

UNS#ACKLING INDONESIA EXPRESSION

CYRILLA APC
ASSOCIATION FOR
PROGRESSIVE
COMMUNICATIONS



INDONESIA REPORT

This report was prepared by Alghiffari Aqsa, an Indonesian human rights lawyer. He is the former director of Jakarta Legal Aid Institute and founder of AMAR Law Firm and Public Interest Law Office.

This work was supported by the Association for Progressive Communications (APC) through the CYRILLA Initiative.

November 2020

Unshackling Expression: A Study on
Online Freedom of Expression in
Indonesia

ISBN 978-92-95113-32-9

APC-202011-CIPP-R-EN-DIGITAL-322

INDEX

<i>Introduction</i>	01
<i>Methodology</i>	04
<i>Indonesia legal framework on online and offline freedom of expression</i>	04
<i>Curtailment of online freedom of expression</i>	07
<i>Attacks and cases of online freedom of expression</i>	12
<i>Differences in online and offline expression restrictions</i>	20
<i>Opportunities in legal advocacy on online freedom of expression</i>	22
<i>Future violations and opportunities through bill</i>	24
<i>Summary and conclusion</i>	25

Introduction

Freedom of expression and opinion is an important factor in the fulfillment of human rights. The Human Rights Committee states that freedom of expression and opinion is the basis for the full enjoyment of other human rights. For example, freedom of expression is integral to the fulfillment of freedom of association, freedom of assembly and the right to vote.¹

In its development, freedom of expression is not only offline, but also online via internet access. The United Nations Human Rights Council affirms that the same rights of people offline must also be protected online, in particular freedom of expression, which applies regardless of boundaries and through any media, chosen by a person, in accordance with Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.² This report aims to provide an overview of the fulfillment and protection of online freedom of expression,

identify specific issues related to laws that are often used against it and also provide recommendations for improvements related to online freedom of expression in Indonesia. The improvement of online freedom of expression certainly contributes to the improvement of the fulfillment of other human rights.

Indonesia has been experiencing ups and downs in freedom of expression. After a long time under Suharto's authoritarian regime which was against criticism and differences in political views, Indonesia had a chance to enjoy a period of freedom after the Reformation era, at least until entering the second decade of the Reformation (1998-2000s). After the 1998 Reformation, Indonesia committed to uphold human rights and democracy stipulated in the Decree of the People's Consultative Assembly of the Republic of Indonesia Number XVII/MPR/1998 on Human Rights, the Law on Freedom of Expression in Public (1998),³ (1999),⁴ the Human Rights Law (1999),⁵ and

1 Human Rights Committee, General Comment No. 34 Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34. (2011, 12 September)

2 United Nations Human Rights. (2016). The promotion, protection and enjoyment of human rights on the Internet. *United Nations*. https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/32/13

3 Law Number 9: Freedom of Expression in Public. (1998).

4 Law Number 40: The Press Law. (1999).

5 Law Number 39: The Human Rights Law. (1999) .

the ratification of various conventions and covenants on civil liberties. Although in practice there are still many violations, after the 1998 Reformation the democratic space began to open. In 2008, the Information and Electronic Transactions Law was issued which began to limit freedom of expression online by means of criminalisation.⁶ Two decades after the 1998 Reformation, Indonesia turned back. Democracy, human rights and civil liberties, including freedom of expression, have begun to recede.⁷ Indonesia is currently facing a shrinking of democratic space with democratic actors under pressure from state actors. Data from the World Justice Project Rule of Law Index 2020 shows that the implementation of human rights in Indonesia ranks 79th out of 128 countries.⁸ Specifically, Indonesia's right to civil and political freedom only scored 61 out of 100. Moreover, Indonesia's

internet freedom scored 51 out of 100 according to Freedom House-Freedom in the World 2020,⁹ 119th place (red zone) out of 180 countries related to press freedom.¹⁰ According to The Economist Intelligence Unit (EIU), Indonesia is ranked 64th out of 167 countries related to democracy,¹¹ and only gets 3.2 points or is still below the moderate number of four on a scale of one to seven related to human rights performance during the Jokowi administration in 2015-2019, where the worst record lies in the right to freedom of religion and belief, the resolution of past human rights violations and freedom of expression.¹²

Respect for the right to freedom of expression in Indonesia has also declined. Many incidents of human rights violations occurred, such as violence and criminalisation of journalists and activists as human rights defenders as many as 118 cases¹³ in 2013 and 74¹⁴ cases

6 Law No.11:Electronic Information and Transaction.(2008)

7 LBH Jakarta (2017). Catatan Akhir Tahun LBH Jakarta 2017: Redupnya Api Reformasi. *LBH Jakarta*.

8 World Justice Project. (2020). World Justice Project Rule of Law Index 2020. *World Justice Project*. https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf.

9 Freedom House. (2020). Freedom in the World – Indonesia. *Freedom House*. <https://freedomhouse.org/country/indonesia/freedom-world/2020>.

10 Reporters Without Borders. (2020). Index Detail Data of Press Freedom Ranking 2020. *Reporters Without Borders*. https://rsf.org/en/ranking_table.

11 Nugraheny, D.E. (2020, 24 January). Indeks Demokrasi Indonesia Turun dalam Tiga Tahun Terakhir, Ini Respons Bawaslu. *Kompas*. <https://nasional.kompas.com/read/2020/01/24/20340031/indeks-demokrasi-indonesia-turun-dalam-tiga-tahun-terakhir-ini-respons?page=all>

12 SETARA Institute for Democracy and Peace. (2009, 10 December). Ringkasan Laporan Indeks Kinerja HAM 2015-2019. *SETARA Institute for Democracy and Peace*. <http://setara-institute.org/indeks-kinerja-ham-2019/>.

13 KontraS. (2018, September). Naskah Kajian Kondisi Pembela Ham di Indonesia - Tidak ada perlindungan HAM untuk Pembela Hak Asasi Manusia di Indonesia. Komisi untuk Orang Hilang dan Korban Tindak Kekerasan. *KontraS*. <https://kontras.org/home/WPKONTRAS/wp-content/uploads/2018/09/Paper-Kondisi-Pembela-HAM-di-Indonesia.pdf>.

14 Nugraheny, D. E. (2019, 11 December). Setara Institute Catat 73 Kasus Pelanggaran Terhadap Aktivistis HAM di Era Jokowi. *Kompas*. <https://nasional.kompas.com/read/2019/12/11/01254631/setara-institute-catat-73-kasus-pelanggaran-terhadap-aktivis-ham-di-era?page=all>

during 2014-2019, discrimination against religious/belief minority groups, the use of blasphemy law and to prosecute lawful expressions as well as curbing academic freedom. Data from the Setara Institute shows that human rights protection is related to freedom of expression and opinion only scores 1.9 (scale 1-7) or the lowest compared to other human rights fulfillment in Indonesia.¹⁵ The low fulfillment and protection of human rights related to the right to freedom of expression and opinions are inseparable from a number of factors that become obstacles, one of which is the emergence of various forms of expression through new media, for example in the online space and expressions that use technological means based on data from the Ministry of Communication and Information Technology (Kemenkominfo), internet users in Indonesia are currently 63 million people. Of that number, 95% use the internet to access social networks.¹⁶ More specifically, research from Wearesocial Hootsuite shows that as of January 2020, internet users in Indonesia were 175.4 million

and 160 million were on social media. The results also showed that social media users are aged 13-34 years old (79.7%) or around 127.52 million people.¹⁷ The amount is large enough to create a very large flow of information but unfortunately the government has failed to protect online freedom of expression and information and to create instruments in accordance with human rights principles, both according to international human rights instruments and the findings of the UN General Assembly relating to freedom of expression and internet freedom.

Various cases on violations of freedom of expression online occur so massively that the internet and social media are no longer a safe place for expression. The violations include censorship, internet site banning, internet slowdown, internet shutdown, criminalisation of expression on social media and online media, doxing, hacking, harassment to the threat of violence. Criminalisation has also resulted in arbitrary arrests, not only against ordinary citizens, but also against

¹⁵ SETARA Institute for Democracy and Peace. (2009, 10 December). Op. cit.

¹⁶ Kementerian Komunikasi dan Informatika Republik Indonesia. (2013, 7 November). Kominfo: Pengguna Internet di Indonesia 63 Orang. *Kominfo*. https://kominfo.go.id/index.php/content/detail/3415/Kominfo+%3A+Pengguna+Internet+di+Indonesia+63+Juta+Orang/0/berita_satker

¹⁷ Kompasiana. (2020, 28 February). Membaca Peta Pengguna Tik Tok dan Aplikasi Media Sosial di Indonesia. *Kompasiana*. <https://www.kompasiana.com/arisheruutomo/5e58c3edd541df2396062422/membaca-peta-pengguna-tiktok-dan-aplikasi-media-sosial-lain-di-indonesia?page=3>.

journalists, activists or human rights defenders who often criticise government policies.

Methodology

This study follows the format of analysis of the 2017 report 'Unshackling expression - A study on laws criminalising expression online in Asia'.¹⁸ It uses a normative-empirical legal research method that combines the analysis of written regulations related to freedom of expression online with the practice of how these regulations are applied, both to protect or even violate freedom of expression online.

This study has limitations in reviewing all cases of violations of freedom of expression online. Apart from the large number of cases, it is also because not all judgments are available and easily obtained and not all cases of violations were brought before the court. However, there are quite a number of high profile cases that can be used as a reference for analysing violations and the application of laws related to freedom of expression online. These cases consist of non-judicial cases, judicial cases and cases where the process is

still ongoing.

In addition to analyzing positive laws and regulations, this study also analyse bills that have the potential to violate freedom of expression in the future or actually become an opportunity for protection. Furthermore, this study also identifies several opportunities for advocacy strategies or legal arguments to protect freedom of expression online in Indonesia.

Indonesia legal framework on online and offline freedom of expression

Indonesia has quite a number of legal instruments that protect freedom of expression including freedom of expression online. Indonesia adopted the Universal Declaration of Human Rights, ratified various international human rights instruments and also enacted various national legal instruments.¹⁹ The 1945 Constitution of the Republic of Indonesia clearly guarantees and

¹⁸ Global Information Society Watch (2017). Unshackling Expression: A Study on Laws Criminalising Expression Online in Asia. *Global Information Society Watch*. <https://www.giswatch.org/2017-special-report-unshackling-expression-study-law-criminalising-expression-online-asia>

¹⁹ Indonesia Foreign Ministry. (2019, 28 March). Indonesia dan Hak Asasi Manusia. *Indonesia Foreign Ministry*. https://kemlu.go.id/portal/id/read/40/halaman_list_lainnya/indonesia-dan-hak-asasi-manusia

regulates freedom of expression. Article 28 of the Constitution stipulates that freedom of association and assembly, expressing thoughts orally and in writing and other forms are determined by law. Article 28E also regulates similarly by stating: “everyone has the right to freedom of belief, to express his thoughts and standings, in accordance with his conscience (paragraph 2) and everyone has the right to freedom of association, assembly, and expressing opinions (paragraph 3)”.

Article 28F of the 1945 Constitution regulates not only the right to obtain, seek and convey information, but also to own, store and process information. Article 28F of the 1945 Constitution reads as follows:

Every person shall have the right to communicate and to obtain information for the purpose of the development of his/herself and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels.²⁰

In addition to the Constitution, Indonesia has Law No. 39 of 1999 on Human Rights that contains several

articles in which there is freedom to expression and opinions. Article 23 Paragraph 2 of the Human Rights Law stipulates that everyone is free to have, issue and disseminate opinions according to his conscience, verbally and or in writing through print and electronic media by considering religious values, decency, order, public interests and national integrity. Article 25 of the Human Rights Law regulates the right to express opinions in public, including the right to protest. Whereas Article 44 of the Human Rights Law, specifically the part of the right to participate in government, guarantees everyone both individually and jointly the right to submit opinions, requests, complaints and or proposals to the government in the context of implementing a clean, effective and efficient government, both through speech or written communication.

Prior to the Human Rights Law, in the beginning of Reformation 1998, Indonesia had the Decree of the People's Consultative Assembly of the Republic of Indonesia Number XVII/MPR/1998 on Human Rights (MPR's Decree on Human Rights) which was similar to the Universal Declaration on Human Rights (UDHR). Article 19 of the UDHR guarantees that everyone has right to freedom of expression

²⁰ The Indonesian Constitution. (1945).https://www.constituteproject.org/constitution/Indonesia_2002.pdf?lang=en

and opinion; the right encompasses the freedom to hold tight to an opinion without any intervention and to seek, receive and convey information and thoughts through any media and regardless boundaries. Article 19 of the Decree of the People's Consultative Assembly stipulates that everyone has the right to freedom of association, assembly and expressing opinion.

Article 14 paragraph (1) of the Human Rights Law is exactly the same as Article 20 of MPR's Decree on Human Rights which stipulates that everyone has the right to communicate and obtain information to develop themselves and their social environment. While Article 14 paragraph (2) is exactly the same as Article 21 of MPR's Decree on Human Rights that everyone has the right to seek, obtain, own, store, process and convey information through any available channel.

Indonesia also has a law that guarantee freedom to express opinion in public, called Law No. 9 Year 1998 on the Freedom to Express Opinion in Public. Article 1 number 1 of Law No. 9 Year 1998 states that freedom to express opinion is the right of every citizen to express

opinion through speech, writing and other forms freely and responsibly in accordance with the law. The laws also regulates the form of expression in public, the procedure to organise and notify activities related to expressing opinion in public, its limitations, security and criminal sanctions to those who impedes expression of opinion in public.

Indonesia has ratified several international human rights instruments and ratified these into national laws such as the International Covenant on Civil and Political Rights (ICCPR) through Law No. 12 Year 2005 on the Ratification of ICCPR. Indonesia therefore is obliged to implement Article 19 on freedom of expression and to follow requirements when limiting it. Indonesia also ratified the Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families through Law No. 6 Year 2012 which also includes freedom of expression for migrant workers and their families.²¹

The Convention on the Rights of the Child is also ratified through Presidential Decree No. 36 Year 1990²² and International Convention on the Elimination of All Forms

²¹ Article 13 paragraph 2 regulates freedom of expression, that migrant workers and their family members have the right to freedom of expression; This right includes freedom to seek, receive and impart any information and thoughts, regardless of boundaries in speech, in writing or in printed form, artwork, or through other media of his choice.

²² Article 12 stipulates that every child has the right to express their opinions and be heard and considered when making a decision that will affect their life or the lives of other children.

of Racial Discrimination.²³ At the regional level, Indonesia is a signatory state to the ASEAN Human Rights Declaration. Although the declaration has problems, Article 23 states that everyone has the right to freedom of opinion and expression including the freedom to maintain opinion without interference and to seek, receive and convey information, in speech, writing and through other chosen means.

Curtailment of online freedom of expression

The Indonesian Constitution regulates the limitation of human rights to applicable rights. Article 28J Paragraph 2 of the 1945 Constitution of the Republic of Indonesia states that every person in exercising his rights and freedoms is obliged to observe to limitations imposed by law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfill just demands based on morality, religious values, public order and security in a democratic society.

The Constitutional Court used Article 28J of the 1945 Constitution to revoke Law No.4/PNPS/1963

concerning Supervision of Printings which contains possible disturbance of public order as the basis for the banning of books in Indonesia. The Constitutional Court is of the opinion that the prohibition of the distribution of books as a source of information, confiscation without trial, is an act that is not in line with or even contrary to Article 28F of the 1945 Constitution which regulates the right to develop oneself and freedom of information.²⁴

In addition to the Constitution, there are limitations regulated by Article 19 paragraph 3 and Article 20 of the International Covenant on Civil and Political Rights or Law No. 12 of 2005 and Article 73 of the Human Rights Law. Article 73 of the Human Rights Law states that the rights and freedoms set forth in this law can only be limited by and based on laws, solely to guarantee the recognition and respect for human rights and the basic freedoms of others, decency, public order and national interests. Unfortunately, there are weaknesses that result in the misinterpretation of limitation not in accordance with international human rights law standards. Some of these weaknesses include the lack of clarity about rights that should not be limited or derogated, basis of limitation that is

²³ Article 5 prohibits discrimination in the enjoyment of the right to have an opinion and to express an opinion.

²⁴ Constitutional Court Judgment No. 6-13-20/PUU-VIII (2010)

not acknowledged in international human rights law, for example limitation based on religious values and decency and the absence of indicators or formulations in defining the requirements of limitation as provided by the Constitution and Laws.²⁵

Siracusa Principles are not used as a reference by policymakers in Indonesia in limiting civil and political rights.²⁶ Likewise, the Johannesburg Principles which specifically regulate restrictions on freedom of opinion, expression and information, have never been used as a reference.²⁷ As a result, there are laws and regulations that are often used to violate freedom of expression, both online and offline.

1) *Criminal Code*²⁸

The Criminal Code is often used in conjunction with the Information and Electronic Transactions Law (UU ITE) in freedom of expression online. Articles that are often used are:

- Article 14 paragraphs 1 and 2 on broadcasting false news intentionally creating chaos. The maximum threat of imprisonment is 10 years and three years.
- Article 15 regarding

broadcasting uncertain, excessive or incomplete news that could raise chaos. The maximum imprisonment is two years.

- Article 310 paragraphs 1 and 2 regarding defamation with maximum imprisonment of nine months and one year and four months. Paragraph 3 of this article states that it does not constitute defamation or written defamation when an act is clearly done in the public interest or forcedly done to defend oneself and these two reasons could be used as a basis for defense.
- Article 315 regarding insults with maximum imprisonment of four months and two weeks.
- Article 316 regarding defamation and insults to officials who are carrying out official duties.
- Article 156 regarding feelings of hostility, hatred or contempt against one or several groups of the Indonesian people. The maximum imprisonment is four years.

25 ELSAM (2013). Buku Saku Kebebasan Berekspresi di Internet - Seri Internet dan HAM. Lembaga Studi Advokasi dan Masyarakat (ELSAM). <https://elsam.or.id/buku-saku-kebebasan-berekspresi-di-internet/>

26 Siracusa Principles. (1984). <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> 27 Johannesburg Principles. (2018). <https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf>

28 Law No. 1: Criminal Law Regulation (1946)

- Article 156a regarding blasphemy and invitation to follow no religion with a maximum imprisonment of five years.
- Article 157 regarding broadcasting hostility, hatred or contempt of a group of Indonesian people through various media. The maximum imprisonment is two years and six months.
- Articles 107a-107d which prohibit the spread of communism, Marxism and Leninism. The maximum imprisonment is 20 years.²⁹

Some of the articles above are not problematic in itself but the problems arise in the implementation by the law enforcers. For example, Articles 156 and 157 provide prohibition of hate speech that are needed to protect minority and vulnerable groups. However, the law enforcement officers do not understand the necessity of prohibition of hate speech and instead use it to curb freedom of expression. As long as there is an element of dislike for a group, the

article is applied. Moreover, the Constitutional Court (MK) expands the meaning of “group” to include certain institutions such as the police.³⁰

2) Information and Electronic Transactions Law (ITE Law)³¹

Articles that threaten freedom of expression online in the ITE Law are actually similar to what have been provided in the Criminal Code only with higher penalties. The ITE Law that originally intended to protect many people from information and technology crimes was actually used to imprison people who speak critically through social media, even with limited communication channels.

Triggered by the criminalisation of Prita Mulyasari in 2009, the government and the House of Representatives amended Law No.11 Year 2008 to Law No. 19 Year 2016.³² Nevertheless, the articles which are often used to prosecute opinions are still maintained. The Minister of Communication and Information stated that Article 27 paragraph 3 of the ITE Law is impossible to be revoked and added that there were

²⁹ Law No. 27: Amendment of Criminal Code related to Crimes against State Security (1999).

³⁰ Constitutional Court Judgment No.76/PUU-XV/. (2017)

³¹ Law No.11 Year 2008 which has been amended by Law No. 19: Electronic Information and Transaction. (2016).

³² Prita was convicted for expressing her complaint via e-mail to Omni International Hospital. Prita was detained and sentenced to a probationary sentence of 6 months in prison under Article 27 paragraph (3) of the ITE Law. A review judgment by the Supreme Court acquitted Prita from punishment. Supreme Court Judgment No. 225 PK/PID.SUS/. (2011).

errors in the implementation.³³

There were changes in the threat of punishment for defamation cases. It was increased from four to six years.³⁴ This is likewise the case of threats through electronic media, which was decreased from 12 to four years.³⁵ It was hoped that the police no longer need to detain suspects in defamation cases because the Indonesian criminal procedure code stipulates that one of the objective conditions of detention is being charged with the article that has at least five years criminal sanction. The revision of the ITE Law also emphasises that criminal defamation is an offense that must be reported directly by the victim and included a prohibition of harassment (cyber bullying).

In addition to maintaining the articles which threaten freedom of expression online such as Articles 27, 28, 45, 45A and 45B, the revision of the ITE Law also adds provisions that require the government to prevent the dissemination and use of electronic information and/or electronic documents that have prohibited content and terminating

access or instructing electronic system operators to terminate access to electronic information or electronic documents that have unlawful contents. This article is a threat to the sites of minority groups such as the lesbian, gay, bisexual and transgender (LGBT) community and other groups who have different beliefs from the majority.

3) Other provisions

In addition to the Criminal Code and the ITE Law, there are several other regulations that are often used to criminalise freedom of expression online or at least have the potential to be used, both alone and in conjunction with the ITE Law. These regulations are:

a. Pornography Law³⁶

Articles 34 and 36 which prohibit anyone from being an object or model or showing themselves or others in a performance or in public that describe nudity, sexual exploitation, sexual intercourse or other pornographic contents punishable with 10 years imprisonment each.

33 Ministry of Communication and Information. (February, 4 2015). Menkominfo: Article 27 Ayat 3 UU ITE Tidak Mungkin Dihapuskan. *Kominfo*. https://kominfo.go.id/index.php/content/detail/4419Menkominfo%3A+Pasal+27+Ayat+3+UU+ITE+Tidak+Mungkin+Dihapuskan/0/berita_satker_

34 ITE Law. (2016). Article 27 paragraph (3) in conjunction with Article 45 ayat (3) .

35 ITE Law. (2016). Article 29 in conjunction with Article 45B.

36 Law No. 44: Pornography. (2008).

This law was disputed by various human rights and women groups since there were many interpretations related to the pornography category.

b. Intelligence Law³⁷

Article 26 *Juncto* Articles 44 and 45 prohibit any person or legal entity from revealing and/or leaking intelligence secrets, punishable with 10 and seven years imprisonment respectively. Netizens must be careful about uploading information related to intelligence's secrets online.

c. State Flag and Symbol Law³⁸

There is a maximum punishment of five years imprisonment against anyone who damage, tear, trample, burn or does other acts with the intention of desecrating, insulting or degrading the honor of the national flag.³⁹ The same threat also applies to anyone who scratches, writes, draws or damages the national symbol with the intention of desecrating, insulting or demeaning the honor of the state symbol.⁴⁰ In practice there are people who upload pictures or videos to

social media that are deemed to be besmirching the national flag or symbol.⁴¹

d. National Police Chief's Circular on Hate Speech Handling

National Police Chief Circular No. 6 of 2015 on Hate Speech Handling principally gives authority to members of the national police to take preventive and law enforcement actions related to alleged hate speech, one of which is done through the internet or online media, with the application of articles in the Criminal Code such as Article 156, 157, 310, 311 Criminal Code and other laws such as Article 28 *Juncto* Article 45 paragraph (2) of the ITE Law. In practice it tends to cause abuse of power by members of the national police itself.

The lack of understanding of law enforcement officers and the unclear scope of hate speech resulted in catch-all applications of hate speech provision, including people who express criticism or feelings of dislike solely not based on ethnicity, religion, race and groups.

³⁷ Law No. 17 : State Intelligence (2011) .

³⁸ Law Number 24: State Flag, Language, Symbol and National Anthem. (2009)

³⁹ *Ibid*, Article 66.

⁴⁰ *Ibid*, Article 68.

⁴¹ Santoso, A. (2019, 11 August). Viral Bendera Merah Putih Dikencingi, Ini Ancaman Pidananya. *detikNews*. <https://news.detik.com/berita/d-4660895/viral-bendera-merah-putih-dikencingi-ini-ancaman-pidananya>.

The state should be able to provide strict limits on the scope of hate speech, or at least following the international provisions regarding expressions categorised as hate speech, which can be limited based on the provisions of Article 20 paragraph (2) of the Covenant on Civil Rights and Politics and Article 4 of the International Covenant on the Elimination of All Forms of Racial Discrimination.⁴²

Attacks and cases of online freedom of expression

The lack of clarity on regulations regarding limitation of the right to freedom of expression and freedom to obtain information, especially through the internet in the national legal system in Indonesia has caused many legal violations which is a factor that affect the low score of human rights fulfillment in Indonesia. One of the regulations governing the use of information through electronic media is the ITE Law which is often

used to ensnare and curb one's right to freedom of expression because of the existence of a catch-all provision that can be easily used and linked to articles in other legislation. Since the ITE Law was enacted, SAFEnet recorded⁴³ that there were 271 cases reported using the law in Indonesia.

Forms of violations of freedom of expression online in Indonesia:

1) *Criminal prosecution/criminalisation*

SAFEnet recorded a number of criminalisation cases against pro-democracy activists in 2019.⁴⁴ The cases involved journalists as well. Some of the cases are:

- Charge against Veronica Koman, who has been declared as a provocateur suspect who caused unrest due to her social media activity that informs incidents in Surabaya, Papua and West Papua and their developments. Police said Veronica's Twitter posts contain provocative matters

42 United Nation General Assembly. (2013, 11 January). Annual report of the United Nations High Commissioner for Human Rights, Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial, or religious hatred. *United Nation General Assembly*. https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

43 Gerintya, S.. (2019, 31 August). Periksa Data – Jerat Setan Pasal Karet. *Tirto*. *id*. <https://tirto.id/jerat-setan-pasal-karet-ehft>.

44 Safenet Voice. (2019, 17 October). Proyeksi Indonesia 2019-2024: Siaga Satu Represi Kemerdekaan Berekspresi dan Kriminalisasi Aktivist Pro Demokrasi. *SAFEnet*. <https://id.safenet.or.id/2019/10/proyeksi-2019-2024-siaga-satu-represi-kemerdekaan-berekspresi-dan-kriminalisasi-aktivis-pro-demokrasi/>.

and can be considered as hoaxes. Veronica was forced to flee abroad and was included in the fugitive list. Her passport was also revoked by the Indonesian government.⁴⁵

- Dandhy Dwi Laksono is a journalist and human rights activist who was arrested by the Jakarta Metropolitan Police on September 26, 2019 at around 23:00 on charges of spreading hoaxes that caused riots in Wamena and Jayapura on September 23, 2019, as well as expressing hatred towards the authorities. Until now, he is still a suspect under Article 28 paragraph (2) in conjunction with Article 45 A paragraph (2) of the ITE Law and/or Article 14 and/or Article 15 of Law No 1 Year 1946 on Criminal Law Regulation.
- Anindya Shabrina Prasetyo Case was reported to the police in 2018 on the suspicion of defamation under Article 27 paragraph 3 in conjunction with Article 45 paragraph 3 of the ITE Law and hate speech under Article 28 paragraph 2 in conjunction with Article 45A paragraph 2 of the ITE Law. She is a student and activist of Surabaya National Student Front who advocates cases of forced eviction and racism against Papuans in Surabaya. There is a strong allegation that the case against her is an intimidation for her to revoke a report she made against a police officer and civil service police unit who sexually harassed her during a police raid in Papuan dorm in Surabaya.⁴⁶
- Ananda Badudu is a former journalist and a human rights activist who was arrested by the police under the allegation of raising funds for student demonstrations. Ananda's arrest was related to the money raised by him through his social media and a fundraising website, Kitabisa.com, for

⁴⁵ United Nations Human Rights. (2019, 16 September). Indonesia must protect rights of Veronica Koman and others reporting on Papua and West Papua protests - UN experts. *United Nations Human Rights*. <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24990&LangID=E>

⁴⁶ Based on Police Report Number LP/ B/ 658/ VII/ 2018/ JATIM/ RESTABES SBY; and Defamation Report based on Article 27 paragraph 3 in conjunction with Article 45 paragraph 3 of the ITE Law and Police Report Number LP/ B/ 689/ VIII/ 2018/ JATIM/ RESTABES SBY dated 25 July 2018 submitted by the Head of Civil Service Police Unit of Surabaya.

medical needs of violence victims during student demonstrations against the Criminal Code Bill and Law on Corruption Eradication Commission in front of the Parliament Building on 24-25 September 2019.

- Raviyo Patra is a good governance activist who aggressively criticised the government on Twitter and his writings. On April 22, 2020 he was arrested and charged by the police under the allegation of spreading hoaxes to advocate riots through Whatsapp messages under to Article 14 paragraph (1) in conjunction with Article 15 paragraph (1) of Law No. 1 of 1964 concerning Criminal Law Regulation and/or Article 160 of the Criminal Code and/or Article 28 paragraph 2 in conjunction with Article 45A paragraph 2 of the ITE Law.⁴⁷
- A Padang's Inter-Community Study Center (PUSAKA) activist, Sudarto Toto, was arrested and declared as a suspect for his criticism against an allegation of prohibition to celebrate

Christmas in Nagari Sikabau, Padang. He was charged with Article 45 A paragraph (2) in conjunction with Article 28 paragraph (2) of the ITE Law and/or Article 14 paragraph (1) and (2) and Article 15 of Law No. 1 of 1946 on Criminal Law Regulations. Sudarto was arrested and named a suspect for publishing criticism in his social media accounts related to the alleged ban on Christmas worship in Nagari Sikabau, Padang.⁴⁸

Apart from the above cases, online expression can also be charged with treason, especially in relation to the human rights and political situation in Papua. For example, on 6 May 2019 a veterinarian named Syahrizal was arrested and charged with treason by the Lima Puluh Kota Resort Police, West Sumatra for posting a status regarding his disappointment about the election and mentioned "Republic of Andalas Raya". The veterinarian was sentenced to one-year imprisonment, not under the treason article but on hate speech or spreading hostility in accordance with Article 45A paragraph (2) of the ITE Law.⁴⁹ Regarding Papua, several

⁴⁷ Police Report Number A/473/IV/YAN.2.5/2020/SPKT PMJ, Polda Metro Jaya. (2020).

⁴⁸ Institute for Criminal Justice Reform. (2020, 8 January). UU ITE Kembali Menelan Korban, Segera Revisi UU ITE. *Institute for Criminal Justice Reform*. <https://icjr.or.id/uu-ite-kembali-menelan-korban-segera-revisi-uu-ite/>.

activists have been threatened with treason and application of the ITE Law because of their posts on social media:

- The case of Riki Karel Yakarmilena, a Papuan activist who was sentenced to 10 months imprisonment by the Jayapura District Court for posting online an invitation to fly the Morning Star flag on 1 December 2019. The Jayapura High Court upheld the Jayapura District Court ruling that sentenced Riki with Article 45 paragraph (2) in conjunction with Article 28 paragraph (2) of the ITE Law because the post was considered as a dissemination of information aimed at creating hatred or hostility towards certain individuals and/or group based on ethnicity, religion, race and intergroup.⁵⁰
- Assa Asso's case, a Papuan filmmaker and photographer who was charged with treason and incitement

because of his post on Facebook related to the riots in Jayapura on 29 August 2019.⁵¹ Asso was not found guilty on the treason charges, but was found guilty of incitement and was sentenced to 10 months in prison by the Jayapura District Court on 3 July 2020.⁵²

In addition to cases of defamation, the spread of hoaxes, and hate speech prosecution of blasphemy occurs in Indonesia. The Setara Institute, in its research, said that from 1965 to 2017, there were 97 cases related to blasphemy. There were only nine cases that occurred before the 1998 reform, but after reform the number had increased to 88 cases.⁵³ Cases of allegations of blasphemy via the internet include:

- The case of former DKI Jakarta Governor Basuki Tjahaja Purnama (Ahok) in 2016. In an event recorded on video, he was accused of religious blasphemy. Ahok was sentenced to two years

49 Chandra, R. (2019, 6 December). Dokter Makar Asal Sumbar Divonis Setahun Penjara. *Tagar.id*. <https://www.tagar.id/dokter-makar-asal-sumbar-divonis-setahun-penjara>.

50 Jayapura High Court Judgment Number 57/PID.SUS/2020/PT.JAP. (2020).

51 Article 106 of the Criminal Code on treason with the intention that all or a part of the country territory fall into the enemy's hands or to separate a part of the state's territory. He was also charged with Article 160 of the Criminal Code on incitement to invite people to commit criminal acts, commit violence against public authorities or fail to comply with the provisions of the law.

52 Yeimo, H. (2020, 3 July). Tidak terbukti makar, Assa Asso divonis 10 bulan penjara karena penghasutan. *Jubi.co.id*. <https://jubi.co.id/papua-tidak-terbukti-makar-assa-asso-divonis-10-bulan-penjara-karena-penghasutan/>.

53 Putsanra, Dipna Videlia. (2018, 21 September). Setara: Jumlah Kasus Penistaan Agama Membengkak Usai Reformasi. *Tirto.id*. <https://tirto.id/setara-jumlah-kasus-penistaan-agama-membengkak-usai-reformasi-c1j6>.

imprisonment for the case of blasphemy of the Al-Maidah paragraph 51 of the Quran, violating Article 28 paragraph (2) of the ITE Law and Article 156 of the Criminal Code on hate speech against a group.⁵⁴

Ahok did not appeal and served his sentence. He also lost in the then election for the Governor of DKI Jakarta.

- Arnoldy Bahari case in 2017. Arnoldy uploaded a status on Facebook that was considered defaming religion and troubling the Pandeglang community in Banten Province. Arnoldy was sentenced to five years in prison after being found guilty of violating Article 45a paragraph 2 in conjunction with Article 28 paragraph 2 of the ITE Law.⁵⁵ In addition, there were also cases of religious blasphemy through other electronic media such as Dwi Handoko who was sentenced to four years in prison by the Surabaya District Court for insulting God through social media and violating Article 28

paragraph 2 of the ITE Law; Soni Sumarno who was deemed to have violated Article 45A in conjunction with Article 28 of the ITE Law and sentenced to two years in prison in Riau; Otto Rajasa who was sentenced to two years in prison for violation of Article 28 Paragraph 2 in conjunction with Article 45 of the ITE Law for insulting God through a Facebook post; Ronald Ignatius Soeyanto Baria was sentenced to two years and ten months for violating Article 28 Paragraph 2 in conjunction with Article 45 of the ITE Law for insulting ulema through his social media account and a series of other cases.⁵⁶ Apart from the abovementioned cases, there was also a criminalisation of a victim of sexual violence, Baiq Nuril. In August 2012 Baiq Nuril, a teacher, received and recorded abusive calls from the principal of the school where she teaches. Her colleague distributed the record and the Principal was finally dismissed. The

⁵⁴ North Jakarta District Court Judgment No. 1537/Pid.B/2016/PN JKT.UTR. (2016)

⁵⁵ Mardiasuti, A. (2018, 30 April). Kisah Ki Ngawur Permana Nistakan Agama Dihukum 5 Tahun Penjara. *Detiknews*. <https://news.detik.com/berita/d-3998665/kisah-ki-ngawur-permana-nistakan-agama-dihukum-5-tahun-penjara>.

⁵⁶ Rahman, V. E. (2019, 20 August). Dari Ahok hingga Meliana, 17 Orang Ini Divonis karena Menista Agama. *IDN Times Jabar*. <https://jabar.idntimes.com/news/indonesia/vanny-rahman/ahok-hingga-meliana-ini-daftar-17-orang-yang-divonis-menista-agama-regional-jabar/4>.

school principal then reported Baiq Nuril to the Mataram Police, accusing her of transmitting an electronic record containing indecency under Article 27 paragraph (1) in conjunction with Article 45 paragraph (1) of the ITE Law.

Baiq Nuril was detained during the court hearings.⁵⁷ She was acquitted in the first instance court, but in appeal, cassation and review, the court found Baiq Nuril guilty and sentenced her to six months imprisonment and a fine of Rp. 500 million replaceable by three months imprisonment.⁵⁸

After widespread pressure from the public, on 29 July 2019 President Jokowi granted an amnesty to Baiq Nuril upon obtaining agreement from the Parliament. In the period of 2017 to 2020, Press Legal Aid Institute (LBH Pers) said that there were 36 journalists criminalised.⁵⁹ The latest case is related to the conviction of a journalist, Diananta, charged with Article 45A paragraph (2) of the ITE Law regarding a news article published on Kumparan.com/Banjarhits.id. Although the content of the news came from the resource person, and not from

Diananta's opinion or conclusion, and the Press Council had issued a statement of assessment and recommendations which confirms that the responsibility for the reported news rests with Kumparan.com, not Banjarhits as a partner, the police continued to process and carry out the investigation until Diananta's case was heard by Batu City District Court. These events occurred although Indonesia has Law Number 40 of 1999 on Press which is a *lex specialis* that says that this kind of dispute should be resolved through the Press Council.

2) Doxxing and violation of private data protection

Article 26 of the ITE Law states that personal information cannot be used and disseminated without the permission of the owner. In addition, in Article 95A of the Population Administration Law, there is a prohibition against disseminating population data with the threat of imprisonment for a maximum of two years and/or a maximum fine of Rp. 25 million. However, violations of these prohibitions are rarely enforced by law enforcement.

57 Ristiano, C. (2019, 30 July). 7 Tahun Baiq Nuril, Berawal dari Pelecehan, Tersangka UU ITE, hingga Terima Amnesti. *Kompas*. <https://nasional.kompas.com/read/2019/07/30/095644217-tahun-baiq-nuril-berawal-dari-pelecehan-tersangka-uu-ite-hingga-terima?page=all>.

58 Supreme Court Judgment No. 83/PK/Pid.Sus. (2019).

59 LBH Pers, Infographic: Pemidanaan Diananta Bentuk Kriminalisasi Pers.

Based on Indonesia Legal Aid Foundation and its 16 offices' monitoring report on the condition of the right to expression and opinion in Indonesia in 2019, there were at least six cases of confiscation or seizure, destruction of personal equipment and/or doxing and hacking of personal information.⁶⁰ Unconcealed doxing was also done by government officials. Minister of Home Affairs Cahyo Kumolo published the personal data of human rights activist Veronica Koman on a journalists' Whatsapp group in 2017 as a response to her oration that criticise the Jokowi government.⁶¹

3) *Bullying and buzzer (trolling)*

Another phenomenon in Indonesia related to freedom of expression online is bullying and buzzers. Unfortunately, there are no specific rules about bullying and buzzing in Indonesian regulations. Bullying can only be subject to defamation articles. This article is rejected by civil society and human rights defenders. Buzzers target anyone with a critical voice, especially towards the government,

both central and regional. For example, the harassment of Agustinus Edy Kristianto, who criticised the government's work program as part of anticipating the economic crisis due to COVID-19. On 16 April 2020, Agustinus conducted a research by subscribing to the pre-employment program and found many irregularities. He then shared his research results and it went viral. Agustinus then received many attacks from buzzer accounts against his personal and media companies.⁶²

Harassment also occurred against Veronica Koman who actively voiced human rights violations in Papua, LGBT activist Lini Zurlia and non-voters activists.⁶³ Veronica Koman faces not only bullying but threats of violence online as well. The buzzer phenomenon could be considered to have seriously disturbed democracy in Indonesia. Buzzers are paid and deployed to attack critical voices, mislead public perceptions, cover up irregularities in government performance and cover up human rights abuses by the government. Oxford University has issued research that includes Indonesia as one

60 Elvitaww. (2019, 27 October). Laporan Pemantauan YLBHI dan 16 Kantor di Indonesia tentang Kondisi Hak Berekspresi dan Menyampaikan di Indonesia 2019. *YLBHI*. <https://ylbhi.or.id/informasi/siaran-pers/laporan-pemantauan-ylbhi-dan-16-lbh-indonesia-kondisi-hak-berekspresi-dan-menyampaikan-pendapat-di-indonesia-2019/>.

61 Zaenudin, A. (2017, 13 May). Menyebar Informasi Pribadi, Menuai Pro dan Kontra. *Tirto.id*. <https://tirto.id/menyebar-informasi-pribadi-menuai-pro-dan-kontra-coA8>.

62 Adilah, R. Y. Dkk. (2020, 23 June). Buzzer Merusak Demokrasi. *Merdeka.com*. <https://www.merdeka.com/khas/buzzer-merusak-demokrasi.html>.

63 Prabowo, Hs. (2019, 4 April). Ketika Para Pemilih Golput Mendapat Serangan dan Stigma Buruk. *Tirto.id*. <https://tirto.id/ketika-para-pemilih-golput-mendapat-serangan-dan-stigma-buruk-dk1E>

of the countries with cyber troop phenomenon. These cyber troops were paid at prices varying from one million to fifty million rupiah.⁶⁴ Another clear example is a research on buzzers related to Papua. There is information that the buzzers received about USD 300,000 or Rp. 42,000,000 billion for advertising on Facebook to tackle anti-racism and referendum in Papua.⁶⁵

4) Hacking

From 2019 to 2020, there have been many cases of violations of the rights to privacy in online media in Indonesia. Hacking has been an increasingly used since the "Reformasi Dikorupsi" (corrupted reformation) protests in 2019 where the protesters went against the Criminal Code Bill and the revision of the Law on Corruption Eradication Commission. Dozens of accounts of human rights activists, student activists and academics were hacked.⁶⁶ Since then, various Whatsapp accounts, social media and

online discussion channels that are critical against the government have been hacked; such as the Indonesia Legal Aid Foundation's Instagram account hack on 14 June 2020.⁶⁷ The Instagram account of Tempo's chief of editorial was also hacked just when he was about to hold discussion on "Why Discussions and Writings Are Terrorized".⁶⁸ Further, the Whatsapp account of Gajah Mada University student who was a member of a committee of an online discussion on impeachment against the president was also hacked in May 2020.⁶⁹

Other examples include: hacking of Rasio Patra's account which led to his criminalisation in April 2020: hacking of social media account of Indonesia Corruption Watch (ICW) that was raising awareness about the acid attack against Commission on Corruption Eradication investigator Novel Baswedan⁷⁰ and various other hacks. Hacking has become a new pattern of challenges against pro-democracy activists.

Tempo and Rasio Patra have reported their hacking cases to the

64 Bradshaw, S. & Howard, P. (2019). The Global Disinformation Order 2019 Global Inventory of Organised Social Media Manipulation. *Oxford Internet Institute & University of Oxford*. <https://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2019/09/CyberTroop-Report19.pdf>.

65 Gunadha, R. (2019, 5 October). Buzzer Hoaks soal Papua Dapat Kucuran Dana Rp 4,2 M untuk Iklan di Facebook. *Suara*. <https://www.suara.com/news/2019/10/05/164608/buzzer-hoaks-soal-papua-dapat-kucuran-dana-rp-42-m-untuk-iklan-di-facebook>.

66 KontraS. (2020, 26 April). Siaran Pers Fraksi Rakyat Indonesia 26 April 2020 - Teror kepada Rakyat Harus Dihentikan, Segera!. *KontraS*. <https://kontras.org/2020/04/26/teror-kepada-rakyat-harus-dihentikan-segera/>.

67 Pebrianto, F. (2020, 16 June). Begini Kronologi Dugaan Peretasan Instagram YLBHI. *TEMPO.co*. <https://nasional.tempo.co/read/1353974/begini-kronologi-dugaan-peretasan-instagram-ylbhi>.

68 Rahma, A. (2020, 31 May). Akun Instagram Pemred Koran Tempo Diretas saat Memandu Diskusi. *TEMPO.co*. <https://nasional.tempo.co/read/1348177/akun-instagram-pemred-koran-tempo-diretas-saat-memandu-diskusi>.

69 KumparanNEWS. (2020, 29 May). Akun WhatsApp Panitia Diskusi 'Pemecatan Presiden' Diduga Diretas. *Kumparan*. <https://kumparan.com/kumparannews/akun-whatsapp-panitia-diskusi-pemecatan-presiden-diduga-diretas-1tVypzHaWSV>.

police using Article 30 Paragraph (3) in conjunction with Article 46 Paragraph (3) of the ITE Law. However, until now there has been no follow-up.⁷¹

5) Internet restrictions, censorship/ banning and internet shutdown

Examples of cases include the Indonesian government's policy of shutting down the internet network and cutting off social media access ahead of the announcement of the presidential election result on 22 May 2019, as well as internet shutdown in the Papua riots in September 2019. These shutdowns occurred without a clear mechanism and bandwidth throttling, no mitigation plan to guarantee public services during internet disconnection and no clear time limit when the internet would be restored so information about what happened in Papua was difficult to access.⁷² Then there was blocking of an LGBT community website,⁷³ the shutdown of North Sumatera University's "Suara USU" news website by the Chancellor because

the site published a story of a woman expressing her love for another woman and it was considered to publish a short story containing pornography,⁷⁴ as well as the blocking of the "Suara Papua" site that reports on factual conditions in Papua.⁷⁵ In February 2018, it was reported that there were 73 applications and 169 LGBT websites closed in Indonesia.⁷⁶ Examples include the Blued app and the Aruspelangi.org website.

Differences in online and offline expression restrictions

Restrictions of freedom of expression online and offline are not much different. Apart from criminalisation, people who participated in protests often become victims of violence. For example, in 2015, 24 workers and two lawyers who accompanied a protest against the Government Regulation on Wages were arrested.⁷⁷ In 2019, the

70 Tempo.co. (2020, 18 July). Empat Akun Media ICW Diretas. *MSN*. <https://www.msn.com/id-id/berita/nasional/empat-akun-media-sosial-icw-diretas/ar-BB16TsNU>.

71 Article 30 (1) of the ITE Law states that every person intentionally and without right or against the law accesses another person's computer and / or electronic system in any way.

72 Elvitaww. (2019, 3 September). Pembatasan Akses Internet: Kebijakan, Batasan, dan Dampaknya. *YLBHI*. <https://ylbhi.or.id/informasi/kegiatan/pembatasan-akses-internet-kebijakan-batasan-dan-dampaknya/>.

73 Forum Pengawas Blokir Internet. (2016, 6 March). Tolak Blokir Illegal terhadap Situs Komunitas LGBT. *ICJR*. <https://icjr.or.id/tolak-blokir-illegal-terhadap-situs-komunitas-lgbt/>.

74 Pearson, Elaine. (2019, 26 March). Sensor Kisah Cinta Lesbian di Kampus - Petinggi Kampus Mematikan Situs Berita Kampus Karena Cerita yang Mempromosikan Homoseksualitas. *Human Rights Watch*. <https://www.hrw.org/id/news/2019/03/26/328555#>.

75 CNN Indonesia. (2019, 2 October). Situs Suarapapua.com Tak Bisa Diakses Lewat Telkomsel. *CNN Indonesia*. <https://www.cnnindonesia.com/nasional/20191002082952-20-435930/situs-suarapapua-com-tak-bisa-diakses-lewat-telkomsel>.

76 BBC News Indonesia. (2018, 1 Februari). Dituding 'bermuatan asusila,' 73 app dan 169 situs LGBT diblokir di Indonesia. *BBC News Indonesia*. <https://www.bbc.com/indonesia/indonesia-42861758>

Indonesia Legal Aid Foundation recorded that between January and October of the year, there were 78 cases of violations of freedom of expression and opinion in Indonesia. There were 6,128 victims of violations, including 324 children, and 51 people died.⁷⁸ In 2019 the National Commission on Human Rights (Komnas HAM) also noted allegations of human rights violations committed by the police in handling protests against the Criminal Code Bill and the revision of the KPK Law on 24-30 September 2019. The victims were not only students but also 15 journalists who reported the demonstration.⁷⁹

In the midst of increasing aspirations for independence and referendum in Papua, repression of freedom of expression has intensified, for example the massive arrests of 1800 Papuan activists simultaneously in several cities in Indonesia on 2 May 2016,⁸⁰ arrests and criminalisation under treason allegation against seven Papuan activists in a protest against racism in August 2019, and six activists who protested on Papua

in front of the State Palace on 28 August 2019. All of these arrests led to a conviction of treason.⁸¹ Violations of freedom of expression and opinion have also occurred against human rights defenders in the environment sector. One example is Budi Pego, who was convicted of spreading communism due to the accusation of the use of a hammer and sickle symbol on the protest banner against the development of a gold mine⁸² and a civil lawsuit against Basuki Wasis and Bambang Hero for being expert witness in cases of environmental destruction.⁸³ There is also a case of the criminalisation of four farmers rejecting environmental pollution by PT.RUM.⁸⁴ From the lawsuits against Basuki Wasis and Bambang Hero, it was evidenced that the threat to freedom of expression is not only in the form of criminalisation, but also civil lawsuits which constitute Strategic Litigation Against Public Participation (SLAPP).

77 Irmansyah, Ade. (2016, 22 November). Pengadilan Memvonis Bebas 26 Aktivistis Buruh - 23 buruh dinyatakan bebas dari dakwaan dan menyusul 3 rekan mereka yang divonis bebas sebelumnya. *KBR.id*. https://kbr.id/nasional/11/2016/pengadilan_memvonis_bebas_26_aktivis_buruh/86946.html.

78 YLBHI, Op.,cit, page 9

79 Komnas HAM RI. (2020, 9 January). Peristiwa 24-30 September 2019, Komnas HAM: Instansi Harus Penuhi Kewajiban. *Komnas HAM RI*. <https://www.komnasham.go.id/index.php/news/2020/1/9/1304/peristiwa-24-30-september-2019-komnas-ham-instansi-harus-penuhi-kewajiban.html>

80 Mambarasar, Y. (2017). Meningkatnya Represi terhadap Kebebasan Berekspresi di Tengah Menguatnya Aspirasi Kemerdekaan Papua. *ELSAM*. <http://referensi.elsam.or.id/wp-content/uploads/2018/11/Meningkatnya-Represi-terhadap-Kebebasan-Berekspresi.pdf>.

81 Madrin, Sa. (2019, 3 September). Diduga Makar, 6 Aktivistis Papua Masih Ditahan. *Voa Indonesia*. <https://www.voaindonesia.com/a/diduga-makar-enam-aktivis-papua-masih-ditahan/5066468.html>.

82 Irfani, F. (2018, 14 December). Kejanggalan Kasus 'Palu Arit' terhadap Budi Pego. *Tirto.id*. <https://tirto.id/kejanggalan-kasus-palu-arit-terhadap-budi-pegodblM>.

Opportunities in legal advocacy on online freedom of expression

The judiciary in Indonesia recognises strategic lawsuit mechanisms such as class action, legal standing, citizen lawsuit, judicial review of laws and regulations and tort lawsuit against the Government in the Administrative Court. In addition, there are also procedures for disclosing public information to obtain information relevant to freedom of expression online.

Lawsuit on internet shutdown in Papua

The Jakarta Administrative Court granted the requests in the lawsuit filed by Press Legal Aid Institute, ELSAM, SAFEnet, the Alliance of Independent Journalists, and Indonesia Legal Aid Foundation on shutdown and throttling of internet in West Papua and Papua Provinces.⁸⁵ The claim was granted with consideration that the actions taken

by the Ministry of Communication and Information and the President by throttling or slowing down the bandwidth, blocking data services and/or terminating internet access completely in Papua Province (29 cities/regencies) and West Papua Province (13 city/regency) from 21 August 2019 to 4 September 2019 was tort and contrary to the provisions of the law. The judges considered that Article 40 paragraph (2a) and (2b) of the ITE Law, which became the legal basis for the Ministry of Communication and Information to slow down and block the internet, could not be used because these articles only limit information or documents that violate the law. Meanwhile, discretion cannot be applied because human rights limitation must be carried out based on law. The granting of the lawsuit is a reference that the government should not arbitrarily terminate or restrict internet networks and it amounted to violation of human rights.

ITE Law judicial Review

Requests for judicial review of the ITE Law to the Constitutional Court

83 Saputra, A. (2018, 11 October). Gugatan Rp 3,51 Triliun ke Dua Ahli IPB Ancam Kebebasan Akademik. *DetikNEWS*. <https://news.detik.com/berita/d-4251932/gugatan-rp-351-triliun-ke-dua-ahli-ipb-ancam-kebebasan-akademik>.

84 Prabowo, H. (2020, 31 May). Kisah Muram Keluarga Aktivist Di Balik Kriminalisasi Limbah PT RUM. *Tirto.id*. <https://tirto.id/kisah-muram-keluarga-aktivis-di-balik-kriminalisasi-limbah-pt-rum-eJVD>

85 Jakarta Administrative Court Judgment No.:230/G/TF/2019/PTUN. JKT. (2020, 3, June).

have been filed several times. One of the things that was granted was a request for a judicial review of Article 31 paragraph (4) of the ITE Law on wiretapping through a government regulation. The Constitutional Court basically annulled the article with the consideration that in its previous judgment, the Court already considered wiretapping and conversation recording as forms of human rights limitation which could only be based on laws as provided by Article 28 J paragraph (2) of the 1945 Constitution. The enactment of government regulation is an administrative regulation and do not have the authority to contain human rights limitation.⁸⁶

On the other hand, Article 27 paragraph (3) of the ITE Law related to defamation failed to be annulled since the Constitutional Court was of the opinion that respect for the dignity of humanity should not be harmed by actions that disturb human values through acts of humiliation and/or defamation.⁸⁷ The judges also cited Article 12 of the UDHR and Articles 17 and 19 of the ICCPR in their consideration and emphasised that restrictions on freedom of expression can be exercised to respect the rights

or good names of others.⁸⁸

Acquittal from the ITE law

Although the Constitutional Court has stated that the “catch-all articles” in the ITE Law are constitutional, there are decisions that can be used as a reference for law enforcers in applying the articles in the ITE Law. These decisions include:

- Judgment No. 196/Pid. Sus/2014/PN.Btl with defendant Ervani Emy Handayani Binti Saiman who was acquitted on the grounds that there are justified reasons that emotions expressed in conveying complaints and criticisms are likely to offend others. The judgment read that Article 27 paragraph (3) of the ITE Law must be contextualised with Articles 310 and 311 of the Criminal Code and that Article 27 paragraph (3) is an absolute complaint-dependent offense.
- Judgment No. 292/Pid.B/2014/PN.Rbi with defendant Ir. Khairudin M. Ali, M.Ap

⁸⁶ Constitutional Court Judgment No. Perkara 5/PUU-XIII/2010 tanggal. (2011, 24 February).

⁸⁷ Constitutional Court Judgment No. Perkara 50/PUU-VI/2008 tanggal. (2009, 4 May).

⁸⁸ Ibid. hal.100.

who was acquitted with the consideration that if a statement does not explicitly mention a name, then the statement does not have an insulting content. The Panel of Judges emphasised the importance of mentioning names accompanied by accusations.

- Judgment No. 1269/Pid.B/2009/PN.Tgn with defendant Prita Mulyasari who was acquitted with the consideration that criticism for public interest or to defend oneself impedes on right to distribute, transmit and make an information accessible although the content might be insulting.
- Judgment No. 415 K/Pid. Sus/2015 in conjunction with Judgment No. 390/Pid.B/2014/PN.Mks with defendant M. Arsyad who was acquitted by the Panel of Judges due to consideration that insults made through Blackberry Messenger need to provide proof of ownership of the messenger account through at least two contacts of such messenger or through digital forensic examination by an electronic information

and transaction expert. The consideration requires the Prosecutor to prove the validity of electronic evidence that proves who is he rightful owner of the account.

Although it is very small, there is still an opportunity to revise laws that threaten freedom of expression online, in particular the ITE Law. The Indonesian Government and the House of Representatives acknowledged before that the revision of the ITE Law was due to the criminalisation of Prita Mulyasari which has received widespread criticism from the public.

Future violations and opportunities through bill

The most obvious threat is the Criminal Code Bill, which was originally due to be passed in September 2019, but was canceled due to massive protests. The draft articles that could threaten freedom of expression online include: Articles 217-220 concerning crimes against the dignity of the President or the Vice President; Articles 240-241 regarding insults to the government;

Articles 246-247 on incitement to rebel against the authority and Article 281 concerning interference and misleading of the judicial process. In addition, the Criminal Code Bill still maintains articles related to defamation, slander and pornography as in the current Criminal Code.

There are no strong phrases to prevent someone being criminalised for exercising their right to expression online. The government and the parliament reentered articles on insult against the President or Vice President and insulting the government which were annulled by the Constitutional Court. The government is determined to reinsert this article into the Criminal Code Bill even though this action is an act of disrespect for the Constitutional Court's judgment or defying the court's judgment.

Apart from the Criminal Code Bill, there is a Personal Data Protection Bill which will soon be passed by the Parliament. Unlike the Criminal Code Bill, the Personal Data Protection Bill is actually an opportunity for promoting freedom of expression online. The Personal Data Protection Bill gives sovereignty to individuals over their own personal data, reinforces the limits of the authority of the government, institutions and other parties in accessing individual

personal data, regulates clearly and specifically the use of individuals' related data and information, guarantees the protection of personal data and provides strict sanctions for violations of these rights. The Personal Data Protection Bill divides personal data into two types: general personal data (name, gender, nationality, etc.),⁸⁹ and specific personal data (health data, biometrics, child's data, sexual life/orientation, political views and others). The Personal Data Protection Bill can protect anyone who makes expressions online from bullying and doxing. There is a maximum penalty of two years and a maximum fine of Rp. 2 billion against people who deliberately and unlawfully disclose personal data that does not belong to them. In addition, there is also an obligation to the controller of personal data to prevent it from being accessed illegally.⁹⁰ This at least minimises the opportunities for hacking.⁹¹

Summary and conclusion

The situation of freedom of expression online in Indonesia affirms that Indonesia is shifting further from human rights and democracy. This is not much different

from the situation in other countries in Southeast Asia which seem to be competing to be the worst in human rights and democracy. The shrinking space for democracy for civil society has the potential to make conditions worse because the state is difficult to be monitored and be reminded in protecting human rights, especially freedom of expression.

Indonesia actually has quite a number of regulations that protect freedom of expression online or offline from laws to the constitution. However, there are still laws that restrict freedom of expression online, such as the Criminal Code, the ITE Law, the State Flag and Symbol Law and the Pornography Law. There is also a threat in the future if the Criminal Code Bill is passed because not only it will maintain articles that are often used to criminalise freedom of expression but it will also revive articles that have been revoked by the Constitutional Court.

Apart from the legal substance that limits freedom of expression online, there are also problems in the application of the law. The application of treason and the ITE Law against Papuan activists and the application hate speech against

human rights activists are some examples. The article on hate speech, which should be a tool to protect minority and vulnerable groups, is instead used to attack activists because law enforcement officials interpret all kinds of criticism or dislike as hate speech. Attacks on freedom of expression in Indonesia are increasingly diverse.

Initially, attacks on freedom of expression online were generally related to slander, defamation and blasphemy but now it has expanded to treason articles, hate speech and spreading fake news. It is made worse by the presence of doxing, buzzing, bullying, hacking, blocking and shutting down the internet in a certain area.

Actors of violations of freedom of expression online are also very diverse, both state and non-state actors. State actors range from the police, civil service police, court, university leaders, to the Minister of Communication and Information and the Minister of Home Affairs. The non-state actors include individuals, community organisations and corporations. Based on aforementioned conditions, Indonesia not only needs a lot of improvements

89 Personal Data Protection Bill. (2019). Article 3. <https://aptika.kominfo.go.id/wp-content/uploads/2019/09/RUU-PDP.pdf>

90 Ibid. Article 61.

91 Ibid. Article 30 ayat (1).

to the substance of the law, but also to improve the quality of the law enforcement officials in understanding freedom of expression and implementation of the law. State administrators and policymakers must understand the various principles of freedom of expression and human rights limitations, such as the Johannesburg Principles, the Camden Principles and the Siracusa Principles.

Apart from that, serious efforts are needed to reiterate and uphold the accountability of the law enforcement officials, either through strengthening supervisory institutions or reforming criminal procedural law which adheres to human rights principles and protection.