

Advantages and Disadvantages of Implementing the Electronic Information and Transactions Law on Freedom of Speech

Hary Isdyanto¹, Alvi Syahrin², Madisa Ablisar³, Mahmud Mulyadi⁴
{haryisdyanto@gmail.com¹, alviprofdr@usu.ac.id², ablisar@yahoo.co.id³,
mahmud_mulyadi@usu.ac.id⁴}

Universitas Sumatera Utara, Indonesia^{1, 2, 3, 4}

Abstract. Freedom of speech and expression is a fundamental right in a democracy. Technological developments in Indonesia, especially social media, have become a significant necessity in carrying out various activities. However, the existence of the Law on Electronic Information and Transactions (EIT Law) has posed a threat to freedom of speech and expression as it can be used against people suspected of violating these laws. The EIT Law can be abused to arrest those criticizing the government. This paper aims to explore the right to freedom of speech in the corridor of national law. The application of the EIT Law has created contradicting opinions in society to ensure the Indonesian national law implements the suitable formulation of the freedom of speech. This normative legal research analyzed laws and regulations and collected field data from law enforcers and academics to determine the application of the EIT Law. This research is intended to obtain an accurate picture of sanctions application relating to freedom of speech and expression in the EIT Law. These sanctions must be imposed professionally and not selectively. Whenever possible, there should be alternatives to these criminal sanctions to prevent the disruption of the right to freedom of speech in Indonesia.

Keywords: Advantages and Disadvantages, EIT Law, Freedom of Speech

1 Introduction

Indonesia is a constitutional state, which means that all behavior is regulated by the applicable laws under Article 2 Paragraph (3) of the Constitution of the Republic of Indonesia. Apart from being a constitutional state, Indonesia adheres to a democratic system where the people have the right to show their expression. Many that speak and express themselves, especially in social media, do so in a positive manner. However, some abuse freedom of speech, causing legal problems and social conflicts.

The Law on Electronic Information and Transactions (EIT Law) was enacted to address legal issues and problems related to information technology and electronic transactions. However, various countries are far ahead in their development of cyberlaw. For example, Singapore and America have developed and perfected cyberlaw ten years ago. Malaysia has the Computer Crime Act 1997, the Digital Signature Act 1997, and the Communication and Multimedia Act 1998. Singapore has The Electronic Act 1998 and the Electronic Communication Privacy Act 1996. Australia, New Zealand, and other European countries also possess cyberlaw to protect their people and countries from cybercrime [1].

Related parties must continue to evaluate the development and implementation of the EIT Law to maintain and provide legal certainty for online transactions. The EIT Law should resolve issues arising due to the misuse of information technology and electronic transactions that are detrimental to the public. This law should positively impact the general public following Article 4 of the EIT Law. Article 4 states that information technology and electronic transactions should educate the general public, develop the national economy, improve public services, and provide a sense of security, justice, and legal certainty for users and organizers of the information technology. The issuance of the EIT Law will assist law enforcers in Indonesia in eliminating cybercrime, including those related to e-commerce and pornography [2].

Law and technology develop alongside each other. However, the law simply cannot keep up with rapid and dynamic technological developments. This imbalance opens up unlawful acts, such as criminal acts using mobile phones, computers, laptops, and other devices. In the last few years, technology has developed and advanced rapidly. Information and communications technology has become very widespread, which has a tremendous impact, such as the rapid development of mobile phones. The discoveries and developments in technology have undeniably facilitated human life [3].

Currently, many people abuse freedom of expression by ignoring the applicable laws and regulations. This can be seen in the rampant cases of hate speech, which can be defined as “provocation, instigation, or insult from one or more parties to another regarding various aspects such as race, gender, disability, skin color, sexual orientation, nationality, religion, and others”. Deploying hateful banners, spreading fake news on social media, and vilification are examples of hate speech [4].

For a democratic country, freedom of speech and expression plays a significant role in national development. Considering that the Draft Criminal Code is still being revised, it is crucial to inject pro-democracy human rights values into the new criminal law of Indonesia. In this study, the values in question are the rights to freedom of speech and expression, which are essential for exercising the control function of state administration. One of the efforts to guarantee freedom of speech and expression is to eliminate criminal sanctions for related transgressions. Based on the background of the problems outlined above, the researchers intend to study the corridors of freedom of speech and expression in the Law on Electronic Information and Transactions.

2 Research Method

This is normative research that examines problems based on concepts, opinions, and legal materials using the statutory approach as a benchmark.

This research uses secondary legal sources such as the Criminal Code, Law Number 11 of 2008 concerning EIT, Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning EIT, and Law Number 40 of 2008 concerning the Elimination of Racial and Ethnic Discrimination. The primary legal sources are books, online sources, and papers related to the issues in question.

The data were collected by observing online cases, especially those related to the EIT Law. The data included primary data from online observation and secondary data from law books, legal journals, and related laws and regulations. Observational data were then analyzed descriptively by taking into consideration legal theories, laws, and regulations.

3 Results and Discussion

The EIT Law has raised many conflicting opinions. Two articles are often considered unjust; namely, Article 27 Paragraph (3), which includes “all who deliberately and illegally distribute and or transmit and or provide access to electronic information and or documents that are insulting and or defamatory in nature” and Article 28 Paragraph (2) which involves “all who deliberately and illegally distribute information to incite hatred or enmity towards certain individuals and or groups based on ethnic group, religion, race, and inter-group relations”.

Freedom of speech and expression has been discussed in the Constitutional Court. In filing Articles 134 and 136 *bis* and 137 of the Criminal Code regarding insults to the President/Vice President, the Constitutional Court decided to terminate these articles. The Court decided that “insults” can create legal uncertainty as it is prone to misinterpretations, for example, determining whether a statement is considered criticism or insult. Criminal sanctions can also hinder the right to freedom of expression through oral, written, and attitude in protests. This article is declared constitutionally contradicting with Article 28, 28D Paragraph (1), 28E Paragraph (2), and Paragraph (3) of the 1945 Constitution. It can hinder efforts to communicate and obtain information, guaranteed by Article 28F of the 1945 Constitution [5].

Controversial cases of applying the EIT Law include:

- a. Prita Mulyasari, August 15, 2008. Prita sent an email containing her and her friends' complaints regarding services at the Omni International Hospital in Tangerang. At that time, the email message was accidentally spread to many mailing lists. Knowing this information, Omni Hospital took legal steps. Prita was charged with Articles 310 and 311 of the Criminal Code concerning Defamation and Article 27 Paragraph (3) of the EIT Law. As a result, Prita was faced with a possible six-year prison sentence. However, the Tangerang District Court did not impose any charges before the Supreme Court appealed to 6 months in prison with one year probation. Four years later, Prita was finally released after reconsidering her case was granted by the Supreme Court on 17 September 2012. Prita's case is interesting to study both in terms of law and justice because, on the one hand, it was proven that she had committed defamation and humiliation. After all, she was considered to have defamed Omni Hospital and its doctors, whereas, on the other hand, she was only trying to share her bad experiences with her friends. According to Article 28 of the Indonesia 1945 Constitution, Prita's right to do is protected by the Law.
- b. Muhammad Arsyad, a former student activist at Universitas Hasanuddin Makassar, was detained due to accusations of insulting a member of the *Golkar* (*Golongan Karya* political party) central board, Nurdin Halid. The informant was Abdul Wahab, a relative of Nurdin Halid. He reported this case with the accusation that Arsyad had insulted Nurdin Halid through a BlackBerry Messenger (BBM) status, which read “*No Fear Nurdin Halid Koruptor!!! Jangan pilih adik koruptor!!!*” (No Fear Nurdin Halid Corruptor!!! Do not elect a corruptor's younger brother!!!) Regarding this accusation, Arsyad was named as a suspect on August 13, 2013. One month later, on September 16, 2013, Arsyad's release was granted.
- c. Ervani Handayani had to deal with the law as she posted on Facebook about her husband's job transfer on May 30, 2014. She posted a status that was deemed to have defamed her husband's boss. After coming across the post, Ayas, the boss in question, reported the post to the police on defamation charges. The public prosecutor charged Ervani with multiple articles, including Article 45 Paragraph (1), Article 27 Paragraph (3) of Law Number 11 concerning Electronic Information and Transactions, and Article 310 Paragraph (1) of the Criminal Code concerning Defamation. Ervani's release was granted on November 17, 2014.

- d. Florence Sihombing was a postgraduate student of Notary Law at Universitas Gajah Mada (UGM). Florence was deemed to have insulted Yogyakarta citizens through uploads shared on Path in August 2014. As a result of her actions, Florence was charged with Article 27 Paragraph (3), Article 45 Paragraph (1), Article 28, and Article 45 Paragraph (2) of the EIT Law. In March 2015, the prosecutor filed a request for six months in prison with a probation period of 12 months and a fine of IDR 10 million instead of 3 months of confinement. The Yogyakarta District Court sentenced Florence to two months in prison.
- e. In November 2014, Fadil Rahim, a civil servant in the Gowa Regency, was reported to the police because he was considered to have insulted and defamed Ichsan Yasin Limpo, who served as the Regent of Gowa, South Sulawesi. Initially, Fadil shared his criticism through a Line group consisting of seven people. Fadil stated that he considered the Regent to be an authoritarian. In the ruling, Fadil claimed that Ichsan always put emotions first. This criticism made the Regent upset which caused him to report Fadil to the police. As a result, Fadil was sentenced to 19 days in prison. He was also threatened to be fired from his position as a civil servant.
- f. In 2012, Baiq Nuril Maknun, an honorary teacher at SMAN (Public Senior High School) 7 Mataram, West Nusa Tenggara (NTB), received a call from the principal, which would be referred to as M. In the conversation, M talked about immoral acts he had committed with a woman who was also acquainted with Nuril. Feeling harassed, Nuril recorded the conversation. In 2015, the recording was widely circulated in Mataram and infuriated M. Nuril was later reported to the police for recording and distribution. On September 26, 2018, through an appeal verdict, the Supreme Court sentenced Nuril to 6 months in prison and a fine of IDR500 million instead of three months in prison. The sentence was given because the judge considered that Nuril had committed a criminal act following Article 27 Paragraph (1) in conjunction with Article 45 Paragraph (1) of the EIT Law. However, on 29 July 2019, President Joko Widodo signed a Presidential Decree regarding granting amnesty for Baiq Nuril Maknun. With the issuance of this decree, Nuril is free from any legal sanctions [6].

The above cases show that law enforcement against the people is considered eliminating the right to freely express opinions as regulated in Article 28 of the 1945 Constitution. However, there are deviations in several articles or often referred to as inconsistent articles of the IET Law. The perpetrators do not realize that their actions are against the law. Freedom of speech is also regulated in Law Number 39 of 1999 concerning Human Rights, which says everybody is free to have, say, and disseminate his/her opinion by speaking and or in writing through printed and electronic media with due regard to religious values, morality, order, public interest and the integrity of the nation. This provision has become a debate in public regarding law enforcement against the perpetrators who violate the IET Law.

Based on the YLBHI (Indonesian Legal Aid Institute) data, there have been approximately 351 cases of violations of civil rights and freedom scattered throughout Indonesia since the enactment of the EIT Law. In addition, the Southeast Asia Freedom of Expression Network (SAFENet) has recorded hundreds of complaints related to the EIT Law. Some cases have been decided by the court, which grants permanent legal force; some are left hanging, while others have been peacefully resolved.

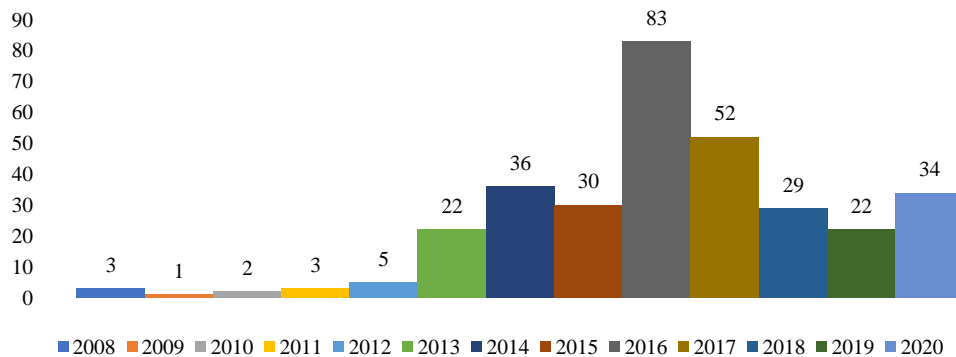


Fig. 1. Trends in EIT Law Cases from 2008 to 2020.

Figure 1 shows that since the enactment of the EIT Law, there were 3 cases in 2008, 1 case in 2009, 2 cases in 2010, 3 cases in 2011, 5 cases in 2012, a significant increase to 22 cases in 2013, 36 cases in 2014, 30 cases in 2015, another significant increase to 83 cases in 2016, 52 cases in 2017, 29 cases in 2018, 22 cases in 2019, and 34 cases in 2020 [7].

In Indonesia, freedom of speech and expression is not without limits and boundaries; there are values of *Pancasila* as the basis of the state that must be respected to maintain tolerance and respect for the rights of fellow citizens. International instruments also provide several provisions regarding the forms of freedom of speech and expression that can be infringed. Article 19 point 3 of the ICCPR (International Covenant on Civil and Political Rights) states that freedom of speech and expression must respect the rights and good name of others and cannot pose a threat to national security, order, health, and public morals. These provisions clearly state that freedom of speech and expression is a derogable right, which is a right that can be detracted. Furthermore, Article 20 of the ICCPR states that: (1) Any propaganda for war shall be prohibited by law, and (2) any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law.

Article 20 clearly states that freedom of speech and expression can be detracted to maintain a conducive situation. This article also obliges the prohibition of actions that could threaten peace.

Anyone is free to express an opinion, but the existing provisions of the current country and place need to be considered. These boundaries appear to be influenced by the social morals, order, and politics of a democratic society. Social morals also limit freedom of speech and expression, and existing regulations act as norms to maintain social and political order [8].

Indonesia is undergoing rapid developments in the field of information technology, especially online content and social media. It has caused its citizens to be familiar with cyberspace. Suggestions, ideas, and reactions towards the behavior of others can easily be uploaded on social media, spread rapidly and widely, and can be accessed by anyone, anywhere. Even without intent, content or opinions expressed in social media can harm the rights of others and even cause psychological damage. Indonesia currently upholds the EIT Law, which was issued in 2008 and amended in 2016. This law limits freedom of speech in electronic information technology, especially concerning the content that affects the rights of others.

The EIT Law has raised conflicting opinions. Those that hold to democratic principles think that freedom, which is the right of every citizen protected by law, must be upheld entirely without any restrictions. At the same time, the government views that freedom of speech and

expression must have limitations as the state, and in turn, freedom of speech and expression should be based on *Pancasila*. Limitations also serve to protect the rights of others and to maintain security and public order.

The public feels that the enforcement of the EIT Law is unsatisfactory, selective, and biased. Opinions often conflict in their discussion, especially if they are related to Law Number 39 of 1999 concerning Human Rights.

4 Conclusion

It can be concluded that in limiting freedom of speech and expression, the EIT Law serves to prevent the circulation of unaccountable information. This law was issued to protect people's rights and not limit or prevent them from speaking up and expressing themselves. The EIT Law is one of the milestones in developing cyberlaw in Indonesia which functions to protect public interests regarding electronic information and transactions. In a democracy, opinions will always be conflicting, and the EIT Law is no exception. Freedom of speech and expression is also regulated in the 1945 Constitution, the Press Law, the Human Rights Law, and other laws. *Pancasila* is the official, foundational philosophical theory of Indonesia, in which all its precepts are interconnected to maintain the integrity of the Unitary State of the Republic of Indonesia. Therefore, the EIT Law should be enforced justly and fairly, not as a means for the authorities to suppress government critics, to ensure that the law can protect the rights of freedom of speech and expression responsibly without the public being in fear of criminalization. On the other hand, the government must provide alternative policies, such as establishing a social media filtering body, before naming suspects and imposing criminal sanctions, as social media users may not realize that they have committed criminal acts. These measures can help to reduce the number of EIT Law infringements in Indonesia.

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