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Human Rights On The Internet: Freedom of Expression In Indonesian Law and Practice

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Abstract
This paper aims to explore the evolution of human rights protection concerning the internet in Indonesia, particularly focusing on the realization of freedom of expression. The expansion of the internet within Indonesia presents significant opportunities for upholding human rights, particularly in ensuring freedom of expression. However, the translation of human rights principles into effective practices within the digital landscape poses challenges. One pressing issue is the continued occurrence of journalist criminalization, indicating persistent obstacles to safeguarding these rights. Additionally, instances involving suspicion of online defamation, blasphemy, racism directed towards activists, and opposition figures have surfaced. Moreover, governmental actions such as censorship and internet shutdowns have been observed. This paper seeks to delve into the extent to which the realization of freedom of expression and privacy has progressed in the digital age amidst these challenges.

Keywords: human rights, freedom of expression, internet, defamation

Introduction

In the initial stages of widespread internet usage, there was significant optimism about its potential impact on human rights and democracy. The internet was viewed as a facilitator of human rights, offering a means to bypass authoritarian censorship, a tool for enhancing education, fostering accountability, promoting democratic participation, and facilitating access to information (Douzinas, 2000). Some even advocated that internet access itself should be recognized as a human right. The term 'the digital divide' emerged to underscore the disparities in opportunities between those with internet access and those without. Consequently, expanding internet coverage became a crucial development objective, evident in initiatives like the Millennium Development Goals and subsequently, the Sustainable Development Goals.

However, it soon became evident that the internet also harbored the potential to undermine human rights. Governments employ internet-based technologies for civilian surveillance while retaining the capacity for various forms of censorship. Moreover, the internet has become a tool exploited by criminals (Siburian, 2016) and terrorist groups (Estevez-Tapiador, 2004). Additionally, large corporations collect vast amounts of data on individual users, which can be utilized and misused in numerous ways, exemplified by the well-known case of Cambridge Analytica.

The proliferation of lies and hoaxes on the internet, while not a new phenomenon, has arguably become more perilous due to their sheer volume. Additionally, numerous challenges underscore the necessity for improved governance over internet content. When a state censors, removes, or blocks content, it inherently restricts the right to freedom of expression. Human rights law delineates stringent criteria for legitimately imposing limitations on the right to freedom of expression.

This article aims to assess the extent to which Indonesian laws and practices guarantee freedom of expression on the internet. To address this research question, a review of the legal framework encompassing international human rights law and national legislation related to data protection will be conducted. Furthermore, the article will examine case law and political-legal issues concerning freedom of expression on the internet in Indonesia.

Although the article primarily focuses on the Indonesian state, it's important to note that the actual censorship or content moderation on a global scale is often executed not by states but by the companies controlling social media platforms where citizens engage. These companies do not bear the same human rights obligations as states, and the restrictions they impose on expressions are not subject to identical stringent rules. In 2011, the Special Rapporteur on Freedom of Expression emphasized that censorship measures should not be delegated to private

entities. Moreover, intermediaries, such as social media companies, should not be held liable for refusing to take actions that infringe upon an individual's human rights. Any requests made to intermediaries to restrict access to certain content ought to be authorized by a court or a competent body (Report of the special rapporteur on freedom of expression, 2011).

Certainly, from a principled standpoint, the stance on limiting private entities' involvement in censorship aligns with human rights ideals. However, the sheer volume of cases involving hoaxes, lies, smears, hateful expressions, and problematic materials, including child pornography, spreading daily poses a significant challenge. Traditional courts may struggle to manage such a caseload effectively. Additionally, the time required for a court to address a case becomes a concern, given the rapid dissemination of information on the internet. Damage might have already occurred before any court process reaches a conclusion.

Consequently, there's substantial pressure exerted on companies providing social media platforms, such as Facebook and Twitter, to swiftly remove inappropriate content. This pressure has led to numerous instances of content being taken down by these platforms.

Human Rights and the Internet at the UN Level

The foundations of the international system of human rights protection was developed before the internet became what it is today. Within the human rights system. there have not been developed any new norms to deal specifically with the internet. Rather, already existing human rights norms have been interpreted again in light of new developments, and new challenges have been analyzed in light of existing norms.

There are a number of documents that have dealt with the issues explicitly related to the internet within the UN system. These include the following resolutions by the General Assembly and the UN Human Rights Council, and comments by treaty-monitoring bodies and report of special procedures:

1. The General Assembly has passed several resolutions on the Right to Privacy in the Digital Age (Report of the special rapporteur on freedom of expression, 2011) and on Information and Communications Technologies for Development.
2. The Human Rights Council has passed various resolutions on Freedom of Opinion and Expression, including a 2009 resolution that relates especially to the internet. It has passed resolutions on the Right to Privacy in the Digital Age (Report of the special rapporteur on freedom of expression, 2014) and on the Promotion, Protection and Enjoyment of Human Rights on the Internet (Report of the special rapporteur on freedom of expression, 2015, 2017, 2018). The 2013 Resolution on the role of freedom of opinion and Expression in women's empowerment also explicitly mentions the Internet.
3. The Human Rights Committee is a treaty-monitoring body, responsible for monitoring implementation of the International Covenant on Civil and

Political Rights, to which Indonesia is a party. It produces various General Comments, interpreting and clarifying the scope of the Covenant. General Comment no. 34 on the right to Freedom of Opinion and Expression (2012, 2014, 2016, 2018) explicitly relates to the Internet.

4. There are various Special Rapporteurs, individuals working based on mandates given by the Human Rights Council. Many special rapporteurs have issued reports related to internet usage and human rights. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, has issued a number of reports related to freedom of expression on the internet (Report of the special rapporteur on freedom of expression, 2011, 2013, 2014. 2015, 2016, 2017, 2018). The Special Rapporteur on violence against women on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective (2018). The Special Rapport rapporteur on privacy has issued various reports discussing the right of privacy in the context of the internet (Report of the special rapporteur on freedom of expression, 2016, 2017, 2018).

A basic premise which is not disputed is that “the same right that people have offline must also be protected online”. The question is what it means in practice. The enjoyment of almost all human rights can be affected by the internet of particular relevance is the right to freedom of expression and the right to privacy.

The protection of someone’s privacy may thus make it necessary to impose limitations on the right to freedom of expression. Article 20 states that propaganda for war, and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. Also this may constitute a limitation on the right to freedom of expression. Other reasons for imposing limitations may include fighting terrorism or child pornography. However, UN bodies and Special Procedures call for minimal use of limitations. For example, in 2011 the report of the Special Rapporteur on Freedom of Expression emphasized “…that there should be as little restriction as possible to the flow of information via the Internet, except in few, exceptional, and limited circumstances prescribed by international human rights law. […] the full guarantee of the right to freedom of expression must be the norm, and any limitation considered as an exception”.

The report also stated that “The Special Rapporteur remains concerned that legitimate online expression is being criminalized in contravention of States’ international human rights obligations, whether it is through the application of existing criminal laws to online expression, or through the creation of new laws specifically designed to criminalize expression on the Internet. Such laws are often justified as being necessary to protect individuals’ reputation, national security or to counter terrorism. However, in practice, they are frequently used to censor content that the Government and other powerful entities do not like or agree with.”

He also called on states to decriminalize defamation. Other UN bodies and experts have expressed similar concerns.

Human Rights In the Indonesian Legal Framework

During Indonesia's reform era, numerous NGOs and civil society movements passionately advocated for human rights (Purdey, 2013) and freedom of expression (Suryadinata, 2011). This fervor stemmed from a strong desire to break free from the repressive Suharto regime, leading to legislative reforms on human rights and the adoption of several international human rights conventions (Butt and Lindsey, 2018, p. 244). However, the intersection of human rights and the internet in Indonesia has sparked contemporary discourse. While the internet made its entry in the early 1990s (Lim, 2013a), the discussion regarding the relationship between human rights and the digital realm is relatively recent.

The conversation about safeguarding individuals from cyber-attacks (Pastukhov, 2011) or preserving the right to privacy in the digital age began with the enactment of Information and Transaction Law No. 8 of 2011 (Lim, 2013b). Globally, concerns about computerized processing of personal data or privacy infringements due to computer (mis)use had been a hot topic since the 1960s (Bygrave, 2004). However, in Indonesia, discourse regarding the right to privacy in the digital age emerged more recently. Fortunately, discussions on human rights had already gained momentum during the amendment of the Indonesian Constitution and the formulation of laws related to human rights.

The inclusion of a chapter on human rights in the amended constitution marked a significant departure from the original 1945 version, which scarcely addressed human rights (Kusuma & Elson, 2011). Initially, legal norms governing human rights were confined to Article 28 of the 1945 Constitution, outlining freedoms such as association, assembly, and expression, subject to legal regulation. Post-amendment, the rights enumerated in the Constitution broadly encompass those in the Universal Declaration of Human Rights and the two human rights covenants (ICESCR/ICCPR). Indonesia not only enacted a domestic Human Rights Act (law number 39/1999) but also ratified numerous international human rights treaties. Additionally, Indonesia established a series of domestic laws incorporating human rights components, including laws concerning the press, child protection, labor, healthcare, education, civil and political rights, as well as economic, social, and cultural rights.

On paper, the legal framework appears robust in safeguarding human rights. However, this hasn't consistently translated into robust human rights enforcement by the Courts. A 2007 assessment by the Judicial Commission revealed that few judges factored human rights into their judgments, and this pattern has seen limited change since then. Notably, the Constitutional Court has made references to human rights on several occasions (Butt, Lindsey 2018). Nonetheless, the court's role primarily revolves around determining the conformity of statutory laws with the constitution rather than handling actual cases of violations.

The status of international treaties under national jurisdiction in Indonesia remains somewhat ambiguous (Butt, Agusman). According to the Human Rights Act, international human rights treaties accepted by Indonesia are supposed to be recognized as national law. However, in practice, many judges appear hesitant to make references to or apply international law in their decisions. This discrepancy raises uncertainty regarding the extent to which international treaties are effectively incorporated into Indonesia's legal framework and considered in judicial proceedings.

On paper, the guarantees for freedom of expression are robust. The Article 28E of the 1945 Constitution states, that:

(2) Everyone has the freedom to believe in their convictions, express their thoughts and attitudes in accordance with their conscience.

(3) Everyone has the right to freedom of association, assembly, and expression of opinion.

The right to freedom of expression is also guaranteed by the Human Rights Law, and further regulated in the Press Law.

Indonesian Laws Specifically Regulating The Internet.

Following the collapse of Soekarno's guided democracy, General Soeharto and the Golkar Party pledged to usher in genuine democracy and protect human rights. However, the reality veered toward institutional paternalism, marked by press censorship and political repression (Nasution, 1994). Freedom of expression suffered immensely under the authoritarian regimes of both Soekarno and Soeharto. Criticizing the government during the guided democracy and new order eras often led to accusations of subversion, insulting those in power, and defamation, as per Indonesia's Criminal Law (Staples, 2016).

Despite the establishment of the Indonesia National Commission of Human Rights in 1993, subsequent to a UN workshop on human rights held in Jakarta that involved 31 countries, freedom of expression remained challenging. Mochtar Pakpahan, a human rights activist from Sumatra, attempted to organize a new independent trade union called the SBSI and hosted a seminar on February 9, 1994, advocating for minimum wages. Shortly after this initiative, he was arrested (Pompe, 1994). It appeared that human rights were merely adopted as a political facade by the government, emphasizing formal acknowledgment but rejecting substantial implementation (Hadiprayitno, 2010).

Certainly, discussing the position of internet development policy in Indonesia involves an examination of specific regulations, notably the Law on Telecommunication (Law no 36/1999) and the Law on Information and Electronic Transactions.

The Law on Telecommunication was a pioneering legislation specifically addressing internet usage and governing both telecommunication and internet provision in Indonesia. This law delineates the fundamental principles and objectives guiding telecommunication development, including trust, legal certainty,

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justice, benefits, partnership, ethics, and safety (Article 2). Additionally, it outlines that telecommunication development aims to support national unity, enhance social welfare, justice and development, and stimulate the economic life of society while fostering government programs and international interconnection (Article 3). The emphasis on social welfare, justice, and development aligns with the principles of human rights.

The law places the responsibility on the government to ensure that telecommunication providers grant people access to the internet, radio, and telephone. Accordingly, every telecommunication provider is mandated to obtain a permit before conducting business operations (Article 11). This regulatory framework underscores the government's role in ensuring access to communication technologies while maintaining oversight and control over telecommunication services provided in the country.

Law No 11/2008 on Information and Electronic Transactions plays a significant role in regulating the internet in Indonesia. It's a revision of Law No 19/2016 and addresses the existence of electronic documents, digital signatures, and transactions while also governing cybercrime.

One notable aspect of this law is its regulation concerning the protection of personal data (Article 26) and addressing defamation in Article 27(3). This particular article has been the subject of considerable controversy due to its potential constraint on freedom of expression. Similarly, Article 28(2) addressing racism, while more acceptable in manner, might also limit freedom of expression.

Article 27(3) has faced criticism from human rights activists for its potential to criminalize individuals expressing their views in public. In 2008, this article was challenged twice for judicial review at the Indonesian Constitutional Court. The first case involved Narliswandi Piliang, a senior journalist charged with online defamation for an article alleging bribery against the mining company Adaro. Narliswandi contended that his actions were protected under the Press Law and the constitutional guarantees of freedom of expression. The second case involved several senior journalists and NGOs, including the Association for Legal Aid and Human Rights (PBHI), the Association of Independent Journalists (AJI), and the Legal Aid Institution for the Press (LBH Pers). Three senior journalists—Edy Cahyono, Nenda Inasa Fadhilah, and Amrie Hakim—encountered legal issues during their journalistic work and were criminally charged under Article 27(3) of the UU ITE. Both cases failed at the Indonesian Constitutional Court, with the Constitutional Judges affirming that Article 27(3) is a crucial norm protecting human dignity and individual image.

The Constitutional Court highlighted numerous cases involving unregistered media and uncertified journalists. Article 27(3) aimed to address the rising issues of hoax and fake news. However, it also raised concerns about the challenge of controlling unregistered media and overseeing the standards of journalistic conduct.

Governmental regulations No 71/2019 and its subsequent change to No

82/2020 served as implementing regulations for the Law on Information and Electronic Transactions. These regulations addressed various aspects of personal data protection. Electronic system providers are mandated to exercise caution in managing data, encompassing collection, utilization, storage, analysis, rectification, display, and eventual deletion (Article 14). Permission from data owners is required for utilizing private data; unauthorized use can be considered illegal and subject to legal action under Article 26(2) of Law No. 11/2008.

Presidential regulations No 53/2017 and No 133/2017 pertain to the establishment of the "Badan Siber dan Sandi Negara" (National Cyber and Code Agency). This body is entrusted with developing, implementing, monitoring, and evaluating technical policies regarding identification, detection, protection, mitigation, oversight, evaluation, and defense against e-commerce, cryptography, critical infrastructure, cyber diplomacy, vulnerabilities, and cyber-attacks (Article 3).

Case studies

The emergence of the digital era following Soeharto's fall brought significant changes to freedom of expression and cyber law in Indonesia. From the issuance of the Information and Electronic Transaction Law in 2008 until 2020, the courts have delivered 1218 verdicts, predominantly ruling that online defamation had occurred (Supreme Court Verdict Directory, 2020).

One significant case is the Omni Hospital case (Supreme Court Case Number 225 PK/Pid.sus/2011, August 15, 2008), involving Prita Mulyasari, a housewife and mother. She was sued for defamation by Omni Hospital Tangerang after sending an email complaining about the hospital's health services, explicitly mentioning 'the fraud of the Hospital.' Prita's email was rooted in her disappointment with the healthcare she received. Instead of addressing her complaint, the hospital pursued legal action against her. While the lower courts found her guilty of defamation, the Supreme Court ultimately ruled her not guilty. The public rallied behind Prita, collecting funds to pay the fine to the Omni Hospital. Many human rights activists criticized the hospital and law enforcement, arguing that Prita's complaint was not defamation but a critique of the hospital's misconduct. This case underscored how defamation clauses can pose a threat to freedom of expression in the digital era, where any electronic complaint might be deemed criminal defamation.

Prita's case originated when she sought treatment at Omni International Tangerang Hospital on August 7, 2008. After receiving initial treatment and tests, doctors advised her to stay at the hospital. However, when her health didn't improve after five days, she transferred to Islamic Bintaro Tangerang Hospital. Upon dissatisfaction with the response from Omni Hospital, she emailed them, intending to express her concerns rather than tarnish the hospital's reputation. The public prosecutor charged her under Article 27(3) of the ICT Law, claiming her email was inappropriate. Despite the final verdict clearing Prita of guilt, her case illustrates

how critique or complaint might be misconstrued as defamation in a digital context.

The case of Dr. Saiful Mahdi, a senior lecturer at Syah Kuala University, Aceh, highlights another instance where an individual faced criminalization for expressing criticism. Dr. Mahdi criticized the recruitment process for new lecturers at the university, expressing his concerns about unfairness and potential corruption in a WhatsApp group without mentioning specific names. However, this statement was perceived negatively by the dean and colleagues, leading to his reported involvement in slander and subsequent legal action by the Dean, which resulted in a three-month prison sentence.

In both Prita Mulyasari's and Saiful Mahdi's cases, they were charged under Article 27(3) of the Information and Electronic Transaction Act for online defamation. Importantly, these individuals were accused of defaming legal entities (institutions) rather than natural persons. Under human rights law and the Indonesian Constitution, restrictions on freedom of expression may be justified to protect the rights and reputations of individuals, not corporate entities. The law doesn't explicitly protect legal entities against defamation.

The essence of defamation as a criminal offense primarily applies to individuals and might not be suitable for organizations such as universities or hospitals. Institutions are not emotionally sentient like individuals and are not the intended targets for defamation laws. The expressions made by Prita and Saiful constituted legitimate critique rather than defamation, and such expressions should be safeguarded as part of the freedom of expression. These cases shed light on the need for a clearer distinction between legitimate criticism and defamation, especially concerning legal entities, within the legal framework..

The landscape of freedom of expression, particularly regarding journalists facing legal repercussions for alleged defamation, paints a concerning picture, especially for those operating in unregistered or uncertified capacities.

In the case of journalist Djeri Lihawa, his article about alleged corruption in a road development project led to his imprisonment. Writing for his unregistered media outlet, Sultra Satu News, he was charged with defamation under Article 27(3) of UU ITE. The court's verdict (Number 158/Pid.B/2017/PN Bau) didn't consider freedom of expression, disregarding his journalistic status and unregistered media.

Similarly, journalist Tri Herianto faced legal consequences after reporting on drug smuggling in Pekanbaru. Despite his article's content, he was not certified as a journalist, and his weekly tabloid, Kasus-News, was not registered with the Indonesian Press Board. He was sentenced to seven months' imprisonment and fined. The court's verdict (Number 345/PId.Sus/2018/PN.Rgt) referenced Article 27(3) UU ITE.

Cases involving alleged defamation against registered journalists often undergo review by the Indonesian Press Council before escalating to legal proceedings. The Press Council, established under Government Regulation 5/1967, aims to assist in regulating the national press and has devised a Code of Conduct

for journalists. Instances of suspected breaches of this code can be mediated by the Press Council.

Presently, when reports of defamation reach the police, they often opt for resolution through mediation by the Press Council. A Memorandum of Understanding (MoU) exists between the police and the Press Council to support this practice. While both registered and unregistered media can face defamation suits, cases involving registered media are typically handled initially by the Press Council. However, it's important to note that the Press Council only engages with registered media, leaving unregistered journalists, like in the case of Djeri Lihawa, without this avenue of mediation and support.

The issue of journalistic extortion, where journalists, especially unregistered ones, demand money in exchange for not publishing compromising news about individuals, has been observed. Such cases are not uncommon and can lead to disputes brought to the attention of regulatory bodies.

In one instance, Tempo Magazine, a reputable media outlet in Indonesia, faced a complaint filed by an individual, TS, regarding their reportage on the appellant's involvement in the capital market. TS contested the publication's data accuracy and terminologies used. The Indonesian Press Council, recognizing Tempo Magazine as a registered media outlet with legally recognized journalists, recommended that TS be given an opportunity to respond in writing, to be published by Tempo Magazine.

Another crucial case involves the internet shutdown in West Papua by the Indonesian Government in August 2019. The government cited security concerns as the rationale for this shutdown, aiming to curb hoax, fake news, racism, provocation, and hate speech. However, the shutdown significantly impeded journalists and the general populace from accessing vital digital services, causing difficulties in economic transactions, e-commerce, mobile banking, and general information access.

Several NGOs and human rights activists sued the Indonesian Government and Ministry of ICT before the Jakarta Administrative Court in March 2020, claiming that the internet shutdown violated principles of good governance and freedom of expression. The court ruled that the internet blockage was unlawful, acknowledging that while the internet can enhance lives, its misuse can also cause harm. The judges highlighted that limiting internet access must follow proper legal procedures and respect human rights principles, particularly the freedom of expression.

The judgment emphasized that restricting internet access should be based on valid justifications and adhere to principles of good governance to prevent arbitrary actions and misuse of power. It underscored that freedom of expression is a crucial human rights indicator when considering policies to regulate internet access, emphasizing the need for proper procedures and considerations of human rights principles in such decisions.

Conclusion

Freedom of expression in the digital era faces a multitude of challenges and divergent viewpoints. The advent of digital transformation and social media platforms has significantly empowered individuals to voice their beliefs, political opinions, and critiques online, considering freedom of expression as an integral part of human rights protection. However, several issues persist, hampering the realization of this right, including the criminalization of journalists, occurrences of online defamation, blasphemy, and racism in cyberspace.

A recommendation regarding the application of the ICT Law, particularly concerning online defamation under Article 27 (3), suggests restricting its use to natural persons (individuals) with legal standing to file police reports. Cases such as Saiful Mahdi's report by the university and Prita's appeal by the hospital illustrate misapplications of the law and a failure to uphold human rights. Neither had any intention to defame an individual, and institutions like universities or hospitals should not be entitled to protection under this law. Article 27 (3) is meant to safeguard human dignity and personal reputation, which pertain to individuals, not institutions or legal entities. The misuse of this article disregards the principle of the rule of law.

The revision of this article may impact the scope of freedom of expression, instilling fear among citizens of being penalized for criticizing the government, private sectors, or institutions. This fear could curtail their ability to express opinions freely, even within their political and social positions. While individuals should respect others when criticizing, they must also avoid cyberbullying.

While the ICT law aims to protect an individual's honor, reputation, and right to privacy, its implementation may justify limitations on freedom of expression to safeguard the rights of others. However, these limitations must adhere to strict criteria, including proportionality, non-discrimination, and legality. There's concern about the clarity of the law regarding what expressions are permissible and which are not, leading to uncertainty and potential unintentional breaches.

Importantly, human rights, including the right to privacy, belong to individuals, not corporations, institutions, or public offices. Protecting institutions from defamation doesn't justify curtailing freedom of expression, except in cases related to national security, public order, public health, or public morals.***

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