



THE NEED TO PROTECT FREEDOM OF EXPRESSION ON THE INTERNET THROUGH A HUMAN RIGHTS-BASED IN INDONESIA

Anak Agung Ayu Nanda Saraswati¹

ABSTRACT

As the main instrument to regulate cyber activity, the most significant threat to freedom of expression on the internet in Indonesia comes from the Law No. 11 of 2008 on Electronic Information and Transactions (ITE Law). Instead of being a momentum to restore the according to human rights principles, the purpose of this paper it to analyze how the 2016 revised ITE Law still creates problems that violate freedom of expression and human rights principles. The results shows that the new law could still potentially suppress the right to freedom of expression and silence legitimate expression such as criticism. The Law has caused people of choosing silence over the existing socio-political conditions in the community for fear of being considered insulting or defamation hence prisoned. Therefore the need to improve several articles becomes crucial. It is also urgent for Indonesia to establish an independent regulatory body that has the authority to clarify and limit the regulation of internet content in accordance with human rights principles.

Keywords: *Freedom of expression, human rights, defamation, ITE law, Indonesia*

¹ Anak Agung Ayu Nanda Saraswati is a lecture at the Faculty of Law, Brawijaya University under the Department of International Law

INTRODUCTION

The internet has become an essential tool for carrying out various types of human rights, combating injustice, and accelerating human development and progress. Therefore, ensuring universal access to the internet must be a priority for all countries. In addition to access, freedom of expression must also be protected by states on the internet. At the international level, the development of the internet has been rolled out in the 17th Session of the United Nations Human Rights Council (UNHRC) in a report from the special rapporteur, Frank La Rue, concerning the protection of freedom of opinion and expression on the internet.²

Regulations on internet is one of the challenges of human rights today in Indonesia. Internet has become one of the important aspects of the lives of Indonesian people. According to Internet World Stats 2019, the number of internet users in Indonesia as of 31 June 2019 is 143,260,000 which included 53.2% of Indonesia's population, and 6.5% of Asia.³ Along with the development of the number of internet users in Indonesia, various innovations and problems arise in public. As innovations, the internet has become a medium being increasingly used to support public participation in policy making, as well as bringing public services closer to the community. In addition, advocacy carried out by civil society organizations has also been supported by internet, such as in raising support for solving corruption cases and advocating women's rights against violence.⁴ On the other hand, the protection of human rights on the internet in Indonesia is inadequate. The Freedom on the Net 2018 report from Freedom House places Indonesia in the category *partially free*.⁵ This indicates that Indonesia still faces problems related to gaps in access, filtering, and blocking/censorship, criminalization of internet users, threats to the right of privacy, as well as freedom to use the internet.⁶

The most significant threat to freedom of expression on the internet in Indonesia comes from the implementation of Law No.11 of 2008 on Information and Electronic Transactions (ITE Law) which has become the main instrument for regulating online content on the internet but also criminalizes legitimate expression. This ITE Law is the first law that regulates cyber activities in Indonesia and is often used in conjunction with the Criminal Code (KUHP) against individuals who issue critical opinions on the internet.⁷ Another issue that should be highlighted is related to the Indonesia's tendency to create regulations that limit internet content that is not in line with the principles of

² Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression 2011 A/HRC/17/27.

³ Internet World Stats, 'Asia Internet Use' (2019). accessed on 19 August 2019

⁴ Indriaswati Saptaningrum and Wahyudi Djafar, *Tata Kelola Internet Yang Berbasis Hak: Studi Tentang Permasalahan Umum Tata Kelola Internet Dan Dampaknya Terhadap Perlindungan Hak Asasi Manusia* (Lembaga Studi dan Advokasi Masyarakat 2013) <<https://elsam.or.id/tata-kelola-internet-yang-berbasis-hak-studi-tentang-permasalahan-umum-tata-kelola-internet-dan-dampaknya-terhadap-perlindungan-hak-asasi-manusia/>>. 3

⁵ Freedom on the Net 2018, 'Indonesia' (2018) <<https://freedomhouse.org/report/freedom-net/2018/indonesia>>. accessed on 19 August 2019.

⁶ Tim ELSAM, *Buku Saku Kebebasan Berekspresi Di Internet* (2013) <https://advokasi.elsam.or.id/assets/2015/09/2013_Buku-Saku_Kebebasan-berekspresi-di-internet.pdf>.53-82

⁷ 'Article 19, Defending Freedom of Expression and Information, Menentukan Arah Jalan Raya Informasi Indonesia' (2013) <https://www.article19.org/data/files/Indonesia_Report_BAHASA.pdf>. 1

freedom of expression. Regarding supervision in the online category, in addition to the unclear definition and scope of online content, supervision and control are still within the authority of the government. This situation is exacerbated by the absence of detailed rules regarding procedures for monitoring, as well as an absence of clear category on contents that can be restricted, and reasons for limitation.

In regards to these problems, every country including Indonesia desires the ability of the government to be able to clearly regulate internet governance that guarantees stability and mutual security.⁸ In compiling these regulations, the state must be fully aligned and proportionate to the protection of human rights. Consequently, limitation on freedom of expression as well as content regulation must refer to human rights standards that have been guaranteed in various international human rights treaties. Indonesia has revised its ITE Law however problems still remains, which makes it necessary to establish a constructive and human rights-based system to protect the freedom of expression of internet users.

From the background above, this article intends to analyze the protection of freedom of expression through a constructive and human rights-based in Indonesia. This article is a result of a normative study using a statutory and conceptual approach. The legislative approach is used to analyze a number of national and international human rights instruments that guarantee freedom of expression on the internet. While the conceptual approach is used to formulate the development of understanding and agreement on the concept of online freedom of expression at the international level. The data in this study is obtained from legal materials which include primary and secondary legal sources. Primary legal sources are public and binding legal instruments, namely the International Covenant on Civil and Political Rights 1966 (ICCPR), and a number of UN resolutions on human rights as well as several Indonesian laws and regulations. Secondary legal sources include the results of research and scientific articles related to freedom of expression at national and international levels. In terms of analysis, classification is carried out in accordance with its relevance to each research problem.

I. PROTECTION OF FREEDOM OF EXPRESSION THROUGH HUMAN RIGHTS-BASED

Freedom of opinion and freedom of expression are fundamental rights recognized in a democratic rule of law which upholds human rights. This freedom is one of the fundamental characteristics for individuals or humans in the context of their development. In other words, freedom of expression is absolute since it cannot be separated from the dignity of the individual or the value of humanity itself.⁹ Freedom of

⁸ Leo Kelion, 'UN Internet Regulation Treaty Talks Begin in Dubai' (*BBC News*, 2012) <<https://www.bbc.com/news/technology-20575844>>. accessed, 29 August 2019.

⁹ Edwin Baker, *Human Liberties and Freedom of Speech* (Oxford University Press 1989).4; See also Catherine Pitt, 'Bridging the Human Rights and Development Discourses: Is the Right to Freedom of Expression of Use to Development' (2005).

opinion and expression is a necessity in any democratic society.¹⁰ This freedom causes a flow of ideas and knowledge, which opinions are very useful for the community.

Although the UNHRC Resolution¹¹ reaffirms the need to protect freedom of expression online, international law has long stated that the right to freedom of expression is a compulsory subject. This freedom of expression was first regulated internationally in the 1948 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.¹² This means that everyone has the right to freedom of opinion and to express an opinion; this right includes freedom to hold opinions without intervention, and to seek, receive, and impart information and ideas through any media and regardless of regional boundaries.

The provision shows international recognition that freedom of opinion and freedom to seek, receive, and provide information and ideas through any media, is one of the widely recognized human rights standards in international forums.¹³ The UDHR itself is not legally binding because it is in the form of a declaration, not an international agreement. Although the principles contained in the UDHR are legally binding, the United Nations (UN) considers it necessary to find a legal basis that can bind all nations or countries in the world, namely to form a treaty that can be legally binding.¹⁴ After passing about eighteen years since the acceptance of the UDHR, in 1966 the UN by acclamation agreed the International Covenant on Civil and Political Rights (ICCPR) which also included freedom of expression. In article 19 of the ICCPR, everyone shall have the right to hold opinions without interference. 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 of frontiers, either orally, in writing, or in print, in the form of art, or through any other media of his choice.¹⁵

The rules on freedom of expression on the internet above guarantee that everyone has the right to such freedom in any media he covers (including online) as they have the right to express offline. In July 2011, the United Nations Human Rights Committee (HR Committee), as the body that monitors the ICCPR international treaty, issued General Comment No. 34 related to Article 19.¹⁶ The General Comment was an authoritative

¹⁰ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, European Court of Human Rights, para 49.

¹¹ Human Rights Council United Nation General Assembly, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development' (2012) <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/G12/147/10/PDF/G1214710.pdf?OpenElement>>.29 June 2012.

¹² UN General Assembly Resolution 217A(III), adopted on 10 December 1948, Article 19

¹³ European Convention on Human Rights, Article 10, paragraph 2; P va Dikj and GJH van HOOFF, *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia, Antwerpen 2006) <<http://www.corteidh.or.cr/tablas/24135.pdf>>.774; Philip Alston Steiner and Ryan Goodman, *International Human Rights in Context* (3rd edn, Oxford University Press 2008).639

¹⁴ UDHR not expressly apply to every Nation, but some of its provisions is considered to have acquired with legal force as international customary law since its adoption; See *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).

¹⁵ International Covenant on Civil and Political Rights 1966. Article 19

¹⁶ General Comment No. 34, Article 19: Freedom of opinion and Expression 2011 ICCPR/C/GC/34.

interpretation of the minimum standards guaranteed by Article 19. It is considered as a progressive clarification of international law related to freedom of expression and access to information, which specifically instructive on a number of issues related to freedom of expression on the internet. The General Comment states that Article 19 protects all forms of expression and how they are spread, including all forms of electronic and internet-based expression modes.¹⁷ In other words, as applies to offline, the protection of freedom of expression also applies online.

With regard to freedom of expression and regulations related to content, each restriction must meet the strict criteria specified in international and regional human rights law. Although the right to freedom of expression is a fundamental right, this freedom may be subjected to limitations. The exercise of the rights creates special obligations and responsibilities. Restrictions can only be carried out in accordance with the law and as long as necessary to respect the rights or good name of others; and protect national security, public order, and public health or morals.¹⁸ Therefore, any restriction on the right to freedom of expression must first pass a three part test. The test, which has been confirmed by the HR Committee, requires that the restriction must be determined by law; has a legitimate purpose; adhere to strict tests related to the principle of need and proportionality.¹⁹ The explanation is as follows.

1. First, these restrictions must be regulated by law, which is clear and accessible to everyone (the principles of predictability and transparency). This means that restrictions on freedom of expression must be determined by national law. However, the law that limits these rights must not be arbitrary and without reason. In addition, the state must provide adequate safeguards and remedies against the establishment or application of arbitrary restrictions on these rights. The law must be accessible, not ambiguous, and made carefully and thoroughly, that allows each individual to see whether an action is against the law or not.
2. Second, the limitation must fulfill one of the objectives set out in Article 19 (3) of the ICCPR namely to protect the rights and reputation of others; to protect national security or public order, or public health or morals. This is called the principle of legitimacy. This means that restrictions must be aimed at protecting the legitimate and more important interests of that freedom. The list of interests in Article 19 (3) is an exclusive list, in the sense that only the interests included in that list can be protected as a reason for limiting freedom of expression. International courts rarely overturn any restrictions based on this stage of the test, and jurisprudence on this subject is underdeveloped.
3. Third, it must be proven that a limitation is important and the means of limitation to a minimum is necessary to achieve the main goal (the principles of importance

¹⁷ 'General Comment No. 34 Article 19: Freedoms of Opinion and Expression' (2011) <<https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>>.

¹⁸ International Covenant on Civil and Political Rights. Article 19 (3)

¹⁹ Velichkin v. Belarus, Communication No. 1022/2001, U.N. Doc. CCPR/C/85/D/1022/2001 (2005); Barbora Bukovska, Agnes Callamard and Sejal Parmar, 'Towards an Interpretation of Article 20 of the ICCPR: Thresholds for the Prohibition of Incitement to Hatred Work in Progress, A Study Prepared for the Regional Expert Meeting on Article 20' (2010) <<https://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf>>.

and balance/proportionality). Restrictions on freedom of expression must be necessary for the protection of the interests identified in the second stage of the test. Unlike the two previous tests, this stage of the test presents a fairly high standard of proof that must be met by a State that tries to justify a limitation.

Based on the three part test above, the interpretation of the various provisions of the restriction must be based on the true intentions of the formulation of the provisions concerning the restriction. A more detailed explanation can refer to various official formulations of the permissible restrictions, for example by referring to the General Comment of the HR Committee, referring to international human rights principles (for example the principles of Siracusa,²⁰ and Johannesburg,²¹ and various other guidelines. In addition, it can also base on various decisions of various regional human rights courts, for example the European Court of Human Rights or the Inter-American Court of Human Rights.

The same principles and restrictions also apply to the forms of communication or electronic expressions distributed on the internet. The HR Committee stated in General Comment No. 34, that any restrictions on the operation of a website, blog, or information system based on internet, electronic, and other, including systems to support such communication, such as internet service providers or search engines, are only permitted as long as they are still in accordance with paragraph 3. The permitted restrictions generally must be content specific; a generic prohibition on the operation of a site and a system that is not in accordance with paragraph 3. What is also inconsistent with paragraph 3 is to prohibit sites or information dissemination system from publishing material only on the basis that the information is critical of the government or socio-political system carried out by government.

These principles were approved by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, in a report dated August 10, 2011. In the report, the UN Special Rapporteur identified three types of expressions for online regulatory purposes, namely:²²

1. Expressions which constitute violations of international law and can be criminalized;
2. Expressions that cannot be criminalized but which can justify civil restrictions and demands; and
3. Expressions that do not provide criminal or civil sanctions, but still cause concern in terms of tolerance, courtesy, and respect for other parties.

In particular, the Special Rapporteur clarifies that the types of excluded expressions that must be banned by countries under international law are child pornography, the spread of hatred, public incitement to commit genocide, and advocacy that can trigger

²⁰ The Siracusa Principles on The Limitation and Derogation Provisions In The International Covenant on Civil and Political Rights 1984 E/CN.4/1985/4. American Association for the International Commission of Jurists, Siracusa Principles, on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights 1985

²¹ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information 1996 U.N. Doc. E/CN.4/1996/39.

²² Promotion and protection of the right to freedom of opinion and expression, A/66/290 2011 A/66/290.

incitement to discrimination, violence, or hostility.²³ The four types of expressions tested above are included in the first category of expressions that constitute violations under international criminal law and/or international human rights law and which must be prohibited by the State at the domestic level. However, because they are all restrictions on the right to freedom of expression, they must also comply with a three part test.

Furthermore, legislation that criminalizes these types of expressions must be strictly appropriate and there must be an effective protection against abuse, including supervision and review by an independent and impartial regulatory or tribunal body. Determination of what content to be blocked must be made by a competent authority or judicial body that independent from political, commercial, and unreasonable influence to ensure that blocking is not used as a way to censor. Furthermore, the Special Rapporteur emphasizes that as stipulated in Human Rights Council resolution 12/16 (paragraph 5 (p) (i)), the following types of expressions may not be subject to restrictions, including discussions on government policy and political debate; reporting on human rights, government activities, and corruption in government; engaging in election campaigns, peaceful demonstrations, or political activities, including for peace or democracy; and the expression of opinions and differences of opinion, religion, or beliefs, including those belonging to minority or vulnerable groups.

II. FREEDOM OF EXPRESSION ON THE INTERNET IN INDONESIA

A. Protection of Freedom of Expression in Indonesia²⁴

Freedom of expression is recognized and guaranteed by the 1945 Indonesian Constitution. Although laws relating to human rights had already existed at the time, human rights activist argued that stronger constitutional protection was needed. Provisions which protect human rights are mostly taken from the UDHR which then was stated in Chapter XA, articles 28A to 28J. Freedom of expression itself is regulated in article 28E (2) where every person has the right to freedom of belief, to express his thoughts, in accordance with his conscience. Article 28E (3) guarantees that everyone has the right to express opinions, including the right to seek information, receive and disseminate the information in various forms, and to use available channels. Whereas article 28F states that everyone has the right to communicate and obtain information to develop personal and social environment, and the right to seek, obtain, own, store, process, and deliver information using all types of available channels. In line with the Constitution, the 1999 Law on Human Rights regulate that everyone has the right to communicate and obtain information needed to develop his personal and social environment and has the right to seek, obtain, possess, store, process, and convey

²³ ELSAM (n 6).61; Wahyudi Djafar, Miftah Fadli and Lintang Setianti, *Desain Kebijakan Tata Kelola Konten Internet, Usulan Pelembagaan Dari Perspektif Hak Asasi Manusia* (ELSAM 2017) <<https://elsam.or.id/desain-kebijakan-tata-kelola-konten-internet-usulan-pelembagaan-dari-perspektif-hak-asasi-manusia/>>.31

²⁴ Denny Indrayana, *Indonesian Constitutional Reform 1999-2000* (Kompas Book Publishing, December 2008) 162

information using all types of available means.²⁵ This guarantee of protection is reinforced by the commitment of the Indonesian government to ratify the ICCPR.²⁶

In its development, the right to freedom of expression which also contains the right to information was recognized in later regulations. These regulations include Law No.40 of 1999 concerning the Press, Law No.32 of 2002 concerning Broadcasting, and Law No. 14 of 2008 concerning Openness of Public Information. However, even though the formulation of a normative framework regarding the protection of the right to freedom of expression was a progress, there are weaknesses related to the development of information technology which is one of the mediums used in exercising the right to freedom of expression. All existing regulations do not explicitly confirm the guarantee of their validity in the online domain on the internet. In fact, some of them have the potential to violate the exercise of the right to freedom of expression on the internet.²⁷

B. Freedom of Expression and the ITE Law

Freedom of expression (including the restrictions) was finally regulated in cyberspace or on the internet through Law No.11 of 2008 on Information and Electronic Transactions (ITE Law) adopted on April 21, 2008, which is the first law governing cyber law in Indonesia. The use of information technology and electronic transactions is carried out with the aim to educate the life of the nation as part of the world's information society; develop national trade and economy in order to improve the welfare of the community; increase the effectiveness and efficiency of public services; open the widest opportunity for everyone to advance their thoughts and abilities in the field of optimal and responsible use and utilization; and provide security, justice, and legal certainty for users and providers of information technology.²⁸

Initially, the ITE Law was directed at improving the Indonesian economy which regulates all transactions in cyberspace (e-commerce). However, after it was passed, controversy and polemics appeared in the public due to its thick nuances of restrictions. Such controversy on the ITE Law has arisen since the arrest of Prita Mulyasari in 2009 which was accused violating article 27 (3) concerning defamation. Prita Mulyasari's case began with an e-mail that contained her complaint about the service of the Alam Sutera Omni International Hospital in Tangerang, which was then spread, and resulted in a civil and criminal suit by the Omni International Hospital. Indeed, the Supreme Court's Judicial Review Board acquitted Prita Mulyasari of all charges.²⁹ However, the Supreme Court at the cassation level had ordered Prita to pay compensation for such provisions categorized as defamation. This case arises because of the weaknesses of article 27 (3) related to the multiple interpretations of the notion of "electronic transmission" which is

²⁵ Law No. 39 of 1999 on Human Rights. Article 14 paragraph (1) and (2)

²⁶ Indonesia has ratified ICCPR through the Law Number 12 of 2015 concerning International Covenant on Civil Political Rights on 28 October 2005

²⁷ Saptaningrum and Djafar (n 4).16

²⁸ Law Number 11 of 2008 concerning Electronic Information and Transaction. Article 4

²⁹ Supreme Court Decision No. 225 PK/Pid.Sus/2011

not distinguished between private and public communication. Hence citizens who send SMS, e-mail, or other closed forums is likened to those who write status on Twitter, Facebook walls, and other open social media.

The offense formula contained in the article 27 (3) is that each person; intentionally and without rights; distribute and / or transmit and / or make information accessible electronics and / or electronic documents; has a charge of insult and / or defamation. The problem is not all of these terms are explained in the ITE Law. For example the terms distributing and transmitting are technical terms that are in practice not the same in the offline world of information technology. At the time of the Constitutional Court trial, problems related to the formulation have become a significant debate between the applicant and the government. Such formulation have repeated the problems in the Criminal Code and various other laws related to defamation. This offense formula model has its own consequences where in practice the Court decide differently.

The main problem arise from the prohibited acts. The most problematic articles are in the chapter "Prohibited Actions", which listed in Article 27, Article 28, and Article 29 of the ITE Law. Based on these three articles, content which are prohibited from circulating on the internet includes:

1. Content that is considered to violate decency;
2. Content containing gambling content;
3. Content that contains elements of insult and/or defamation;
4. Content containing elements of extortion and/or threats;
5. Content that spreads false news, causing consumer losses;
6. Hateful content based on racism; and
7. Content that contains a threat of violence.³⁰

From those articles, internet content has become the subject of debate amidst the vortex of criminalization of a number of citizens who use the internet either to disseminate information or produce content (visual, audio, video, or textual). In this context, the law potentially silence the right to freedom of expression and criminalize legitimate expression such as critics. Indeed expression such as hate speech should be prohibited. However, there are various expressions which should not be criminalized. In terms of insult or defamation, although the purpose is to protect one's honor, against this problem, almost every year the UN Human Rights Commission in its resolution on freedom of expression calls for concern about the ongoing abuse of legal provisions on defamation and criminal libel.³¹ In addition, 3 international commissions were formed with a mandate to promote freedom of expression, namely the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. In addition, in December 2002 important statements were also issued that criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with

³⁰ Law Number 11 of 2008 concerning Electronic Information and Transaction. Article 27, 28, and 29

³¹ 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Paragraf 40'.

appropriate civil defamation laws. The problem is that criminal defamation is often used to obstruct government policy discussions and political debate, report on human rights situations, government activities, government corruption, election campaign, peaceful demonstrations or various political activities. Whereas these activities, in the view of the UN Special Rapporteur, cannot be imposed any restrictions at all.

A number of people have been criminalized since the enactment of the ITE Law for the content they publish on the internet. In practice, the application of criminal sanctions is mainly based on the use of the ITE Law combined with the Criminal Code (KUHP) which has claimed several victims. The Southeast Asia Freedom of Expression Network (SAFEnet) notes that since it was first enacted in 2008 and until October 31, 2018, the ITE Law has taken some 381 victims.³² Most victims were charged specifically under article 27 (3) and article 28 (2). Still from SAFEnet, it is also known that since 2008 until the end of June 2018, 49.72% of the cases used article 27 (3) as the basis for reporting a content.³³ The article was mostly used in 2016 with an amount of 54 cases whereas in 2017 there were a total of 32 reported cases. Typically, this ITE Law targets reporting by those who have power, including state and government officials. The pattern of criminal penalties in the ITE Law case also varies. Among other things such as revenge, barter cases, silence criticism, shock therapy, and group persecution.³⁴ In addition to the Prita case in 2008, several examples of cases that emerged include Alexander An in 2012, Florence Sihombing in 2014, Nuril in 2015, and the case of the governor of Jakarta, Basuki "Ahok" Tjahja Purnama in 2016, who were subject to prohibited acts under the ITE Law and the Criminal Code.³⁵

In addition, it is also important to consider proposals to eliminate the criminal provisions for defamation (decriminalization).³⁶ Attempts to fight against the use of criminal sanctions have actually been carried out through the submission of a constitutional review of article 27 (3) to the Constitutional Court. For information, Law No. 11 of 2008 concerning ITE has been tested 7 times in the Constitutional Court, namely the decision of the Constitutional Court Decision No. 50/PUU-VI/2008, Decision No. 2/PUU-VII/2009, Decision No. 5/PUU-VIII/2010, Decision No. 52/PUU-XI/2013, Decision No. 1/PUU-XIII/2015, Decision No. 20/PUU-XIV/2016, and Decision No. 74/PUU-XIV/2016. However, from those 7 cases, only 2 cases were granted by the Constitutional Court. Other were mostly rejected or withdrawn. The Constitutional Court refused to declare the provision unconstitutional and not binding. In its legal considerations, the Court stated that the defamation stipulated in the Criminal Code (offline) cannot reach

³²<https://nasional.tempo.co/read/1143103/pemerintah-didesak-hapus-pasal-karet-uu-ite/full&view=ok>;
<https://www.beritasatu.com/nasional/521564/uu-ite-ancam-kebebasan-berpendapat-dan-berekspresi>; accessed on 19 August 2019

³³ <https://tirto.id/betapa-kecilnya-peluang-untuk-lepas-dari-jerat-uu-ite-cVUm>; Fifink Praiseda Alviolita and Barda Nawawi Arief, 'Kebijakan Formulasi Tentang Perumusan Tindak Pidana Pencemaran Nama Baik Dalam Pembaharuan Hukum Pidana Di Indonesia' (2019) 15 Law Reform 131 <<https://ejournal.undip.ac.id/index.php/lawreform/article/view/23359>>.131

³⁴ <http://id.safenetvoice.org/2018/08/Peluang-Kecil-Untuk-Terlepas-Dari-Uu-Ite/>.

³⁵ <http://id.safenetvoice.org/daftarkasus/> accessed on 19 August 2019

³⁶ Institute for Criminal Justice Reform, 'Catatan Atas RUU Perubahan Pasal 27 Ayat (3) UU ITE Dan Sikap Fraksi-Fraksi Di Komisi I DP' (2016) <<https://icjr.or.id/catatan-atas-ruu-perubahan-pasal-27-ayat-3-uu-ite-dan-sikap-fraksi-fraksi-di-komisi-i-dpr/>>.

the offense of defamation carried out in cyberspace (online). The elements in the Criminal Code provisions are not possible to be fulfilled with the ones online.³⁷ The Constitutional Court decided that article 27 (3) and article 45 (1) as c constitutional because they were in accordance with the democratic values, human rights, and the principles of the rule of law.³⁸

In its later development in 2016, there was a process of revision of the 2008 ITE Law to Law No.19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning ITE. This revision was considered crucial taking into account the high number of victims sued for defamation under the law. However, the revision of several articles to the ITE Law did and still does not necessarily solve problems related to freedom of opinion and expression on the internet. The amendments to several articles did not touch the main problems and needs of a law regulating internet. There are at least 3 concerns.

First, to avoid multiple interpretations of the provisions of insult and/or defamation in Article 27 (3), the ITE Law adds a number of explanations. There is an additional explanation for the terms of distributing, transmitting and/or making electronic information accessible. It was also emphasized that the provision was a complaint offense and not a general offense. This means that according to article 72 of the Criminal Code, the offense can only be complained of by the person who was the victim. Besides that, the criminal element in the provision refers to the defamation and slander provisions stipulated in the Criminal Code.³⁹ This means that it must meet the elements in public and is an interpersonal problem. In Article 310 of the Indonesian Criminal Code paragraph (1) there are 4 important elements that must be met, namely (1) intentional, (2) assaulting one's honor or reputation, (3) by accusing something, (4) for public purpose, then these four elements must be proven in the trial. In fact, often cases of defamation that enter the field of crime are not done publicly for public knowledge.

Second, the decrease in sanctions. On the sanction of imprisonment, there is a reduction in sanctions from a maximum of 6 years to a maximum of 4 years and/or a fine of no more than Rp.1 billion to a maximum of Rp.750 million. While against the threat of criminal violence in Article 29, there is a decrease in the law from a maximum of 12 years to a maximum of 4 years and/or a fine of no more than Rp.2 billion to a maximum of Rp.750 million.⁴⁰ At first glance, the reduction in sentence provides fresh air to the community. However, the problems in the criminal regulation have not been able to reduce violations of freedom of expression, especially the criminalization of legitimate expressions. This means that there is no substantive change between the old law and the new one. Article 27 paragraph (3) continues to restrict freedom of opinion and expression for citizens. The government revision only implies that a suspect in violation

³⁷ See ELSAM, Report of Research on Two Basic Freedoms in Indonesia Contained in the Decision of the Constitutional Court: Study on the Constitutional Court's Decision concerning Freedom of Religion and Beliefs, and Freedom of Expression, 2010, unpublished

³⁸ *Constitutional Court Decision Number 50/PUU-VI/2008 on the Review of Law Number 11 of 2008 concerning Electronic Information and Transaction.; Constitutional Court Decision Number 2/PUU-VII/2009.*

³⁹ General Commentary of the Law No. 19 of 2016 concerning Changes on the Law No.11 of 2008 concerning Electronic Information and Transaction, Article 27 para (3)

⁴⁰ Law Number 11 of 2008 concerning Electronic Information and Transaction. Article 45 (3) and 45 B

of article 27 (3) will not be detained because it is below the threshold of the detention requirement, i.e. the threat of 5 years imprisonment.

Third, the ITE Law strengthens the Government's role in providing protection from all types of disruptions due to misuse of information and electronic transactions by inserting additional authority. In this case, the Government is obliged to prevent the dissemination of electronic information which has prohibited contents and has the authority to terminate access and/or order the electronic system operator to terminate access to electronic information that has unlawful contents.⁴¹ This means that the article authorizes the government to restrict access or distribution of illegal content. The action is based on the government's efforts to protect the public interest from all types of disturbances as a result of misuse of information and electronic transactions. Therefore, the government is required to prevent the dissemination of prohibited electronic information in accordance with statutory provisions.

When linked to the general explanation of the ITE Law, the enactment of the Law is a synergy of three approaches, namely the legal approach, the technological approach, and the socio-cultural-ethical approach.⁴² One of the consideration directed towards the need to pay attention to the religious and socio-cultural values of the Indonesian people in terms of the use of information technology. This context is interesting because the starting point of the basis of consideration is what has led to some controversial articles contained in the ITE Law, especially those related to internet content.⁴³

C. Regulation on Online Content

In regards to the governmental authority, the revised ITE Law model actually shows a state-centric (direct regulation) pattern, which places the government as the sole authority in regulating the internet, including in the formation of regulations, supervision, and control. This pattern is similar to other laws that regulate online content, such as Law No.44 of 2008 on Pornography which authorizes the government (including local governments) to block pornographic content on the internet, and also Law No. 28 in 2014 concerning Copyright which gave the government (Ministry of Communication and Information) authority to block pages that infringed copyrights, after a request from the Ministry in charge of intellectual property rights (Ministry of Law and Human Rights).

Whereas other related laws,⁴⁴ such as the Telecommunications Law, Law No.40 of 1999 concerning the Press, Law No.32 of 2002 concerning Broadcasting, Law No. 14 of 2008 concerning Openness of Public Information, and Law No.33 of 2009 concerning Film, mandate the establishment of an independent body that functions as a regulator,

⁴¹ *ibid.* Article 40 para (2), para (2a), and para (2b).

⁴² Ahmad Ramli, *Cyber Law Dan HAKI Dalam Sistem Hukum Di Indonesia* (Refika Aditama 2004).

⁴³ Djafar, Fadli and Setianti (n 23).⁷⁵

⁴⁴ The Press Law prefers a more self-regulatory approach, meaning that although the law governs the press, the press has its own code of ethics to regulate itself without government interference. While the Telecommunications Law, the Public Information Openness Act, the Broadcasting Law, and the Film Law, prefer a more co-regulate approach, by involving a number of stakeholders in its regulation.

supervisor, and controller. For example, the Law on Press has a Press Council as an independent watchdog,⁴⁵ the Law concerning Broadcasting has the Indonesian Broadcasting Commission as an independent watchdog,⁴⁶ the Law concerning Public Information Openness has a dispute resolution mechanism through the Information Commission,⁴⁷ and the Law concerning Films has a Censorship Institution Film.⁴⁸

This shows the non-uniform procedures for offline and online content. In the offline content category, all monitoring and control mechanisms are carried out through an independent regulatory body, with procedures that specified by law. As for online content, in addition to the unclear definition and scope of online content, the authority of supervision and control is absolutely still the authority of the government. This situation is exacerbated by the absence of detailed rules regarding procedures for monitoring, as well as the absence of clear category of restrictions on the content that can be restricted, and the reasons for the restriction.

Based on that, several parties suggested to the government to use a co-regulation approach to regulate internet content management. The management can be done through an independent body that can be formed through a Government Regulation and technically it is regulated in a Presidential Regulation. That way the government does not directly intervene in internet governance such as content blocking or access restrictions. Internet governance arrangements that involve many stakeholders are in line with the mandate of the ICCPR. For example, article 19 (3) of the ICCPR mandates restrictions to be carried out through national laws or regulations that formally recognized and formed by legislators. Then, it has a legitimate purpose, such as national security, public order, public health/morals, and protecting the rights and reputation of others. Restrictions must be made if very necessary. At last, the procedure of restriction must be clear, transparent, and accountable, and can be tested in court. Therefore, it is important that the government establish an independent body to regulate internet governance. The agency has strong authority so that its decision can be sued in the State Administration Court. The existence of an independent body will clarify the regulation of internet content because the procedure is clear. Those who object to restricted content can also have the right to sue in court.

The paradigm which is always oriented to the management of content censorship (filtering) on the internet ultimately colors the conversation rather than highlights a far more comprehensive aspect of the management of internet content itself. This trend actually arises because a number of internet's content management policies initiated by the government also describe the nature of public policies that care too much about censorship as a form of restriction, rather than tidying up the important elements that support the governance ecosystem itself, such as physical infrastructure, policies for access to information, and so on. As a result, today's internet content management ecosystem is more colored by debates about the content of prohibited and non-prohibited

⁴⁵ Law No. 40 of 1999 concerning Press. Article 15

⁴⁶ Law No. 32 of 2002 concerning Broadcasting. Article 7

⁴⁷ Law No. 14 of 2008 concerning Public Information Openness. Article 23

⁴⁸ Law No. 33 of 2009 concerning Film. Article 58

content. Although this topic is also important, and is actually the substance of what we call internet content management, the real purpose why content governance should be put on the agenda of public policy making is the need to build an information architecture that has now migrated to the digital sphere.

CONCLUSION

As a signatory to the ICCPR, Indonesia is obliged to ensure that the laws, policies, and practices applied in regulating modes of electronic and internet-based expression and their content are in accordance with article 19 of the ICCPR, as set out by the Human Rights Committee. Moreover, Indonesia is one of 82 countries that support HRC's historic resolution on the promotion, protection, and enjoyment of human rights on the internet.⁴⁹

Until today, the existence of the ITE Law has always been linked to freedom of expression. Several provisions in the ITE Law, especially article 27 (3) which regulates defamation and / or defamation, are considered to be contrary to the nature of freedom of expression guaranteed in Article 28 of the 1945 Constitution. In general, both before and after revision, article 27 (3) of the ITE Law, is often seen as the cause of people choosing silence over the existing socio-political conditions in the community for fear of being considered insulting or defamation. The law is often used to suppress freedom of expression and silence criticism. Therefore there needs for improvements to articles that are considered crucial which causes multiple interpretations and used as a toll punish anyone for allegedly committing defamation. For this reason, there are several proposed recommendations so that the provisions in the ITE Law can be in line with international human rights principles. In the context of punishment, it is important to review all the provisions governing criminal punishment, to later eliminate all duplicated criminal acts from the ITE Law that have been regulated in the Criminal Code.

In regards to the practice of blocking internet content, Indonesia needs to specifically provide a space for content regulation that takes into account three elements of testing: (i) the act of blocking content must be regulated by clear laws and accessible to everyone (the principles of predictability and transparency); (ii) the action must fulfill one of the objectives set out in Article 19 (3) of the ICCPR, namely to protect the rights and reputation of others; national security, or public order, or public health or morals (the principle of legitimacy); and (iii) the action must be able to prove its urgency to achieve the main goal (the principles of importance and proportionality). In terms of procedure, since there is no uniformity in handling procedures for offline and online content, it is urgent for Indonesia to establish an independent regulatory body (other than the government) that has the authority to clarify the regulation of internet content.

⁴⁹ The promotion, protection and enjoyment of human rights on the Internet 2012 A/HRC/20/L.13.

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