

LIMITATION OF RIGHTS AS A MANIFESTATION OF DUTIES AND RESPONSIBILITIES PERTAINING TO THE FREEDOM EXPRESSION IN DIGITAL COMMUNICATIONS

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Abstract

The freedom of expression is thriving due to the global use of the internet. The digital era has revolutionized the scope, practices, and even the definition of freedom expression. However, it also evokes a number of social concerns. Offenses such as the circulation of defamation, hate speech, misleading propaganda to the masses, and fraud, for instance, can be found in the internet. Certain limitations deriving from the conditions prescribed by the human rights principles and instruments as well as the national constitution are therefore prudent to prevent the excess of freedom. As a state that abides to the rule of law, Indonesia recognizes the freedom of expression as a manifestation of human rights that is crucial to democracy. While new laws such as the Information and Electronic Transaction Act have been enacted to answer the challenges brought by the digital era upon the freedom of expression, the question of whether the existing laws have accommodated an ideal balance between restriction and protection for the freedom of expression remains a matter worth reviewing. This paper aims to study the limits of the freedom of expression, particularly in the digital context, in the constellation of the Indonesian legal system and how they converge and correlate with one another. Finally, this study concludes that the Indonesian government must protect its citizens from the spread and use of illegal content in electronic communications by enforcing and harmonizing its criminal, private, and administrative law configurations.

Keywords: *freedom of expression; digital communications; human rights; limitation of human rights.*

Abstrak

Penggunaan internet secara global mengembangkan kebebasan berekspresi. Era digital telah merevolusi jangkauan, praktik, bahkan definisi dari kebebasan berekspresi itu sendiri. Namun kenyataan tersebut menimbulkan beberapa kekhawatiran. Tindak pidana seperti penyebaran pencemaran nama baik, ujaran kebencian, propaganda menyesatkan kepada publik dan penipuan telah merajalela di internet. Maka dari itu, pembatasan tertentu yang didasarkan kondisi yang telah ditentukan dalam prinsip dan instrumen hak asasi manusia serta konstitusi diperlukan untuk mencegah penyalahgunaan kebebasan. Sebagai negara hukum, Indonesia mengakui kebebasan berekspresi sebagai manifestasi dari hak asasi manusia yang krusial dalam demokrasi. Meskipun peraturan perundang-undangan baru seperti Undang Undang Informasi dan Transaksi Elektronik telah diundangkan untuk menjawab tantangan yang dibawa oleh era digital terhadap kebebasan berekspresi, terdapat keraguan terkait kemampuan undang-undang yang berlaku dalam mengakomodasi keseimbangan yang ideal antara pembatasan dan perlindungan kebebasan berkespresi, yang menjadi persoalan yang patut untuk dikaji. Karya tulis ini bertujuan untuk mempelajari batasan daripada kebebasan berekspresi, terutama dalam konteks digital, di dalam konstelasi sistem hukum Indonesia dan bagaimana hal tersebut berkonvergensi dan berkorelasi satu sama lain. Terakhir, kajian ini menyimpulkan bahwa pemerintah Indonesia harus melindungi warga negaranya dari persebaran dan penggunaan konten ilegal dalam komunikasi elektronik dengan menegakkan dan mengharmonisasi konfigurasi hukum pidana, perdata dan administratif.

Kata kunci: *Kebebasan berekspresi, komunikasi digital, hak asasi manusia, pembatasan hak asasi manusia.*

I. INTRODUCTION¹

Freedom of expression is the basis of human rights, the source of humanity, and the mother of truth.²

LIU XIAOBO, NOBEL LAUREATE, ON HIS IMPRISONMENT IN CHINA

The freedom of expression is a perennially substantial, if not vital right to any democratic society. It helps individuals to attain self-fulfillment, assists in the discovery of truth, strengthens the capacity of individuals in participating in decision-making, and provides a mechanism by which it would be possible to establish reasonable balance between stabilize and social change;³ and thereby it is only natural that many experts claim the freedom of expression to be most important element of civil and political rights.⁴ It rings true for Indonesia wherein the 1998 Reformation against an authoritarian regime took place, a momentum which has consequently revived the freedom of the expression in the country. As the the nation's democratization progresses, for instance, the national press continues to prevail—indicating the development of freedom of expression in the country. Yosep Adi Prasetyo, the Chairman of the Indonesian Press Council, opined that this could for one be inferred from the quantitative growth of the media since then, accumulating at 47.000 media outlets in 2017—43.500 of which in the form of online media⁵—whereas prior to the Reformation, press publications were subject to, among others, licensing, censorship, and possibilities of ban by the government.⁶

Indonesia has learned the hard way that the freedom of the expression is indeed invaluable, but circumstances prove that certain demarcations must nevertheless be established. Not unlike a double-edged sword, the challenges regarding the freedom of expression that the nation faces today in fact stem from the disparity of its own freedom. While issues relating to the oppression of freedom of expression still persist, the *excess* of freedom begets its own problems due to the constant evolution of technology and the new media, namely the violation of the principles of check and balance and the presumption of innocence, libel, manipulation of information, and misquotation.⁷ The Indonesian Ministry of Communications and Information also denotes that there are around 800 thousand local sites affiliated with the circulation

¹ This article is a revised version of a paper presented in June 2019 at the National University of Singapore, Faculty of Law's annual Asian Law Institute Conference on the Rule of Law and the Role of Law in Asia.

² Michael O'Flaherty, "International Covenant on Civil and Political Rights: Interpreting Freedom of Expression and Information Standards for the Present and the Future" in *The United Nations And Freedom Of Expression And Information: Critical Perspectives*, eds. Tarlach McGonagle and Yvonne Donders (Cambridge: Cambridge Univ. Press, 2015) p. 59.

³ Bagir Manan, *Politik Publik Pers* (Jakarta: Dewan Pers, 2012), p. 85.

⁴ Larry Alexander, *Is There a Right of Freedom of Expression?* (Cambridge: Cambridge Univ. Press, 2005), p. 9.

⁵ This statement was conveyed in a mass media gathering event held by the government of North Sulawesi's Bureau of Collaboration and Public Communication Protocols in 18 August 2017. See Cahya Sumirat, "Pers di Indonesia Relatif Bebas" in *Koran Sindo* (last updated Aug. 21, 2018), http://koran-sindo.com/page/news/2017-08-21/0/20/Pers_di_Indonesia_Relatif_Bebas and Berita Manado, "Dihadiri Ketua Dewan Pers, Olly Dondokambey Buka Gathering Mass Media", (last updated Aug. 19 2017) <https://beritam Manado.com/dihadiri-ketua-dewan-pers-olly-dondokambey-buka-gathering-mass-media>

⁶ See Wikrama Iryans Abidin, *Politik Hukum Pers di Indonesia* (Jakarta: Grasindo 2005), Edward C. Smith, *Pembredelan Pers di Indonesia* (Jakarta: Pustaka Grafitipers 1986), and Tribuana Said, *Sejarah Pers Nasional dan Pembangunan Pers Pancasila* (Jakarta: Inti Idayu Pers 1988).

⁷ Tjipta Lesmana, "Kebebasan Pers Dilihat dari Perspektif Konflik, antara Kebebasan dan Tertib Sosial" *Jurnal Ilmu Komunikasi* 2 (1) (2005), p. 7-8.

of hoaxes and hate speeches in 2016.⁸ These facts suggest that a line needs to be drawn between the protection and restriction of the freedom of expression.

There are several normative bases for such notion, *inter alia* Article 29 of the Universal Declaration of Human Rights (UDHR) and Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia ("*Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*", hereinafter referred to as UUD 1945)—both affirming that a degree of limitation on human rights shall be permitted to protect the rights of others. Furthermore, limitations on the right to the freedom of expression is also prescribed by Article 19 paragraph (3) and Article 20 of the International Covenant on Civil and Political Rights (ICCPR). Freedom has to be regulated so that it can truly be beneficial to the society it affects, and the institution that holds the legitimate power to carry that out is none other than the state. To put this into a legal mindframe, one may refer to the doctrine of state obligation: when a state ratifies an international agreement, it is bound by the law to adhere to the agreement's provisions,⁹ and in that manner, ratifying a human rights instrument such as the ICCPR means that the enforcement of human rights principles becomes an international obligation for the state. This obligation includes the state's positive duty (as opposed to negative duty, which is to refrain from intervening rights) to take action to control the relationships between private individuals, groups, organisations or companies or to implement positive measures to ensure that the standards required by international human rights law are achieved in practice.¹⁰ For example, Article 20 of the ICCPR compels states to regulate against expressions consisting of war propaganda and discrimination.

Indeed, many of the rights guaranteed to the citizens of democratic countries must be limited or qualified—or the scope of rights narrowed—in order to prevent conflicts with other rights or with certain general interests,¹¹ for instance public order. Yet a democratic society should be one in which citizens are exposed to all shades of opinion, regardless of whether this offends the sensibilities of some. In this argument, the public interest is served by a citizenry that is consequently able to make informed choices and it is therefore crucial that conflicting or minority opinions are heard and protected.¹² This means that in a democracy, the state's efforts to uphold order and other public interests cannot in any way negate or overrule the values of freedom and human rights. Through its positive and negative human rights duties, it is the state's role to guarantee the existence of expressions that are both free and responsible, and the law is the state's instrument to achieve the balance between them.

Taking into account the mass and rapid growth of the means of communication in this postmodern era, especially in terms of its ubiquitous correlation with the

⁸ Aulia Bintang Pratama, "Ada 800 Ribu Situs Penyebar Hoax di Indonesia", CNN Indonesia (last updated 29 December 2016) <https://www.cnnindonesia.com/teknologi/20161229170130-185-182956/ada-800-ribu-situs-penyebar-hoax-di-indonesia>

⁹ UNDP Pacific Centre, Pacific Handbook on Human Rights Treaty Implementation (Suva: UNDP, 2012), p. 45. For instance, see International Covenant on Civil and Political Rights (adopted Dec. 16 December 1966, entered into force Mar. 23 1976) 999 UNTS 171 (ICCPR) art 2. The article strictly dictates that states must "respect and ensure" the rights of every individual.

¹⁰ International Bar Association, Human Rights and Parliaments: Handbook for Members and Staff (2011), p. 49 <https://www.ibanet.org/Document/Default.aspx?DocumentUid=7B0B2D39-F3EC-4724-B797-C3CB68C51B57>

¹¹ Dawood Ahmed and Elliot Bulmer, *Limitation Clauses* (Stockholm: International IDEA, 2014) p. 3.

¹² Nicholas Bouchet and Nixon K. Kariithi, *Parliament and the Media: Building an Informed Society*, (Washington: World Bank, 2003) p. 11, <http://documents.worldbank.org/curated/en/503371468162549295/Parliament-and-the-media-building-an-informed-society>.

internet, the question that now arises is: what kind of restrictions can and *should* the state impose on the freedom of expression with regards to the principles that govern the limitation of human rights? With view to the fundamental implications the law has on the freedom of expression, this paper will specifically observe the legal configuration and construction that serve as the foundation of the freedom of the press in Indonesia.

II. FREEDOM OF EXPRESSION IN HUMAN RIGHTS PERSPECTIVE

The freedom of expression is a human right that is recognized and protected by the UDHR, in Article 19, and the ICCPR, in Article 19 paragraph (2). Black's Law Dictionary (2018) defines the of freedom of expression as follows:

[...] The right to say what one wants through any form of communication and media, with the only limitation being to cause another harm in character or reputation by lying or misleading words.¹³

The freedom of expression in a broad sense also serves as the root for other rights such as the freedom of opinion, the freedom of thought, the freedom of religion, the freedom of creativity, and the freedom of research.¹⁴ More importantly, the freedom of expression is the bridge that connects civil rights (freedom from state intervention) and political rights (freedom to encourage state action).¹⁵

The freedom of expression is formed of three components: the absolute right to freedom of opinion; the fundamental but not absolute right to freedom of expression; and the not absolute right to freedom of information.¹⁶ Bell as quoted by McDonagh remarks: "Freedom of information is in the blood which runs in the veins of freedom of expression."¹⁷ This interpretation is supported by Resolution 59 of the United Nations General Assembly as well as the ICCPR. It is based on the rationale that the access to information is actually a precondition for the freedom of expression itself.¹⁸

III. THE LIMITS OF THE FREEDOM OF EXPRESSION

A. Limitations on Human Rights

Ahmed and Bulmer asserts that not all rights can—or necessarily should—be protected in absolute terms.¹⁹ Almost all of the constitutions in the world consist of at least a specific limitation clause over certain rights, and more than forty percent

¹³ The Law Dictionary, What is freedom of expression? [https:// thelawdictionary.org/freedom-of-expression](https://thelawdictionary.org/freedom-of-expression) (last visited Feb. 3 2019).

¹⁴ Manan, *op.cit.*, p. 74.

¹⁵ KONTRAS, *Menguji Pembatasan terhadap Kebebasan Berekspresi dan Hak Berorganisasi yang Dimungkinkan Berdasarkan Perspektif HAM*, p. 5 https://www.kontras.org/data/20170507_Menguji_Pembatasan_terhadap_Kebebasan_Berekspresi_dan_Hak_Berorganisasi_yang_Dimungkinkan_Berdasarkan_Perspektif_HAM_t3rys46u7.pdf

¹⁶ United Nations Commission on Human Rights, General Comment No 10: Freedom of Expression, art. 19 of the Compilation Of General Comments And General Recommendations Adopted By Human Rights Treaty Bodies.

¹⁷ Maeve McDonagh, *The Right to Information in International Human Rights Law*, *Human Rights L. Rev.*, Vol. 13, No. 1, (2013), p. 29.

¹⁸ *Ibid.* at 29.

¹⁹ Ahmed and Bulmer, *op.cit.*, p. 3.

of them incorporate some form of disguised limitation clauses.²⁰ Limitation of rights is different from derogation of rights in the way that it allows a state to violate its obligations to uphold certain rights on the basis of reasons that are unrelated to states of war or emergency.²¹ Theoretically, limitations of freedom can come in two forms: (a) on the basis of self-awareness or self-control, and (b) on the basis of the law.²² This paper will only attempt to study the latter.

The basic paradigm in the limitation of rights is that democracy would blossom if it is accompanied by responsibility and discipline.²³ Hatta states that a democracy that puts too much emphasis on freedom will eventually lead itself to the reign of anarchy which would threaten its very own existence instead.²⁴ According to Mill, the concept of freedom or liberty means that a person is free to do anything he pleases as long as he does not violate the freedom of others.²⁵ In the context of the rule of law, freedom means that a person is free to do or not to do something, provided that there is no law that limits him to do so.²⁶

On another note, numerous international human rights instruments have also been formulated to navigate the operation and limitation of rights. In general, Article 29 of the UDHR stipulates that the exercise of rights and freedoms are subject only to limitations as are determined by the law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. In relation to the freedom of expression, Article 19 paragraphs (2) and (3) of the ICCPR further specify that:

Article 19

- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
- a. For respect of the rights or reputations of others;
 - b. For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20

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

The human rights school of thought construes that the responsibility of a state is to

²⁰ *Ibid.*, p. 6.

²¹ Stapleton in Sara Abiola, *Limitation Clauses in National Constitutions and International Human Rights Documents: Scope and Judicial Interpretation*, (Health Rights, 2010) at 1. <http://health-rights.org/index.php/cop/item/limitation-clauses-in-national-constitutions-and-international-human-rights-documents-scope-and-judicial-interpretation> .

²² Manan, *supra* note 2, at 33-34.

²³ *Id.* at 33.

²⁴ *Ibid.*

²⁵ John Stuart Mill, *On Liberty*, (Oxford: Oxford Univ. Press, 2008) p. 16-17.

²⁶ Bryan Magee, *The Story of Philosophy* (London: DK, 2001) , p. 129.

respect, protect, and fulfill rights.²⁷ As briefly touched beforehand, this responsibility may come in two forms, negative duties (to intervene rights) and positive duties (to do something in order to enact rights). Inasmuch as the freedom of expression is affirmed by Article 19 paragraph 2 of the ICCPR, Article 19 paragraph (3) and Article 20 as shown above assign a positive duty to the state to enforce particular limitations in facilitating the freedom of expression. In practice, the implementation standards for these limitations are also supported by several supporting documents, such as the Siracusa Principles, the Johannesburg Principles, and the Camden Principles. These documents help accommodate the judicial institutions in interpreting the legitimacy of a state's acts of limitation.

The Siracusa Principles, for one, are the official supplementary document to the ICCPR which describes the principles of the limitation of rights. Among other things, it dictates that a limitation of freedom must not jeopardize the essence of the rights concerned,²⁸ and it shall not be applied in an arbitrary manner.²⁹ Every limitation shall be subject to the possibility of challenge and to remedy against its abusive application³⁰ and it cannot be more restrictive than is required for the achievement of its purpose.³¹ On another front, as per the Johannesburg Principles, certain expressions should not be restricted nor deemed a threat to national security i.e. criticisms of the government and government policies.³²

Ultimately, Manan contends that the real issue surrounding the limitation of rights is not a matter of whether it is necessary or unnecessary but of the concrete scope and form of the limitation.³³ It is therefore imperative for limitations, in the words of the Camden Principles, to be "clearly and narrowly defined and to respond to a pressing social need."³⁴

B. Limitation Clauses

Limitation clauses are provisions that establish particular limitations on rights by (a) allowing specific restrictions on rights, and (b) restricting such restrictions so that rights are protected from excessive restrictions.³⁵ Limitation clauses can be found in international human rights instruments, such as the UDHR and the ICCPR (see above), or a country's constitution.³⁶

²⁷ Inter-Parliamentary Union (IPU) and UNCHR, Human Rights: Handbook For The Parliamentarians No. 26 (Geneva: IPU, 2016), p. 31.

²⁸ UNCHR, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, art. 2, Sep. 28 1984, E/CN.4/1985/4. In Indonesia, the Siracusa Principles are often referenced by experts in the national Constitutional Court proceedings. Some of the examples are Constitutional Court Decisions No. 7/PUU-XV/2017, No. 13/PUU-XV/2017, No. 41/PUU-XV/2017, and No. 71/PUU-XIV/2016.

²⁹ *Ibid.* art 7.

³⁰ *Ibid.* art 8.

³¹ *Ibid.* art 11.

³² International Centre Against Censorship, The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Nov. 1996, Principle 7

³³ Manan, *op.cit.*, p. 11.

³⁴ International Centre Against Censorship, The Camden Principles on Freedom of Expression and Equality, Apr. 2009, Principle 11.1.

³⁵ Ahmed and Bulmer; *op.cit.*, p. 4.

³⁶ Even one of the oldest human rights documents in the world, Déclaration des droit de l'homme et du citoyen (1789), incorporates a limitation clause.

This means that when certain conditions are met, a government can legitimately limit a universal right to accommodate legitimate state interests.³⁷ Limitation clauses usually state that the limitation of a constitutional right or a human right must first be prescribed by law and that law must be necessary and reasonably required to fulfill certain social or public purposes.³⁸ Overall, however, the state is free to determine how far and in what way it wishes to limit the human rights in question as long as the terms and conditions in relevant clauses are met.³⁹

This fact points out that the construction of a limitation clause, which will be utilized as the state's legitimate tool to limit its citizens' rights, is nothing less than imperative. Depending on the discretion of the lawmakers, some constitutions are equipped with provisions that are more detailed than others. Nevertheless, in principle, a limitation clause has two possible forms: general limitation clause and specific limitation clause.⁴⁰ A general limitation clause validates the government's general authority to limit freedoms, for example Article 28J of UUD 1945, while a specific limitation clause only pertains to rights that are explicitly defined, such as Article 19 paragraph (2) of the ICCPR.

IV. THE LIMITS OF FREEDOM OF EXPRESSION IN INDONESIA: A LEGAL CONFIGURATION

As a democratic nation abiding to the rule of law, Indonesia recognizes and upholds the guarantee of human rights with respect to their national ideology, "Pancasila". Pancasila, set out in the fourth paragraph of the UUD 1945 Preamble, encompasses five values: (1) belief in the One and Only God, (2) just and civilized humanity, (3) the unity of Indonesia, (4) democratic life led by wisdom of thoughts in deliberation amongst representatives of the people, and (5) social justice for all the people of Indonesia. Subsequently and within the philosophical framework of Pancasila, Indonesia accedes to the human rights values that are comprised in the notion of the freedom of expression. The guarantee of such freedom is mainly regulated under Articles 28, 28E paragraph (3), and especially 28F of UUD 1945,⁴¹ which read as follows:

Article 28

The freedom to associate and to assemble, to express written and oral opinions, *et cetera*, shall be regulated by laws.

Article 28E

(3) Every person shall have the right to the freedom to associate, to assemble and to express opinions.

Article 28F

Every person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall

³⁷ Ryan Thoreson, "The Limits of Moral Limitations: Reconceptualizing "Morals" in Human Rights Law", *Harvard Intl. L J.* Vol. 59 No. 1 (2018), p. 197- 198.

³⁸ Abiola, *op.cit.*, p. 1.

³⁹ Manfred Nowak, *Introduction To The International Human Rights Regime* (Leiden: Martinus Nijhoff, 2003), p. 63.

⁴⁰ Ahmed and Bulmer, *supra* note 10, at 16-19.

⁴¹ Ismail Hasani, ed., *Dinamika Perlindungan Hak Konstitusional Warga Negara* (Jakarta: Pustaka Masyarakat Setara, 2013) p. 281-282.

have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels.

Moreover, the constitutional guarantee for the freedom of expression cannot be separated from the state responsibility clause that is attached to it, which obliges the state to fulfill the rights as stipulated in Article 28I paragraphs (4) and (5).

Nonetheless, UUD 1945 also employs a general limitation clause that is Article 28J, designating that:

Article 28J

- (1) Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state.
- (2) In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.

The existence of Article 28J alongside other provisions from international human rights instruments ratified by Indonesia means that the rights and freedoms named in the constitution cannot be exercised in absolute terms. In this fashion, it can be inferred that Article 28J is built atop the contexts of Article 19 paragraph (2) of the ICCPR.

A number of statutes are put in effect thereupon to operationalize the aforementioned constitutional norms, which can be catalogued as follows (*see* Table 3.1).

V. FREEDOM OF EXPRESSION IN THE CONTEXT OF DIGITAL COMMUNICATIONS

A. Indonesian Regulations Concerning the Freedom of Expression in Digital Communication Platforms

Prior to the existence of the internet as a form of digital communication, limitations on conventional communication platforms already existed under the Press Act, Broadcasting Act, and the Cinema Act as means for the government to prevent the violation of decency and public order. Hence, the limitations set upon the existing one-way communication platforms are automatically applied to the internet as a two-way, mass communication media.

With regards to international human rights limitation clauses stipulated in the ICCPR and its Annex, the Siracusa Principles, and other international conventions including the Johannesburg Principles and Camden Principles, restrictions on freedom of expression are set by the laws of Indonesia, which can be categorized based on the information being communicated: (*see* Table 5.1)

1. Personal Data

The Indonesian context of private information is defined in the Population Administration Act as “[...] information regarding an individual which is stored, and assured of its truth and secrecy”. As a part of privacy rights, under this law the state has a responsibility to protect personal data of every person. Furthermore, the revision

of this act imposes criminal responsibilities to every person who distributes personal data unlawfully. The privilege of the utilization of personal data can only be done on the basis of national security, police, and judicial activities according to the Government Regulation No. 37/2007 as a derogation of the Population Administration Act.

Likewise, the Electronic Information and Transaction Act assures privacy rights where it is specified that any form of utilization of personal data through an electronic media must be with the approval of the owner of the personal data. If not, by law the owner can exercise his/her right to conduct a civil lawsuit for the losses suffered.

The act and its derogative regulations not only impose responsibilities to the government to protect personal data, but also electronic system operators and its users. This stipulation is further regulated under the Government Regulation on Operations of Electronic Systems and Transactions, where electronic system operators must assure that the utilization of any personal data in their system must be with permission from its owner, and form internal privacy policies to protect their users' personal data. The responsibilities of electronic system operators to protect personal data include the processes of display, announcement, delivery, distribution, opening of access, and destruction of personal data.⁴²

Users are also given the responsibilities to protect their own personal data from any misuse and utilize their personal data in accordance to their interests only, according to Article 27 of the Minister of Communications and Information Regulation on Personal Data Protection.

2. Public Information

Public information is defined by Public Information Act as any information created, stored, managed, sent and/or received by a public institutions regarding activities of state governance and/or operations of public institutions. The act imposes responsibilities to state agencies and the users of public information, where public information provided by state agencies must be accurate, true and not misleading, while users of public information must mention the source of the information and utilize it in accordance to laws and regulations. Although in nature public information must be accessible for the public to seek and utilize, there are exceptions regulated under Article 17 of this act wherein certain types of information is prohibited of its access and utilization, such as state intelligence data.

3. Other forms of information communication limitations

a. Protection of copyrighted works

Copyrighted works as an expression of information is protected by the Copyright Act. In this regulation, it is ruled that anyone who wishes to utilize a creation, especially for commercial purposes must obtain permission from its creator as the holder of economic rights. The permissions to utilize a creation includes as follows: publishing, copying, translating, adapting, arranging, transforming, distributing, display, announcement, communication and leasing.

b. Expressions of pornography

Expressions that contain pornographic content is prohibited in Indonesia under the Pornographic Act. In Article 4 of the regulation, activities of production, reproduction, duplication, distribution, broadcast, import, export,

⁴² Indonesia, Peraturan Pemerintah Penyelenggaraan Sistem dan Transaksi Elektronik [Govt. Reg. on Operations of Electronic Systems and Transactions], PP No. 82 Tahun 2012, LN No. 189 Tahun 2012 [Govt. Reg. No. 82 Year 2012, SG No. 189 Year 2012], art. 15.

offer, trade, rent, and provision of explicit pornography is prohibited. Moreover, explicit pornographic content is defined as follows: (i) sexual intercourse, including uncommon intercourses, including deviant intercourses; (ii) sexual violence; (iii) masturbation; (iv) nudity; (v) display of genitals; and (vi) child pornography.⁴³

c. Expressions on communist-related ideologies

As a country with political and social history against communism, Indonesia prohibits the ideology even to this day. After the fall of the Sukarno regime, the anti-communist New Order regime enacted the People's Interim Consultative Assembly Resolution (TAP MPRS) No. XXV/MPRS/1966. The Resolution stipulates that activities of propagation and development of communist, leninist, and marxist ideology and any kind of apparatus and media to support the activity is prohibited. Subsequently, the studies of the ideologies must be under guidance of the government.⁴⁴

Despite the democratization of Indonesia within the Reformation Era, the resolution is strengthened by the encament of Revision of the Criminal Code Regarding National Security Act in 1999 which imposes criminal sanctions against any activities of propagation of communist-related ideologies and expressions of intention to change Pancasila as national principles in any medium.

In short, the Indonesian legal system encourages every person to have an awareness about the communication platforms on which information is exchanged—private communication or public information platforms—and realize the responsibilities behind the action of transferring such information.

d. Hoaxes

Internationally, recorded cases of hoaxes can be found from at least the 1600s, when the nature of information dispersal and news gathering made the creation and dissemination of hoaxes relatively easy. On the 20th century and beyond internet **hoaxes are easier to create than those on traditional media as anyone can create a webpage or post information to blogs. Countless posts on the internet have carried inaccurate news stories and columns.**⁴⁵

In Indonesia, hoax is regulated as early as 1946 – a year after the nation's independence and still used by law enforcers until today. The Article 14 of the Criminal Law Act (1946) which prohibits "[...] broadcast of false news or announcement with intention to cause confusion among the people"⁴⁶ is still considered applicable in the age of digital media. Moreover, the Electronic Information and Transaction Act also prohibits hoax and misinformation that

⁴³ Indonesia, Undang-Undang Pornografi [Pornography Act], UU No. 44 Tahun 2008, LN No. 181 Tahun 2008, [Act No. 44 Year 2008, SG No. 181 Year 2008].

⁴⁴ Indonesia, Ketetapan MPR tentang Pembubaran Partai Komunis Indonesia, Pernyataan Sebagai Organisasi Terlarang Diseluruh Wilayah Negara Republik Indonesia Bagi Partai Komunis Indonesia Dan Larangan Setiap Kegiatan Untuk Menyebarkan Atau Mengembangkan Faham Atau Ajaran Komunis/Marxisme-Leninisme, [People's Interim Consultative Assembly Res. on Abolishment of Communist Party of Indonesia and Prohibition of Activities of Propagation and Development of Communist/Marxist/Leninist Ideology], TAP MPRS No. XXV/MPRS/1966

⁴⁵ Robert Dardenne, "Hoax: Falsehood", Encyclopedia Britannica, <https://www.britannica.com/topic/hoax#ref335043>, (last visited Jun. 24 2019).

⁴⁶ Indonesia, Undang-Undang tentang Peraturan Hukum Pidana [Criminal Law Act], UU No. 1 Tahun 1946 [Act No. 1 Year 1946].

is propagated “[...] with intention and without right that results to a consumer loss in an electronic transaction”.⁴⁷ Therefore, the Electronic Information and Transaction Act differs from the other where the stipulation is designed to prevent hoaxes broadcasted in e-commerce transactions and only shall be acted upon if it results to consumer damage.

e. Expression against religious values (blasphemy)

Under Article 156a of the Indonesian Book of Criminal Code, those who conduct acts or expressions “[...] that contain hostility, misuse or desecration of a religion adopted in Indonesia, or with intention that a person do not follow any religion based on single divinity” shall be sentenced to a maximum of 5 years in prison.

B. Protection from Illegal Information in Digital Communications by the Government

To protect the human rights of others and foster freedom of expression with responsibility among individuals, the Indonesian government is obliged by law to protect the public from: “[...] any hindrance as a result of misuse of electronic information and electronic transaction which disrupts public order.” Moreover, on the revision of the Act, it is stated that the government must prevent: “[...] the propagation and utilization of electronic information and/or electronic document which contain content that is prohibited under the law.”⁴⁸

This official duty is assigned to the ministry which manages matters in communication and information according to the Electronic Information and Transaction Act, which in this context is the Ministry of Communication and Informatics. By upholding Article 40 of the act as the basis of conduct, the Ministry administers filtering and blocking policies and operates an automatic *crawling* system.

Under the Minister Regulation on the Treatment of Internet Sites Containing Negative Content (2014), the Ministry is authorized to take action against a negative content. The definition of a “negative content” is defined in the Minister’s regulation:

Article 4

(1) An internet website with a Negative Content that is required treatment are the following:

- a. Pornography;
- b. Other illegal activities based on other rules and regulations.

Treatment of illegal content by the Ministry is in the form of administrative orders to the provider or owners of websites containing illegal content to block or delete the negative content, after a report from the civil community or government institutions has been processed and confirmed to contain negative content. Internet service providers (ISPs) are also instructed to either block the content by themselves or by using a block service provider. If not, the Ministry is authorized to impose

⁴⁷ Indonesia, Undang-Undang tentang Informasi dan Transaksi Elektronik [Electronic Information and Transaction Act], UU No. 11 Tahun 2008, LN No. 58 Tahun 2008 [Act No 11 Year 2008, SG No. 58 Year 2008], art. 28.

⁴⁸ Indonesia, Perubahan Undang-Undang tentang ITE [ITE Revision], UU No. 19 Tahun 2016, LB No. 251 Tahun 2016 [Act No. 19 Year 2016, SG No. 251 Year 2016], art. 40.2a.

administrative sanctions to the ISPs.⁴⁹ (see Figure 5.1).

One example of filtering/blocking is jurdil2019.org. On April 20th 2019, the website managed by an election observer service enterprise, PT Prawedanet, was blocked of its access by the Ministry by the request of Election Supervisory Agency (BAWASLU), a state agency that supervises the election process in Indonesia. It is said that the website has misused the permit given by BAWASLU. Instead of supervising the election process as authorized by the permit, the website publishes quick count and real count statistics, which they are not authorized because it is not the part of the permission given by BAWASLU.⁵⁰

C. Limitation on the Freedom of Expression by the Indonesian Government: An Analysis

Before analyzing the technical mechanisms, there is concern on whether the classification of illegal information in Indonesia itself is parallel with international human rights principles, such as regulation on blasphemy that is prohibited under the Indonesian Criminal Code. On the contrary, the 7th Principle of the Johannesburg Principles holds that include objection or advocacy of objection, on grounds of religion, conscience or belief are to be excluded from “National Security” as one of the conditions which human rights limitations is justified under the ICCPR.

In response to the preceding argument, it is important to realize that the Johannesburg Principles is a protocol with no legal binding power, which means Indonesia do not have an obligation to comply and refer to its provisions. However, if we were to debate the stipulation regardless of Johannesburg Principles’ binding powers, it is prudent to understand that the right of expression must be in accordance to the public morals, based on ICCPR. In other words, the conduct of expression must take notice of the political and social context. As a society with religious culture, The social condition of Indonesia is manifested in the Pancasila, the national pillar, where the first principle is *Ketuhanan Yang Maha Esa* which can be interpreted that the Indonesian people is a religious community who believes in one God. In short, the public moral condition is that the Indonesian society holds religious values that are protected under the law.

The limitation on the basis of public morals is not uncommon in other countries. For example, the Canadian Constitution ‘guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. Other instances include Egypt’s 2012 Constitution which prohibits ‘insult or abuse of all religious messengers and prophets’ while at the same time claiming to guarantee freedom of thought and opinion.⁵¹

Another issue is the term “negative content” in the Minister of Communication and Information Regulation. It is assumed that the legal term is a form of limitation of human rights. On the other hand, the limitation of human rights must be regulated in

⁴⁹ Indonesia, Peraturan Menteri Kominfo Penanganan Situs Internet Bermuatan Negatif [Minister of Communication and Informatics Reg. on the Treatment of Internet Sites with Negative Content], Perkominfo No. 19 Tahun 2014

⁵⁰ Dwi Bowo Raharjo, Ini Alasan Kominfo Blokir Situs [Jurdil2019.org](http://jurdil2019.org) [Ministry gives reason behind the blockage of [Jurdil.org](http://jurdil.org)], SUARA, (last updated Apr. 21 2019). <https://www.suara.com/news/2019/04/21/153757/ini-alasan-kominfo-blokir-situs-jurdil2019org>.

⁵¹ Ahmed and Bulmer, op.cit., p.10-12.

the form of a statute according to Article 28J of UUD 1945, while the term is regulated in a Minister Regulation which is lower than a statute in the hierarchy of laws. The notion is supported by arguments that the existence of the term violates the The Camden Principles on Freedom of Expression and Equality, where the second principle stipulates that states should establish a clear legal framework for the protection of the right to information.

We believe that the term “negative content” is still on boundaries within the national legal framework, since the Minister of Communication and Informatics Regulation is a law to execute the stipulations ruled in the Electronic Information and Transaction Act as its superior regulation in the hierarchy of laws, so it does not create new definitions outside the framework of the act. In the Minister Regulation, negative content is defined as “[...] pornography and other illegal activities based on other rules and regulations.” Therefore, the “negative content” term refers to the illegal content stipulated in the Electronic Information and Transaction Act and other legislations, such as the Pornography Act.

After contemplating the illegal content that is prohibited under the laws of Indonesia, there are issues regarding the prevention and protection mechanism by the State. The Institute for Criminal Justice Reform (IJCR), who argues that the existence of Ministry Regulation on Treatment of Websites Containing Negative Content (2014) is detrimental to the society and can potentially cause violations of human rights. The reason for this argument is that ICJR believes that the Ministry of Communication and Information is a “superpower institution”, playing the role of a reporter, investigator, prosecutor, standard setter, judge, and executor in blocking and filtering content on the internet without any “real” checks and balances from other institutions.⁵²

This notion is untrue since the decision making process of the administrative action of filtering content involves hearing the insights from the government institutions and the public who reports the existence of a suspected negative content, rather than an authoritative approach. Furthermore, as part of the executive branch of the government, checks and balances apply to the Ministry from the legislative body: the People’s Representative Assembly. Furthermore, every administrative decision done by the Ministry can be criticized and evaluated through lawsuits at the Administrative Court. Internally, the Ministry is obliged to process an appeal against a decision to filter content by the Ministry Regulation on Treatment of Negative Content.

However, the argument may be disapproved with the existence of AIS or *Mesin Pengais Konten Negatif* (re: Negative Content Scavenger Machine). AIS is an automatic *crawling* machine launched by the General Directorate of Informatics Application of the Ministry of Communication and Informatics in January 2018. It is operated to supervise and search the internet for illegal content. Per 20 February 2019, there have been 550,000 negative content from social media platforms and one million content published in websites that have been blocked by this system.⁵³ This is assumed to be an authoritative approach by the Ministry because it is not instructed by the Minister Regulation on Treatment of Negative Content. It is true that AIS system does not refer

⁵² Oik Yusuf, Peraturan Blokir Internet Disebut Melanggar HAM [Internet Blocking Regulations is said to violate human rights] KOMPAS (last updated Aug. 8 2018), <https://tekno.kompas.com/read/2014/08/08/17114897/Peraturan.Blokir.Internet.Disebut.Melanggar.HAM>

⁵³ Leski Rizkinaswara, “Kepoin Mesin AIS Kominfo” [Getting to know the Ministry’s AIS Machine], The Ministry of Communication and Informatics, (last updated Feb. 20 2019), <https://aptika.kominfo.go.id/2019/02/kepoin-mesin-ais-kominfo/>

to the Minister Regulation as the basis of conduct, instead it refers to Article 40 of the Electronic Information and Transaction Act as an initiative by the government to “[...] prevent propagation of prohibited content” as stipulated by the act. Therefore, it is unprecise if this approach is considered authoritative and unlawful.

VI. CONCLUSION

On a normative context, the Freedom of Expression is limited in the Indonesian legal system based on the preamble of the Constitution (which mentions the State shall protect all citizens and preserve the unity of the nation) and rules and regulations that are parallel with international human rights principles, including those stipulated in the ICCPR and Siracusa Principles, where the Government shall not be arbitrary in limiting human rights.

In the context of digital communications, the Indonesian government is authorized to prevent crime, including illegal content distribution as instructed by the Electronic Information and Transaction Act. The Ministry of Communication and Informatics Regulation No. 19/2014 as the Act’s derivative law can be said to be in accordance with the principles of human rights, democracy and the rule of law. This is because on one side the government has the authority to act preemptively on the basis of public interest and national security, but on the other side, content creators and owners are given the opportunity to complain and appeal against the Government’s decisions.

Thus, it is wise for other countries to note that a government’s efforts to counter illegal content by involving multi-stakeholder views and active roles. The existence of notice and takedown policies as the civil community’s involvement self-censoring initiative needs to be improved and intensified so that filtering and blocking policies from the government shall be a last resort.

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Appendix

Table 3.1: Legal framework for the limitation of freedom of expression in Indonesia.

| No | Statutes | Content/Issue |
|----|--|---|
| 1 | The Law on Freedom of Expression in Public No. 9/1998 | Freedom of expression in public, public demonstration |
| 2 | The Human Right Act No. 39/1999 | The right to access information |
| 3 | The Press Act No. 40/1999 | Press freedom |
| 4 | The Broadcasting Act No. 32/2002 | Broadcast media |
| 5 | The Information and Electronic Transaction Act No. 19/2016 | Expression on the internet |
| 5 | The Public Information Act No. 14/2008 | Freedom of public information |
| 6 | The Pornography Act No. 44/2008 | Limitation of media content relating to pornography |
| 7 | The Law on Flag, Language, Symbol, and National Anthem No. 24/2009 | Expression relating to state apparatus |
| 8 | The Law on Cinema No. 33/2009 | Cinema and film industry |
| 9 | The Copyright Law No. 28/2014 | Intellectual property |
| 10 | The Law on the People's Consultative Assembly, House of Representatives, and Regional Legislative Council No. 2/2018 | Several articles relating to expression with criminal penalty clauses |
| 11 | The General Election Act No. 7/2017 | Several articles relating to expression with criminal penalty clauses |
| 12 | The Criminal Law Code (Kitab Undang-Undang Hukum Pidana) | At least 35 articles with criminal penalty clauses regarding the freedom of expression (Haatzai Artikelien) |
| 13 | The Private Law Code (Kitab Undang-Undang Hukum Perdata) | Acts against the law (perbuatan melawan hukum) |

Table 5.1: Indonesia’s legal framework on the limitation of Freedom of Expression based on types of information expressed.

| Private Information and Personal Data | Public Information | Other Classifications of Information |
|---|---|--|
| Restricted by: Population Administration Act (2006 & 2013) Electronic Information and Transaction Act (2008 & 2016) Government Regulation on Operations of Electronic Systems and Transactions (2012) Minister of Communication and Informatics Regulation on Personal Data Protection (2016) | Restricted by: Public Information Act (2008) | Intellectual Property: Copyright Act (2016) Pornography: Pornography Act (2008) Propagation of communist, marxist and leninist ideology: People’s Interim Consultative Assembly Resolution (TAP MPRS) No. XXV/MPRS/1966 (1966) Revision of the Criminal Code Regarding National Security Act (1999) Hoax: Criminal Law Act (1946) Electronic Information and Transaction Act (2008) Electronic Information and Transaction Act regarding: (1) violation of decency, (2) gambling, (3) defamation, (4) threats and blackmails, (5) hate speech based on ethnic, religion, race and intercommunities Blasphemy Criminal Code Lawbook (1915) |

Figure 5.1: The Indonesian Ministry of Communication and Informatics legal framework for filtering and blocking content.

