation, or incitement.

Assessment of the content and form of speech needs to be the main focus of examination in court, assessing the extent to which the said speech was delivered provocatively and directly. It will be reviewed from the form, style, and arguments used, as well as how a balance is achieved with all the arguments presented by the speaker. In Bambang's case, law enforcement officials must be able to determine which content of the utterance Bambang delivered in the uploaded video fulfills the element of sedition. Nevertheless, Indonesian National Police have yet to officially open the two videos in question because they can no longer be found on the Gus Nur 13 Official YouTube account belonging to Gus Nur but can be accessed through the Bloko Suto Channel YouTube account, which also belongs to Gus Nur.

According to those videos on the Bloko Suto Channel YouTube account, Bambang stated under oath that President Joko Widodo's diploma was fake and, therefore, doubted the legitimacy of President Joko Widodo's position and the implications for the policies taken by him. Bambang also stated that he did not want to be hostile to anyone for his statement in the video and wanted his statement to be assessed fairly by examining

²⁴ Gus Nur, "Part 1 - Perdana Bambang Tri Podcast Dengan Gus Nur - Mubalah - Jokowi Itu Pembohong!!" Bloko Suto Channel, dipublikasikan tanggal 27 September 2022, video: 13.30-13.57, available at <https://youtu.be/pCzUVVREtY>, accessed 26 February 2023.

various related parties. Furthermore, Gus Nur said that the conversation in the video was not carried out to spread hatred but rather to invite and ask for responses from the public and related parties regarding Bambang's statement concerning President Joko Widodo's diploma, which was believed to be fake.

The extent of its dissemination aspects will assess the reach of hate speech by the speaker, as well as consider the extent of the community impact and the use of media tools. Concerning this aspect, an utterance can be identified by assessing whether the utterance is public, both the scale and size of the audience; how and the form of distribution; what media is used, what is the primary media, using internet suggestions; how is the frequency, quantity, and scope of communication; how the circulation of the spread of speech is intended, whether in a closed environment or can be accessed easily by the public in general; and whether the listener/receiving party has a way to act according to the incitement uttered by the perpetrator.

In the case of Bambang, where the utterances were carried out through a video uploaded via Gus Nur's YouTube account, which anyone can access, Bambang's actions can be classified as public utterances. Moreover, that YouTube account can be accessed through internet facilities so that the community can access the frequency, quantity, and coverage of communication and its dissemination more easily. Also, uploading videos on YouTube can potentially be disseminated again through various other social media applications, so law enforcement officials must assess how many audiences have shared the video through other social media.

Law enforcement officials also need to show the number of subscribers to the Gus Nur 13 Official account, the number of viewers, the number of likes and dislikes for the intended video, and the number of community interactions in the comments column when compared to other uploaded videos, including the comparison of the number of subscriber account owners before and after the video content is displayed. The extent of its dissemination aspects also considers aspects of the position and status of the speaker so that his actions can reach the wider community. Speech material related to the President also adds value to fulfilling the outreach aspect because the news from various media also supports the dissemination of the speech. In addition, as well as the frequency of

utterances or how often Bambang repeats utterances regarding President Joko Widodo's fake diploma, the material of the two videos intensely focuses on discussing President Joko Widodo's fake diploma and even Bambang taking an oath on this matter. Therefore, the extent of its dissemination aspects, in this case, has been fulfilled relatively.

The last aspect that needs to be assessed based on the Rabat Plan of Action is *the likelihood of harm, including imminence*. An act of hate speech must be able to assess the risk of harm it causes because incitement which is hate speech, is an initial crime. The action recommended by incitement does not have to be carried out to become a crime. Therefore, the risk of harm must be able to and needs to be identified so that the court must determine that there is a reasonable possibility that the said speech will succeed in triggering real action against the victim or target of the utterance.

The assessment of the risk of harm also relates to how the response and involvement of the audience are in the scope of assessing the intention aspect of an utterance. An utterance can cause public unrest, cause commotion, have the potential to divide society, or even trigger or inspire people not only to comment and argue but, for example, to behave negatively according to what is said. Before determining Bambang's action as an act of hate speech, law enforcement officials need to assess whether Bambang's speech can divide society, whether there is any possibility of any harm arising from an utterance, or whether there is an audience group that is moved to do something or behave by the utterance. In this case, it is not only an assessment of the audience's positive or negative comments but has further created a feeling of hatred or hostility among the public or the audience toward President Joko Widodo, who is the target of the hate speech. Identification of the potential dangers that arise or the impact of Bambang's utterances can also be used as a reference, especially for judges in determining matters that can lighten or burden Bambang if it is proven that his words meet the elements of being criminal liability.

In order to determine whether said speech can be subject to punishment without violating the speaker's rights to free opinion, the interrelated six aspects of the Rabat Plan of Action assessment must be considered cumulatively by law enforcement officials. In Bambang's case, the assessment of the six aspects of the Rabat Plan of Action

succeeded in identifying context aspects, the speaker's position or status, and the extent of its dissemination aspects. Meanwhile, an assessment of the aspects of intent to incite the audience against the target group, the content and form of the statement, and aspects of the likelihood of harm, including imminence, still require further elaboration in court.

Based on the simulation, the context assessment finds relevance in Bambang's remarks within the social and political context, particularly the debate over a presidential third term. Regarding the speaker's status, although Bambang is an ordinary citizen, his repeated questioning of President Joko Widodo's diploma requires further examination of his intentions. The simulation revealed that Bambang's speech met the dissemination criteria as it was publicly uploaded on YouTube, easily accessible via the internet, enhancing its reach. Consequently, the aspects of intention, content or form of the statement, likelihood of harm, and imminence is essential for law enforcement officials to determine whether Bambang's actions constitute incitement or hostility, potentially leading to criminal prosecution under Article 28, paragraph (2) in conjunction with Article 45A, paragraph (2) of the ITE Law.

Benefits and Urgency of Implementing the Rabat Plan of Action in Indonesia

Handling of cases of hate speech carried out through social media is based on the provisions of Article 28 paragraph (2) of the ITE Law, which consists of several elements that must be proven fulfilled, namely: (i) every person; (ii) intentionally and without proper; (iii) disseminate information; (iv) aimed at creating feelings of hatred or hostility toward specific individuals and/or groups of people based on ethnicity, religion, race, and inter-group (SARA). That regulation focuses on the prohibition of disseminating information, not the prohibition of carrying out hate speech.²⁵ Even though there is a difference in meaning with acts of hate speech which should be utterances that contain elements of incitement or move other people to trigger discrimination, hatred, or hostility, and in the context of the ITE Law, these actions are carried out through electronic means. Acts of hate speech carried

²⁵ Putusan Mahkamah Konstitusi Nomor 76/PUU-XV/2017, tanggal 28 March 2018, 70.

out through electronic means will be subject to more severe criminal penalties because the distribution and dissemination of information through electronic media is relatively faster, has a broader reach, and massive impact.

At the operational and technical level, law enforcement for acts of hate speech uses references including: (i) Surat Edaran Kapolri (SE Kapolri) Nomor: SE/6/X/2015 tentang Penanganan Ujaran Kebencian (*Hate Speech*); Nomor: SE/2/11/2021 tentang Kesadaran Budaya Beretika untuk Mewujudkan Ruang Digital Indonesia yang Bersih, Sehat, dan Produktif, which regulates forms of hate speech; and (ii) Keputusan Bersama Menteri Komunikasi dan Informatika RI, Jaksa Agung RI, dan Kepala Kepolisian Negara RI Nomor 229 Tahun 2021, Nomor 154 Tahun 2021, Nomor KB/2/VI 2021 tentang Pedoman Implementasi atas Pasal Tertentu dalam UU ITE. Although the Joint Decree has emphasized that the primary offense of Article 28 paragraph (2) of the ITE Law is not committing hate speech but spreading hate speech, the elements of Article 28 paragraph (2) of the ITE Law have not accommodated elements of incitement or moving other people. The element of causing hatred or hostility focuses on the impact of hate speech that has appeared and can be felt, namely hatred or hostility, so that must be proven in court. On the other hand, the Joint Decree states that hate speech can occur even though the impact of hatred or hostility has not actually occurred and is sufficiently marked by content inviting, influencing, moving the public, inciting, and bringing into conflict.

The occurrence of an anomaly in the regulation of the prohibition of hate speech through social media has now been anticipated by the enactment of the new KUHP. Article 28 paragraph (2) jo Article 45A paragraph (2) of the ITE Law, has been amended into Article 243 paragraph (1) of the new KUHP,²⁶ whose elements are broader than the norms in the previous ITE Law. The new KUHP provides a lower penalty than the provisions in the ITE Law. Sanctions that were initially in the form of imprisonment for a maximum of six years and/or a fine of up to Rp. 1 billion in the ITE Law are now subject to imprisonment for a maximum of four years or a maximum fine of category IV in the

²⁶ *Undang-Undang tentang Kitab Undang-Undang Hukum Pidana*, UU Nomor 1 Tahun 2023, LN Tahun 2023 No. 1, TLN No. 6842, Pasal 622 ayat (1) huruf r dan ayat (10) huruf c.

new KUHP. However, this new KUHP has only been effective for three years since its promulgation on January 2, 2023,²⁷ so the Rabat Plan of Action needs to be considered for use during this transitional period.

Simulating the Rabat Plan of Action in the Bambang case offers guidance for law enforcement officials in determining potential punishment for speech. Neglecting these six Rabat Plan of Action aspects can lead to inadequate case handling, as officials may try to fit facts into statutory criteria, risking arbitrariness and infringing on freedom of expression rights in hate speech cases. The Rabat Plan of Action instrument's role is to complement, not negate, existing statutory hate speech regulations. However, the use of the Rabat Plan of Action has not received full attention from countries because it is a 'soft law' formally.²⁸

Since being adopted as one of the international human rights instruments in 2012, the Rabat Plan of Action has not been designated as a legal instrument/convention and is only limited to a recommendation for use as a guideline.²⁹ OHCHR has just published the Rabat Plan of Action instrument in 32 languages because it was triggered by a 'tsunami of hate' during the COVID-19 pandemic.³⁰ Likewise, in Indonesia, Komnas HAM stated that the Rabat Plan of Action was still in an initiation position to be used as a law enforcement instrument in handling hate speech cases.³¹

The slow dissemination of the Rabat Plan of Action in countries is because the implementation of the six aspects of assessing a case is considered quite difficult, very

²⁷ *Undang-Undang tentang Kitab Undang-Undang Hukum Pidana*, UU Nomor 1 Tahun 2023, LN Tahun 2023 No. 1, TLN No. 6842, Pasal 624.

²⁸ Burkhard J Berkmaann, 'Blasphemy, Religious Defamation and Hate Speech: A Comparison of The European Court of Human Rights and The Rabat Plan of Action' in M Christian Green, T Jeremy Gunn and Mark Hill (eds), *Religion, Law and Security in Africa* (African Sun Media 2018) 66.

²⁹ Statement by Michelle Bachelet, UN High Commissioner for Human Rights, at the end of her visit to Malaysia in October 2019. See United Nation Human Rights, 'Press conference by UN High Commissioner for Human Rights Michelle Bachelet at the end of her visit to Malaysia' <https://www.ohchr.org/en/statements/2019/10/press-conference-un-high-commissioner-human-rights-michelle-bachelet-end-her>, accessed 4 March 2023.

³⁰ United Nation Human Rights, 'Threshold Test on Hate Speech Now Available in 32 Languages' (2020) <<https://www.ohchr.org/en/stories/2020/05/threshold-test-hate-speech-now-available-32-languages>> accessed 4 March 2023.

³¹ Komisi Nasional Hak Asasi Manusia, 'Keterangan Pers Nomor: 007/Humas/KH/II/2021' (www.komnasham.go.id) <<https://www.komnasham.go.id/index.php/siaran-pers/2021/02/23/144/keterangan-pers-nomor-007-humas-kh-ii-2021.html>> accessed 4 March 2023.

flexible, and depends on the experience of the law enforcement officials themselves and the readiness of the state, primarily related to the development of the official and local language in force. Another reason is that hate speech occurs not only directly but is also carried out covertly³² by using the local language. On the other hand, one of the challenges encountered upon implementing the Rabat Plan of Action in Indonesia pertains to the growing usage of the Indonesian language and the vast array of regional languages, in which 718 languages across 2,560 regions in the country.³³ Another challenge emerges from the nature of the Rabat Plan of Action as a soft law policy document, lacking formal binding power over countries. Consequently, its utilization remains greatly constrained, compounded by the limited evidence showcasing its effectiveness in other nations, thus lacking substantial impetus for widespread adoption.

The state's readiness is also influenced by the development process of the democratic journey because it is closely related to the right to freedom of expression. Therefore determining acts of hate speech requires a multidimensional assessment³⁴ by applying the Rabat Plan of Action. Because the implementation of Rabat Plan of Action has been proven to be able to influence the process of extracting legal facts, which is more focused as in the Bambang's case simulation, the instrument should be adopted immediately at the national level as a complement to legal instruments for handling acts of hate speech. This is in accordance with Audrey Fino's research³⁵ that performing the Rabat Plan of Action needs to be balanced with an adequate legal framework, so that there are no more allegations of criminalization attempts by law enforcement officials or efforts to silence the right to freedom of expression, especially if there are power relations involved in a case.

³² Fabienne Baider, 'Covert Hate Speech, Conspiracy Theory and Anti-Semitism: Linguistic Analysis Versus Legal Judgement' (2022) 35 *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique* 2347 <<https://link.springer.com/10.1007/s11196-022-09882-w>>.

³³ Badan Pengembangan Bahasa dan Perbukuan, Kementerian Pendidikan dan Kebudayaan, 'Bahasa dan Peta Bahasa di Indonesia' (*petabahasa.kemdikbud.go.id*) <<https://petabahasa.kemdikbud.go.id/index.php>> accessed 15 March 2024.

³⁴ Baider (n 32).

³⁵ Fino (n 2) 190-213.

Conclusions

The Rabat Plan of Action provides a valuable framework for law enforcement officials when dealing with hate speech cases while ensuring the protection of the fundamental right to freedom of expression. In this regard, it is prudent for law enforcement officials to thoroughly scrutinize utterances using the Rabat Plan of Action's six key aspects before concluding that an expression qualifies as hate speech deserving punishment. The application of the Rabat Plan of Action to Bambang's case shows that the speaker's context, position or status aspects, and the extent of its dissemination aspects are fulfilled. In contrast, the intention aspects, content and form aspects of speech, and the likelihood of harm, including imminence, still require further examination.

It is essential to acknowledge that, due to limited data and restricted access to the uploaded videos, not all aspects can be considered cumulatively in the assessment. Nonetheless, the simulation results indicate that, at a minimum, the Rabat Plan of Action can offer guidance for law enforcement officials as they navigate legal facts and related events. It helps officials determine whether the statements made by Bambang indeed constitute hate speech that warrants legal action.

Implementing the Rabat Plan of Action is not without its challenges. Its effectiveness depends not only on the experience of the law enforcement officials applying it but also on the linguistic and cultural context within each country. However, there is a compelling case for the Rabat Plan of Action instrument to be swiftly adopted and integrated into positive law. By doing so, countries can address regulatory inconsistencies in handling hate speech cases, and law enforcement officials can benefit from a standardized approach to implementing the Rabat Plan of Action, thus promoting more consistent and fair enforcement of hate speech regulations.

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