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# **Ambiguity of the Indonesian Electronic Information and Transactions Law related to Freedom of Speech against the Government**

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## **INTRODUCTION**

With the rise of advances in science and technology, of course, it has a great impact on human life. As a part of the development of information and communication technology, the presence of electronic media has opened up a new horizon in people's lifestyle and created new culture among society. Electronic media then brings progress by forming a new world which is considered as a world without boundaries. The development of such technology has become increasingly rapid and has been proven to provide benefits for its users. People who come from various ages and classes are able to access electronic media through the internet, such as social media, effortlessly as a means of communication and sharing information without limits of distance and time.

As we all know, through advances in information and technology, people have become more creative in expressing their opinions and channeling their aspirations. Varied media, specifically the electronic ones, have become a matter of interest. What then became a problem is that the difference in perceptions about the proper means to express opinions, particularly through social media, which then triggered the emergence of conflicts in society. Referring to several cases that have occurred related to expressing opinions through social media, sometimes problems are solely rose by trivial matters. Many people are reported or detained simply due to the fact that they convey criticism. On the other hand, there are also those who insult or harass others but cannot be prosecuted or even acquitted of suspicion just because the reasoning is based on the human rights of person in question. In many cases related to human rights, especially in expressing opinion

and/or criticism, there is often a clash between individual rights that must be respected and the right to freedom of speech.<sup>1</sup>

For instance, the Indonesian Government which enacted a Law that is known as the EIT (Electronic Information and Transactions) Law has generated a polemic amongst its people. It is due to the fact that many people believe that numerous Articles under the Law have snatched the freedom of speech on social media. Those Articles, which were essentially made with the aim to protecting the public, eventually backfired people due to ambiguity and multiple interpretations. Therefore, a huge number of people in Indonesia felt threatened by the enactment of the Law and asked the Government to make amendments for the Law.

## DISCUSSION

Basically, freedom of speech is one of the categories of human rights that are considered essential. Such right is included in the category of rights with a civil-political dimension. Although the right to express opinion is considered not as fundamental as the right to life, the right to belief and religion, and the right to be free from torture, and it is still possible to be derogated, such right has always been important for basic human rights. As part of liberal rights, freedom of speech is a bridge between civil rights, such as the right to be free from state intervention, and political rights. Freedom of speech may be a sign of a democratic political order and the basis for the rule of law. Therefore, of course, freedom of speech is guaranteed, protected, and restricted by law.

Indonesia, as a state of law where every action of its citizens is regulated in laws and regulations, ensures freedom of speech constitutionally under Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Such matter is also stated within the Law No. 39 of 1999 on Human Rights. Hence, it can be said that freedom of opinion, communication, obtaining and conveying information through various media are justified to do and are the rights owned by every human being, including the people of Indonesia.

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<sup>1</sup> Fadilah Raskasih, "Batasan Kebebasan Berpendapat melalui Media Elektronik dalam Perspektif HAM Dikaitkan dengan Tindak Pidana Menurut UU ITE", *Journal Equitable*, Vol. 5, No. 2 (2020), pp. 1-20.

Although in general the term 'freedom' is usually associated with the absence of barriers, restrictions, bonds, coercion, constraint, and obligations from certain things or to do something,<sup>2</sup> in this context, it does not mean that it has no limit. The Indonesian Law No. 19 of 2016 on Electronic Information and Transactions, which is also known as the EIT Law, is presented to regulate freedom of speech through electronic media as well as its restrictions. The Law provides prevention for the negative effects of the development of information technology, especially electronic media, such as classifying and regulating the types and forms of crime by using the advanced information technology. In addition, the Law also regulates legal enforcement against violations in using of information technology, one of which is for individuals who use social media.

Although the provisions under the EIT Law aim to maintain a balance between the freedom and protection of individuals, families, honors, and dignities with the freedom to express opinions and thoughts in a democratic society, several Articles are often multi-interpreted and have the potential as a tool to penalize people. Consequently, many people think that the State represses freedom of speech through the Law. Furthermore, it also causes people to be afraid in criticizing the Government through social media even though the Government itself has asked the Indonesian people to provide opinions and criticism through social media to improve public services, especially in handling the current COVID-19 pandemic. People still believe that several Articles in the EIT Law can ensnare them at any time. It is due to the fact that there are many cases of criminal acts related to the delivery of public criticism for the Government through social media.

For instance, the case that happened to a newspaper columnist named Bersihar Lubis.<sup>3</sup> He was deemed to have defamed an official and was sued on the reasoning had violated the EIT Law and was then convicted. The case stems from his writing which was published in a daily newspaper, *Koran Tempo*, on 17 March 2007 entitled *Kisah Interogator yang Dungu* (The Story of a Dumb Interrogator), in which Bersihar criticized the ban on a history book by the Attorney General's Office. The official of the Depok District Attorney's Office offended by the writing of Bersihar. He then was sued in court due to his writing which contained criticism were considered

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<sup>2</sup> Nur Rahmawati, Muslichatun, and M. Marizal, "Kebebasan Berpendapat terhadap Pemerintah melalui Media Sosial dalam Perspektif UU ITE", *Widya Pranata Hukum: Jurnal Kajian dan Penelitian Hukum*, Vol. 3, No. 1 (2021), pp. 62-75.

<sup>3</sup> Ibid.

insulting to the Attorney General's Office which resulted in Bersihar being sentenced to eight months imprisonment.

Last year, the Commission for Missing Persons and Victims of Violence criticized the arrests and detentions carried out by the Indonesian National Police against a number of people on accusation of spreading hoaxes related to COVID-19 and insulting Joko Widodo, the President of Indonesia. Such action was taken after the establishment of the Telegram Letter of Chief of Police ST/1100/IV/HUK.7.1./2020 on Handling Crimes in Cyberspace which was signed on 4 April 2020, in response to the President's statement regarding the status of public health emergency in Indonesia and the policy of Large-Scale Social Restrictions in dealing with the COVID-19 outbreak. However, instead of focusing in preventing the spread of the virus, in the Telegram Letter, the Chief of Police asked the Criminal Investigation Agency and the Head of the Regional Police in each region to enforce cybercrime laws and monitor opinions in cyberspace regarding the spread of hoaxes related to Covid-19 as well as insults of government officials.

Cases which are considered to contain restrictions on freedom of speech, as mentioned above, have made some people feel wary in criticizing the Government, while others have decided not to express any opinion nor criticism to the Government on the sociopolitical conditions in Indonesia. Furthermore, the Head of Advocacy of the Legal Aid Foundation, Muhammad Isnur, assessed that in recent years freedom of speech and expression in public seemed to have been "threatened" by the EIT Law.

Indeed, there is a tendency for people to worry when expressing opinions and/or criticism on social media. In fact, it is very common that police officers will be involved when people express their opinions and/or criticisms, then, they are dragged to court for allegedly committing defamation, hate speech, or conveying false information. Meanwhile, Vice-Chairman of People's Representative Council, Aziz Syamsuddin, assessed that the EIT Law initially has taken the principle of justice into consideration. However, in practice, a number of Articles of the EIT Law are used as "weapons" to report each other to the police, so that their application has multiple

interpretations.<sup>4</sup> The public is also fed up with the imposition of Articles of the EIT Law regarding defamation and insult in social media.

The Southeast Asia Freedom of Expression Network (SAFEnet) itself noted that there were hundreds of reports of complaints related to the EIT Law. Some have been decided by court and have permanent legal force, the status of other cases in the police is not clear yet, while some others end peacefully. For instance, there were 3 cases in 2008 since the enactment of the EIT Law. Then in 2009 there was 1 case; there were 2 cases in 2010; and there were 3 cases in 2011. In 2012, it increased to 5 cases. Hereinafter, the number of cases experienced a significant increase in 2013 to 22 cases. In 2014, the number of cases continued to increase to 36 cases. It decreased to 30 cases in 2015. In 2016, it crept up again to 83 cases. Then, there were 52 cases in 2017 and 29 cases in 2018. Fortunately, it decreased to 22 cases in 2019. However, it increased again to 34 cases in 2020.<sup>5</sup>

There actually has been an amendment to the applicable EIT Law, namely the Law No. 19 of 2016 concerning Amendment to Law No. 11 of 2008 on Information and Electronic Transactions. However, the amendment of the EIT Law is considered failed to provide significant changes to minimize the criminalization related to freedom of speech and expression. In fact, it can be seen that there are additional principal issues, such as the emergence of potential abuse by the Government due to the expansion of authority in controlling cyber activity. Moreover, the issues of freedom of speech, expression and even the right to obtain information are still not regulated clearly nor measurably.

Once again, the EIT Law is criticized, especially on the issues related to defamation and/or hate speech, which are regulated in Article 27 paragraph (3), Article 28 paragraph (2), Article 36, and Article 45 paragraph (3). Such issues are what caused, within 2016 to 2020, the EIT Law with its multi-interpretation Articles has resulted in a conviction rate reaching 96.8% (744 cases) with a very high imprisonment rate, reaching 88% (676 cases) according to the data collected by civil society coalition. Furthermore, a report from SAFEnet concluded that journalists, activists, and

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<sup>4</sup> Rofiq Hidayat, "Melihat Tren 'Korban' Jeratan UU ITE", *Hukumonline.com* (23 February 2021), <https://www.hukumonline.com/berita/baca/lt6033d91c46c27/melihat-tren-korban-jeratan-uu-ite/>, accessed on 2 June 2021.

<sup>5</sup> *Ibid.*

critical citizens are most frequently criminalized by imposing those “elastic Articles” which tend to be multi-interpreted with the aim of silencing critical voices.

The Executive Director of SaFEnet, Damar Juniarto, revealed that there are at least nine problematic Articles under the EIT Law<sup>6</sup>, as follows below.

1. Article 26 paragraph (3) concerning the elimination of irrelevant information is considered to have multiple interpretations regarding the issue of information censorship.
2. Article 27 paragraph (1) concerning immorality is considered problematic since it may be used to punish victims of online gender-based violence.
3. Article 27 paragraph (3) concerning defamation is the Article that is considered as the most problematic one. The Article regulates insults and defamation through the electronic media. The Article is frequently used to curb the expression of citizens, activists, and journalists. In addition, it is often used to prosecute criminals for those who criticize the Government through social media.
4. Article 28 paragraph (2) on the issue of hate speech may suppress religious minorities and repression of citizens regarding criticism of the Government. In addition, this article is often used to ensnare freedom of expression and journalistic work.
5. Article 29 concerning threats of violence is also problematic since it may be used to penalize people who have the intention to report to the police.
6. Article 36 concerning losses may be used to enhance the criminal penalty for defamation.
7. Article 40 paragraph (2a) concerning prohibited content is also considered problematic since it may be used as an excuse for internet shutdown to prevent the spread and use of hoaxes.
8. Article 40 paragraph (2b) concerning the termination of access can be an affirmation of the role of the Government which takes precedence over court decisions.
9. Lastly, Article 45 paragraph (3) concerning the threat of imprisonment from defamation is problematic since it may detain the accused during the investigation process.

It is true that the Government recognizes that public input and criticism is very important in improving government performance and is a manifestation of democracy in the State.

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<sup>6</sup> Galuh Putri Riyanto, “9 ‘Pasal Karet’ dalam UU ITE yang Perlu Direvisi menurut Pengamat”, *Kompas.com* (16 February 2021), <https://tekno.kompas.com/read/2021/02/16/12020197/9-pasal-karet-dalam-uu-ite-yang-perlu-direvisi-menurut-pengamat?page=all>, accessed on 2 June 2021.

Additionally, the President has appealed to the public to be more active in offering criticism, input, and/or potential maladministration so that government and public service providers will be able to improve efforts continuously. However, the statement by the Government is still reaping polemics among people since the multi-interpretation Articles under the EIT Law are still applied which often backfires on those who convey them. Such Articles are considered not sufficient in providing protection of the public regarding freedom of speech in criticizing the Government through social media. Therefore, it is necessary to revamp the existing legal structure. Because without a good legal structure, the protection of freedom of speech through electronic media will only become a mere discourse.

From the existing cases, it can be said that the main problem is the difficulty in distinguishing between criticism and acts of defamation. Regarding the difference between the two, the lecturer of Communication Studies at Muhammadiyah University of Yogyakarta, Indonesia, Fajar Junaedi stated that the two are indeed different. Criticism is aimed at the substance of the problem that occurs, while defamation occurs when the tendency of criticism is an individual or institutional aspect.<sup>7</sup> Meanwhile, according to the Executive Director of SAFEnet, Damar Juniarto, criticisms related to the performance of government officials cannot be categorized as defamation. For example, a person who is upset and angry on the fact that public roads are damaged even though he/she has paid taxes and then expresses disappointment through social media cannot automatically be considered as defamation. Such criticism shall be used as an evaluation of the performance of the Government, instead of being charged with defamation or hate speech.

As a middle ground, the existence of the EIT Law may still be maintained and applied with a note that amendments shall be made. Although the EIT Law is considered to restrict freedom of speech and expression, especially through social media, the Law, of course, also has advantage in anticipating the possibility of misuse of electronic media. In addition, the Law does not only provide regulations on defamation, slander, false information, or immoral matters, but also many other regulations regarding the rules of living in cyberspace and the transactions that occur in it

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<sup>7</sup> Rosy Dewi Ariyanti Saptoyo, "Jokowi Minta Masyarakat Aktif Beri Kritik, Warganet: Lalu Kena UU ITE", *Kompas.com* (9 February 2021), <https://www.kompas.com/tren/read/2021/02/09/160000565/jokowi-minta-masyarakat-aktif-beri-kritik-warganet-lalu-kena-uu-ite?page=all>, accessed on 2 June 2021.



which are regulated in detail. Nevertheless, the Government cannot flip a blind eye since it is still necessary to amend or change the EIT Law, especially the Articles related to freedom of speech and expression which still require more detailed provisions.

Several civil society organizations have encouraged efforts to amend the Articles which considered crucial as mentioned above. It is essential due to the fact that these Articles frequently have multiple interpretations and have the potential to be used as a tool to penalize people for allegedly committing defamation or blasphemy. So far, the EIT Law has only created fear and silenced the critical thinking of people. If it continues to be implemented without clear boundaries, the Law is seen as potentially being used for the practice of abuse of power, for instance, interpreting based on the desires of the authorities or interested parties to criminalize others.

With the issuance of a Joint Decree by the Minister of Communication and Information Technology, the National Police Chief, and the Attorney General at the end of June, it can be said that the efforts of civil society organizations and people have paid off. The Decree was made as a guideline for the implementation of the EIT Law which provides an explanation regarding the definitions, requirements, and linkages with other Laws and/or regulations for almost all Articles that are considered problematic and have multiple interpretations so far. Although there are still those who believe that the Decree does not resolve the problems of the Articles under the EIT Law since the ambiguity of the legal norms contained in the Articles is still exist which subsequently demand the Government to reamend the Law, the presence of the Decree can be considered as a positive response from the Government in accommodating the aspirations of its people.

## **CONCLUSION**

The presence of the EIT Law provides a polemic amongst the Indonesian people. It is due to the fact that there are several Articles that are considered ambiguous and have multiple interpretations. Therefore, many people are afraid to express their opinions, especially to criticize the Government and public services, on social media because they believe that the Law has snatched freedom of speech on electronic platforms. Consequently, many people and civil society organizations asked the Government to amend the Law. In response, the Government issued a Joint Decree which was made as a guide for the implementation of the Articles deemed problematic

under the Law. Although the Decree is sufficient to provide an explanation of the related Articles, people still hope that the Government will immediately amend the Law.

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