Repressing Expression

Case study of blocking and filtering of internet content and criminalization of internet users in Indonesia

Writers:

Wahyudi Djafar
Zainal Abidin

Institute for Policy Research and Advocacy [ELSAM]

2014

Repressing Expression

Case study of blocking and filtering of internet content and criminalization of internet users in Indonesia

Writers:

Wahyudi Djafar
Zainal Abidin

First published by:
Institute for Policy Research and Advocacy [ELSAM]

Jl. Siaga II No.31, Pejaten Barat, Pasar Minggu, Jakarta Selatan 12510
Tel. +62 21 7972662, 79192564, Fax. +62 21 79192519
email: office@elsam.or.id, laman: www.elsam.or.id, twitter: @elsamnews - @ElsamLibrary

All ELSAM publication are dedicated to the victims of human rights violation as well as part of effort of promotion and protection of human rights in Indonesia.

Except where otherwise noted, content on this report
is licensed under a Creative Commons Attribution 3.0 License
creative commons
Some rights reserved.

TABLE OF CONTENT

CONTENT

A. INTRODUCTION

B. INTERNET CONTENT POLICY IN INDONESIA

C. BLOCKING AND FILTERING OF INTERNET CONTENT

- **a. Blocking and Filtering of Internet Content in Indonesia**
- **b. Blocking and Filtering Related to Religious Defamation**
- **c. Blocking and Filtering Related to Pornography**

D. RESTRICTION EXPRESION WITH THE THREAT OF CRIMINAL SANCTIONS

- **a. The Problematic Formulation of ITE Law**
- **b. Implementation of the ITE Law**
  - **b.1. Discussion of the Elements of Article 27 (3) of ITE Law**
  - **b.2. Discussion of the Elements of Article 28 (2) of ITE Law**
  - **b.3. Severe Sanctions Encouraging Pre-trial Detention**
  - **b.4. ITE Law Creates Legal Uncertainty**
  - **b.5. The Absence of Human Rights in Legal Considerations**
- **c. ITE Law: The Act of Public Control**
- **d. The Civil Code Enforcement: A Multiple Punishment and High Rated Risk of Large Amount of Fine**
- **e. The Mediation: Apology is An Adequate Means to Settle a Dispute**
- **f. The Damage of the ITE Law: The Rising of the Chilling Effect**

E. CONCLUSION

BIBLIOGRAPHY
Appendixs of implementation cases of the ITE Law
Profile of ELSAM

A. INTRODUCTION

The increasing number of internet users has resulted in the rise of cyber world crimes. To anticipate the cyber world crimes, many countries, including Indonesia, have produced various policies to control and supervise the internet users. Some policies, which may contain a threat of detention, are particularly related with internet content. When we talk about internet content, there are at least two emerging issues which are blocking and filtering of the content and the criminal charges burdened to the users posting certain content.

Indonesia definitely faces several problems on internet content. The country, for example, has mentioned the practice of blocking and filtering on internet content in some regulations but has yet to compose a thorough and complete technical know-how on the practices, including the complaint mechanism. The existing policies only regulate the state's authority to block and filter certain content which may contain pornography, religious defamation and hate speech. Those policies, unfortunately, never give a clear context on the limitation, the mechanism, as well as the defense and complaint efforts upon those acts.

Meanwhile, when it comes to criminalization of internet users, the state says that criminal charges are necessary to protect others' rights and reputation, as well as preventing religious defamation and incitement to hatred. The decision makers have adopted almost all materials of Indonesian Criminal Code (KUHP) to process cyber crimes cases, even impose heavier charges as they believe that online defamation creates wider impact. As a matter of fact, United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression Frank La Rue stressed that internet is a new and unique tool of information that it should be regulated in different way with other offline publications. What looks balance and fair treatment for offline media may not be suitable on internet. La Rue made example on how online defamation can be responded by the related individuals as soon as it is published. Criminal charges on defamation in internet, therefore, will not be necessary.

An arbitrary usage of criminal charges for internet users is one of the hardest form of limitation for rights of expression. Not only does the action create a chilling effect, it also tends to violate other forms of human rights. The detention practice, for instance, might include torture, intimidation and other forms of punishments that go against human rights values.

This writing tries to elaborate the problems around the regulation and the practice of blocking and filtering of internet content in Indonesia, which apply on two actions: the act of blocking and filtering and the criminal charges threat for the internet users. The protection of civil liberty, which is closely related with all those matters, will also be discussed.

B. POLICY ON INTERNET CONTENT IN INDONESIA

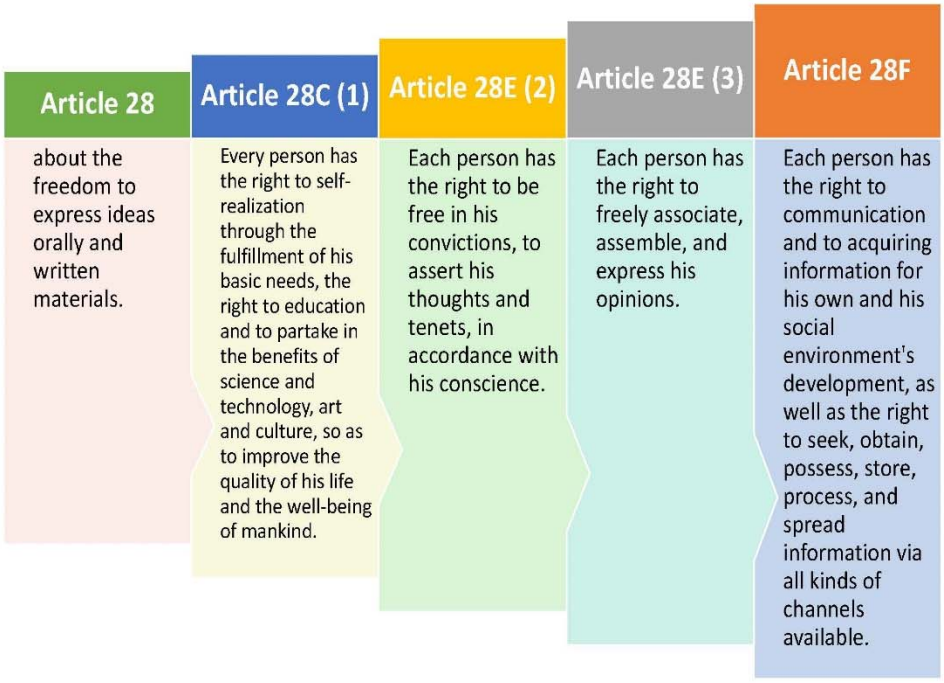
Elsam's previous publication highlighted the dynamic policies related to internet and human rights, including the regulation of internet content. The publication said that the limitation of internet content, which is legalized in some regulations, was increasing.[1] When we talk about internet content, in the framework of national Law or human rights protection, we must relate it with the protection mandated in the 1945 constitution. The fulfillment of the freedom of speech and expression, and the right to spread information must become the main foundation and the ultimate purpose of any internet-content policy. UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression Frank La Rue stated that internet

[1] See Wahyudi Djafar, Control Policy versus Internet Freedom: Brief introduction of the development and dynamics regulation related to internet and human rights in Indonesia, Malaysia and Philippines, (Jakarta: Elsam, 2013).

has become a tool that is necessary to fulfill human rights, to eradicate fairness and to foster the development.[2]

The second amendment of the 1945 Constitution emphasized that the protection of human rights is inseparable from the citizen's constitutional right, including the freedom of speech and expression, as well as the right to find, keep and spread the information. Following the development of technology, the Constitution recognized the importance of science and technology toward the improvement of human development and saw it as the part of human rights. This acknowledgment went in the same line with La Rue's statement on the role of internet as the modern form of communication and information in fostering development. Details of the acknowledgment and protection of human rights are listed in the following articles:

Grapich 1: Rights Protection on the 1945 Constitution



The articles do not only strongly acknowledge and guarantee the fulfillment of the rights but also stipulate the state, especially the government, to protect, develop, fulfill and uphold the human rights for every citizen.[3] Other acknowledgments of human rights can be found in several Laws such as 1999 Law No. 39 on Human Rights, 1999 Law No. 40 on Press, 2005 Law No. 12 on and 2008 Law No. 14 on KIP. The Human Rights Law, for instance, acknowledges the right to enjoy the development of science and technology for the sake of personal and society's welfare;[4] the guarantee to seek, keep and spread information;[5] and the right to own, express and spread the opinion.[6] Meanwhile, the Press Law contains some regulation that apply on internet content such as (i) press freedom is part of human rights for every citizen; (ii) censorship, ban and restriction of national media is not allowed; (iii) the press's right to seek, own and spread the ideas and information is guaranteed; and (iv) every journalist owns the right to refuse.[7]

[2] See Indriaswati D. Saptaningrum and Wahyudi Djafar, *Rights based internet governance: A study on the general issues in internet governance and the impacts on the protection of human rights*, (Jakarta: Elsam, 2013).
[3] See Article 28I verse (4) of the 1945 Constitution.
[4] See Article 13 of Human Rights Law.
[5] See Article 14 of Human Rights Law.
[6] See Article 23 of Human Rights Law.
[7] See Article 4 of Press Law.

Despite the Laws that support human rights fulfillment, other regulations contain opposite material, meaning that the limitation and reduction of internet-related rights (freedom of speech, expression, and right to information) are made without considering the standard and principles of human rights.[8] In Indonesia, the specific regulation of internet content was made in 2008 when the country issued the Law No. 11 on Information and Electronic Transaction (ITE). Prior to that law, the sole reference on internet was the 1999 Law No. 36 on Telecommunication even though the law did not regulate the internet content, including the control and supervision.

ITE Law, despite its name, does not contain sufficient material to be the main reference on internet content. The Law mainly stresses on the limitation of internet content that suspected of containing restricted subjects and is categorized as crime. Such limitations can be found in the Article 27, 28 and 29 of the law. The forbidden content includes those related to: (i) morality; (ii) connected to gambling; (iii) contains contempt and/or defamation; (iv) contains threat and/or extortion; (v) spreads the fabricated stories that cause damage or loss to consumers; (vi) incites hatred based on religious, race and intergroup relations; and (vii) contains violent material.

Apart from the ITE Law, the conditions to regulate internet content are also found in the Article 18 (a) of the 2008 Law No. 44 on Anti-pornography, which stresses that the state may block any website suspected of containing pornographic material or offers pornography-related services. The Article 40 (2) of the law states that the government controls the internet content to protect the public interest and public order from any misuses of information and electronic transaction.

Referring to the ITE and the Anti-pornography laws, there are four reasons of internet content's control in Indonesia, which are public morality, public order, public security and individual's reputation. The restriction has followed the principles of international law on human rights, but the law-making process has yet to go in line with the principles of human rights restriction. However, the procedure of restriction of the ITE and the Anti-pornography laws is not designed by considering the principles of restriction. Ideally, the principles of restriction is used as the procedural law for the implementation of the laws. The broad definition of pornography, which often used as the basis of restriction to many internet contents, becomes a problem since it could lead to violation toward the right of expression.

The two laws provide a legal basis for the government to block some internet contents. This act first emerged soon after the ITE Law was issued in March 2008. Muhammad Nuh, then Communication and Information Technology Minister, said that the ministry would soon block the internet contents related to pornography and violence. Nuh said that the blocking would be based on common sense.[9] However, until he stepped down as the minister in October 2009, the ministry only did little to block several sites displaying pornographic content.

His big, ambitious plan on blocking and filtering was continued by his successor Tifatul Sembiring. On his early period at office, Tifatul expressed his eagerness to immediately pass the ministerial plan on multimedia content, which was prepared by Nuh.[10] The ministerial regulation was based

[8] Details of the restriction and reduction of civil and political rights, especially the freedom of expression can be accessed in Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, available at http://www1.umn.edu/humanrts/instree/siracusaprinciples.html, and The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, tersedia di http://www1.umn.edu/humanrts/instree/johannesburg.html. Also read Manfred Nowak. *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev. ed.). Kehlam Rhein: Engel, 2005.

[9] See "Menkominfo: Pemblokiran Situs Porno Berdasarkan Akal Sehat", at http://www.antara.co.id/view/?i=1206456463&c=NAS&s=, accessed on Nov. 20, 2013.

[10] See The Ministry of Communication and Information's press release No. 22/PIH/KOMINFO/2/2010, "Sikap Kementerian Kominfo Dalam Menyikapi tabeningkatan Maraknya Penyalah-Gunaan Layanan Internet".

on Article 40 (2) of the ITE Law. The ministry said that the government was equipped with full authority to censor or block suspicious internet content.[11]

The ministerial regulation draft stated that internet providers were restricted to distribute and open access to: pornographic contents; morally-incorrect content; gambling-related content; content that might offense one's physical ability, intellectuality, service, skill and other physical and psychological aspects; content that carrying the fabricated story and could harm consumer's right on electronic transaction; content that incites hatred, individual/group racial and religious conflict; content that exposes violence and threat to certain individual; content that exposes private and confidential matters such as one's testament; content that related to intellectual property without the holder's consent.[12]

The ministry's plan was massively rejected by the civil society, especially from internet providers, journalist and media, who was afraid that it could limit the effort to cover news and restrict the public's access of information. The public's reluctance also came from the state's repressive treatment on information sharing during the New Order.[13] Out of controlling the internet content, the government came up with idea to initiate the Multimedia Content Team, controlled by a directorate general, and would act as an "Internet Censorship Board".[14] Due to the strong rejection from public, the government called off the ministerial regulation's draft. In its attempt to go on with the plan, the ministry revised it into the Procedure of Report and Complaint of Internet Content, only to find another public rejection. The draft was seen as restricting civil liberty.[15]

Recently, the ministry offered a new version of ministerial regulation on the treatment for negative-content, which is basically made to block the websites suspected of containing restricted materials as listed in the ITE Law. This regulation draft mentions three internet contents that classified as negative: pornography-related sites, gambling-related sites and other illegal activities. The draft is also prepared to legalize the ministry's Trust Positive (Trust+), a database of websites suspected of having pornographic content or that against the country's moral values (more on this topic will be explained later). This draft is meant to fill the legal gap on blocking and filtering of internet content that is not yet regulated by the ITE Law.[16]

Once again, the draft was criticized. According to the Article 28J (2) of the 1945 Constitution, any restriction related to the freedom of expression must be prescribed by law. The Constitutional Court's verdict No. 5/PUU-VIII/2010 on the judicial review of ITE Law also confirmed that restriction of derogable rights has to follow the Article 28J paragraph (2) of the 1945 Constitution.[17] The confirmation was necessary to avoid misuse on the regulation of restriction of freedom of expression. The court stated that procedural law of interception of communication must be passed in a law. Therefore, the ministry was not allowed to compile and pass the policy of restriction without the involvement of the Parliament as the representation of people.

---

[11] See the draft of ministerial regulation No: .../PER/M/KOMINFO/2/ 2010, available at http://www.postel.go.id/content/ID/regulasi/telekomunikasi/kepmen/rpm%20konten%20multimedia.doc, accessed on Nov. 20, 2013.
[12] See *Ibid*.
[13] See "Sensor Internet Akan Rugikan Indonesia", at http://www.detikinet.com/read/2010/02/15/122453/1299671/398/sensor-internet-akan-rugikan-indonesia, see also "RPM Konten Terus Ditentang", http://berita.liputan6.com/hukrim/201002/264295/RPM.Konten.Terus.Ditentang, accessed on Nov. 20, 2013.
[14] See "Selamat Datang Lembaga Sensor Internet Indonesia", at http://www.politikana.com/baca/2010/02/12/selamat-datang-lembaga-sensor-internet-indonesia.html, accessed on Nov. 20, 2013.
[15] See "Berganti Nama Pun, RPM Multimedia Tetap Kekang Pers", at http://www.tempo.co/read/news/2010/06/26/173258619/Berganti-Nama-Pun-RPM-Multimedia-Tetap-Kekang-Pers, accessed on Nov. 20, 2013.
[16] Detailed information on ministerial regulation draft on the treatment for negative-content sites can be accessed at http://donnybu.com/wp-content/uploads/2013/12/RPM-Tentang-Situs-Bermuatan-Negatif.pdf.
[17] See the Constitutional Court's verdict No. 5/PUU-VIII/2010 on the judicial review of ITE Law at http://www.mahkamahkonstitusi.go.id/putusan/Putusan%20%205_PUU_VIII_2010%20_edit%20panitera_.pdf.

C. BLOCKING AND FILTERING OF INTERNET CONTENT

Prior to further discussion on the practice of blocking and filtering of internet content in Indonesia, we must clearly coin the definition of blocking and filtering. The blocking of internet content refers to any attempt or technique to control the information access on internet. There are two ways: (i) directory technique through IP address filtering and; (ii) content-analysis technique.[18] Generally, the government blocks and filters the internet content through several technological instruments designed to hide certain content from being accessed by public. This is seen as the most effective way to control the online information as the traditional way of filtering is no longer compatible with the fast growing development in cyber space.

The IP address filtering is conducted by configuring certain router, which is functioned to reject the address, domain or any service in the certain port. Some countries block and filter the internet content in the international gateway level, making blacklisted topics such as pornography and human rights is not accessible inside their countries. Meanwhile, content-analysis filtering focuses on the certain keywords allegedly related to the prohibited topics. The IP address of the sites containing blacklisted keywords would be automatically blocked. This method might harm other sites that share the same IP address since their page will be blocked even though they do not share the restricted topics. Generally, there are three types of blocking and filtering:[19]

1. Open filtering: this model of filtering allows the internet users to access the approved and safe sites, also known as the "the white list" sites, and blocks the rest of the sites that suspected of containing restricted materials.
2. Filtering with exception: this model focuses on the blocking of "the black list", all the suspicious sites, and allows the internet users to browse other contents.
3. Content analysis: this model requires frequent analysis on content of certain sites and blocks any suspected website that contains certain keywords such as pornography or democracy.

To explain further, there are many kinds of mechanism on blocking and filtering, depending on the purpose and available resources. The choice of mechanism also depends on the capability of institutions desire the blocking and filtering, especially their access and connection to the related parties with ability to execute the process. Other considerations include the number of tolerated mistakes, the openness of filtering action and the effectiveness of the filtering. Steven J. Murdoch and Ross Anderson (2008) specifically explains some mechanism used in blocking and filtering:[20]

1. TCP Header/IP Filtering

Routers inspect the packet header, which is located in the IP address, when someone tries to access a certain site. The routers can be configured to block the destined address, which is listed in the black list of restricted websites, and prevent the users from accessing the content of the site. This method possesses some weaknesses as many web hosts may have multiple services, such as hosting both web sites and email servers. Blocking the site through its IP address will drop all services, making them inaccessible for the users. To avoid the simultaneous blocking and filtering of internet content, we can add the port number, which is also found in the IP header, in the blacklist.

2. TCP content/IP Filtering

---

[18] See Ronald J. Deibert and N. Villeneuve, Firewalls and Power: An Overview of Global State Censorship of The Internet, in M. Klang dan A. Murray (eds.), *Human Rights in the Digital Age*, (London: Cavendish Publishing: 2004).
[19] See Ronald J. Deibert, The Geopolitics of Internet Control Censorship, Sovereignty, and Cyberspace, in Andrew Chadwick and Philip N. Howard, *Handbook of Internet Politics*, (London: Routledge, 2009), pg. 324-325.
[20] More information, read Steven J. Murdoch and Ross Anderson, Tools and Technology of Internet Filtering, in Ronald Deibert, John Palfrey, Rafal Rohozinski, and Jonathan Zittrain (eds.), *Access Denied: The Practice and Policy of Global Internet Filtering*, (The President and Fellows of Harvard College, 2008), page. 57-65.

This mechanism only targets illegal content in the internet. As the routers could only inspect packet header and not the content of the sites, other supporting instruments are needed to inspect all the content. The equipment used in this method might not fast enough to block all the blacklisted material. As the result, sometimes the filtering equipment fails to detect the illegal keywords and cannot fully block all the content related to the prohibited topics.

3. DNS Tampering mechanism

Instead of blocking the IP address, this method will block the whole domain names mentioned in the blacklist. We only need to submit the list of unwanted or prohibited domain names. Should the internet users try to access the domain, they will find "error" or "no answer" result. DNS tampering provides relatively simple mechanism, even though it will cause the whole domain to be banned rather than the particular web page containing illegal content.

4. HTTP Proxy Filtering mechanism

HTTP proxy filtering provides another way of blocking and filtering by preventing the internet users to directly connect to the blacklisted websites. Instead, the users will be forced to access the web sites through a proxy server, which could function as the tool to block the site. This mechanism proven more effective and precise than other methods as the proxy could filter each web page without having to block the whole domain or IP address.

5. Hybrid TCP/IP and HTTP Proxy

This method operates by collecting the list of blacklisted IP address and redirecting the users from the address to HTTP proxy. The proxy then will check the content from the original web page and block it when it finds blacklisted topics.

6. Denial-of-Service (DoS) mechanism

This mechanism operates when the organization responsible for blocking and filtering does not secure the authority (or does not have access to the network infrastructure) to add conventional blocking mechanism. The method requires very fast connection or large number of computers to simultaneously access the same web site to make it overloaded. This way, the users cannot access the destined site.

7. Domain Deregistration mechanism

This mechanism uses country-based domain (ccTLDs). The organization responsible for blocking and filtering will do the domain deregistration with the intention to automatically cut all the sub-domain.

8. Server Take Down mechanism

The method can be done if the server of blacklisted web sites is located inside the country. The government could order the server operator to shut down the site, which is suspected of containing illegal content.

9. Surveillance mechanism

The mechanism is used to watch the sites frequently accessed by the users. Those who are caught accessing the blacklisted content will face the threat of legal and extralegal charges. Surveillance

commonly used to complement the conventional filtering. Surveillance is aimed at creating chilling effect, discouraging the users to access the prohibited site.

10. Social Techniques mechanism

This method is worked by creating social technique, usually involves many layers of society like family and schools, to dissuade the internet users from accessing the illegal content. Some of the popular ways to work the techniques include installing the PC in the family room instead of bedroom, no-barrier internet café and glass-cubicle computer rooms in the library. Working and education institutions could also monitor their employees and students by asking them to wear their identity cards when they access the computer.

The various filtering mechanisms will show different results, depends on the interest or orientation of the state performing blocking and filtering. Generally, blocking and filtering practices are conducted for four purposes: politics, social, security and economy. Further explanation of these four dimensions, as stated by Robert Faris and Nart Villeneuve (2008), is listed below:[21]

Blocking and filtering dimensions on internet content

Blocking/Filtering of internet content			
Politics	**Social**	**Security/conflict**	**Economy**
Is aimed at restricting the spread of political information that may harm the authority of a state. This kind of blocking and filtering is commonly found in authoritarian countries.	Is aimed at preventing the spread of internet content that could ignite the social unrest, especially the contents that go against the social and religious norms, as well as public morality.	Is designed to prevent the attack against national security of a country, as well as the users' personal safety.	Is meant to protect the economic interest of a country or giant corporations. The main reason behind the filtering is to protect the intellectual and property rights in the cyberspace.

According to UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression Frank La Rue, blocking and filtering are the actions to prevent certain contents to reach their final users. The acts include the blocking of certain web pages, the Internet Protocol (IP), web domain, the shutting down of the web sites from their server, closing the access of certain content, and by using some filtering mechanisms to eradicate the contents with several blacklisted keywords.[22]

While those acts have been commonly found in many countries, the recent dynamic sees new trend namely just-in-time blocking. The method prevents internet users to access or spread or gain certain information using specific keywords in certain times. The states likely choose politically vulnerable occasions such as general election, social unrest or important days that mark historical timelines. During those times, the websites of opposition parties, independent

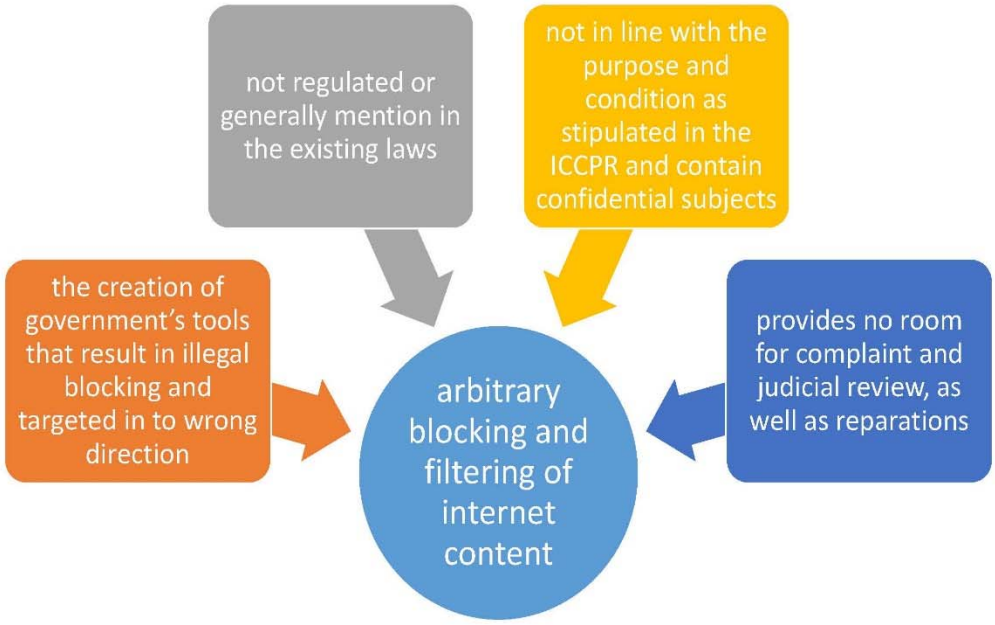
[21] See Robert Faris and Nart Villeneuve, Measuring Global Internet Filtering, in Ronald Deibert, John Palfrey, Rafal Rohozinski, and Jonathan Zittrain (eds.), *Access Denied ... Op.Cit*., pg. 5-26 for detailed information. See also Joanna Kulesza, *International Internet Law*, (London: Routledge, 2012), pg. 44-45.

[22] See A/HRC/17/27, paragraph 29, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf. On his report, Frank La Rue made example on China as a country which has very strong and broad control system on information spread. China has adopted the system to block the words like "democracy" and "human rights".

media, and other social media platforms like Twitter and Facebook are not available for access. Such trend was found in the conflicting countries in Middle East and North Africa.[23]

In many cases, the governments impose restriction, monitoring, manipulation and tight censorship on internet content without having legal basis. Even when the legal basis is available, it is too absurd and broad to be used as the main Law umbrella. The one-sided action is made to justify the government's political interest. The censorship of certain internet content is a violation of the freedom of expression. The actions go against human rights values and often unnecessary chilling effect for the internet users and information seekers.

Graphic 2: Arbitrary blocking/filtering by the state



Referring Frank La Rue, the blocking and filtering of internet content is categorized as violation in these circumstances: *first*, the special situation that justifies blocking is not particularly stated in the Law or only briefly mentioned in Law, or is regulated in Law but apply in very large context that it may result in arbitrary blocking of internet content; *second*, the blocking is not conducted to fulfill the purpose as stated in the Article 19 (3) of ICCPR, and the blacklisted web sites remain confidential for public, making it hard for public to oversee the purpose of blocking and filtering; *third*, even when the blocking and filtering are justified, such practices create unnecessary tools and often do not have fundamental purpose to make a content classified as illegal and is not open for public; and *fourth*, the blocking and filtering are conducted without public intervention and do not come with the chance of judicial review from the court or independent agency.[24]

Similar to other technological inventions, internet could be easily misused and could jeopardize one's life. Therefore, the limitation on internet content does make sense, especially on the following rights: (i) information containing child pornography (in attempts of protecting children's rights),[25] (ii) incitement of hatred (to protect certain communities affected by the

[23] See *Ibid*., paragraph 30.
[24] See *Ibid*., paragraph 31.
[25] The spread of content containing child pornography is strictly prohibited by the international human rights Law, see *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, art. 3, para. 1 (c).

information),[26] (iii) defamation (to protect one's reputation), public propaganda that encourages genocide (to protect people's safety),[27] and (iv) national advocacy, religious sentiment that triggers discrimination, assaults and conflict (to protect the minority's rights, especially the right to live).[28]

However, when the limitation on internet content is imposed, the state must undergo three phases of review: (1) the limitation must be regulated by clear and specific Law that can be openly accessed by all citizens (principles of predictability and transparence); (2) the limitation must follow at least one of 19 purposes of blocking and filtering as stated in the Article 19 (3) ICCPR, which are (i) to protect one's rights and reputation; (ii) to protect the national security and public order, or Law or public moral (principle of legitimacy); and (3) the limitation must be minimum and is proven as necessary to pursue the ultimate goal (principle of interest and proportionality). Further, any attempt to restrict the freedom of expression must be applied by independent agency that is free from political and commercial interests, as well as unauthorized organizations, and will not be arbitrary or discriminatory executed. There has to be sufficient protection to face the possible misuses, including the complaint mechanism and repatriation.

Based on ICCPR, every state limiting its people's freedom of expression must follow the Law, which firmly regulates the detail procedure of blocking and filtering and is available for all citizens to know. Apart from that, the Law has to ensure such practices are legal and the state must obtain the court's order prior to the acts, such as the government's plan to launch a committee to decide and identify the legal/illegal content. In short, to achieve the ICCPR standard, the Law related to blocking/filtering of internet content must be as clear as possible and will not change within short period. To comply with the ICCPR standard, the state must implement license policy, like it found in Uzbekistan. Internet café's owners in the country must register to the government agency to get their review and permit before launching their business.[29]

The covenant also highlighted that the limitation is aimed at achieving one of ICCPR's goals (necessity). On blocking and filtering of internet content, to fulfill these terms, the governments must list the specific purpose to avoid unnecessary censorship.

The procedure of blocking and filtering of internet content also involves public control and accountability. For the example, Pakistan launched Deregulation Facility Unit as a place to facilitate complaints and to repatriate the victims of blocking and filtering practices.

It shows that the blocking and filtering of internet content, with tight regulation and supervision is allowed for the sake of national security, public order, public health and morality. Below is the example of guidelines to measure the urge of blocking and filtering practices and its connection with human rights protection:

An unofficial guide to filtering legally

To filter in a way that honors international human rights commitments on freedom of expression, a government can use the following as an unofficial guide:

1. PURPOSE

[26] See example *Faurisson v. France,* United Nations' Human Rights Commission, Resolution 550/1993, the perspectives on Nov. 8, 1996. The issue related to the hate speech is elaborated in the previous report, see in E/CN.4/1999/63; E/CN.4/2000/63; E/CN.4/2002/75; and A/HRC/4/27.
[27] See example of Article 3 (c) of the *Convention* on the Prevention and Punishment of the Crime of *Genocide*.
[28] See example of Article 20 (2) of the UN Covenant on Civil and Political Rights.
[29] See Mary Rundle and Malcolm Birdling, Filtering and the International System: A Question of Commitment, on Ronald Deibert, John Palfrey, Rafal Rohozinski, and Jonathan Zittrain (eds.), *Access Denied ... Op.Cit*., pg. 73-84.

The state believes restrictions on freedom of expression are necessary to.
[Example: . . . prevent people from using the Internet to stir up violence against a particular ethnic group.]

2. STATEMENT OF WHAT NEEDS TO BE DONE

Therefore, the government decides to pass a Law to.
[Example: . . . limit hate speech.]

3. SPECIFIC EXPLANATION OF HOW FILTERING WILL BE CARRIED OUT

To ensure that people can understand the Law and can check to see that its application is not arbitrary, the government spells out.
[Example: . . . what exactly is beyond the limits of acceptable speech and how it will be filtered.]

4. PERMITTED LIMITATION AS LISTED IN ICCPR ARTICLE 19 OR 20

In grounding this action in a justification acceptable by international Law, the government indicates that this restriction is necessary .
[Check all that apply:]

- ✓ for respect of the rights or reputations of others;
- ✓ for the protection of national security;
- ✓ for the protection of public order;
- ✓ for the protection of public health;
- ✓ for the protection of morals;
- ✓ for the prohibition of propaganda for war;
- ✓ for the prohibition of advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.

5. PROCESS TO TELL PEOPLE WHAT IS HAPPENING AND CORRECT ANY PROBLEMS

To help ensure that the Law is not implemented in an arbitrary or overly broad manner, the state provides a mechanism whereby.
[Example: . . . if a Web site is blocked, Internet users receive a message 1) indicating why this filtering has occurred, according to what specific.

Source: adopted from Mary Rundle and Malcolm Birdling, *Filtering and the International System: A Question of Commitment*, (2008: 85).

a. Blocking and Filtering of Internet Content in Indonesia

Recently, the blocking and filtering practices in Indonesia can be found in various forms, which sometimes involve the third parties. In certain cases, the service providers are forced to facilitate the state's agenda of blocking and filtering toward their customers. In order to secure the operational permit, Research In Motion (RIM), the maker of Blackberry smartphone, was required to block some of content.[30] The government, through the Ministry of Communication and Information Technology, has launched the *Trust Positive* (Trust+) program to filter pornographic content.

[30] See "BlackBerry Diblokir di Indonesia? Bukan Tidak Mungkin", at http://inet.detik.com/read/2010/08/02/150658/1411828/317/blackberry-diblokir-di-indonesia-bukan-tidak-mungkin/?topnews, accessed on Nov. 20, 2013.

According to the ministry, the campaign is designed to protect Indonesian citizens from negative ethics and moral values. The program is basically a database of blacklisted web sites suspected of containing ethically wrong content and pornographic materials. In composing the database, the ministry has searched and analyzes the suspected sites, as well as calls on public participation to report pornographic content. The list is distributed to the internet-service providers and frequently updated in certain periods. The ministry also checks whether the blacklisted sites come back with better content.[31]

The filtering involves the third party through DNS-based (*domain name service*) filtering system. The practice is known as Nawala Project, which was started by the Association of Internet Café Owners (AWARI). The Nawala Project is used by the internet providers to filter the sites suspected of containing negative materials and go against morality and national culture, especially pornography and gambling. DNS Nawala also blocks the sites that break the regulation such as scam, malware and phishing. Critics slammed the Nawala project since the program was carried out by the internet providers while it supposed to target the individuals and end-users.[32]

Controversies over the practice of Trust+ and DNS Nawala are centered in the enormous mistakes on blocking and filtering. The mistakes rooted in the ministry's decision to use keywords that, according to its morality measurement, closely related to pornography or other blacklisted materials. The existing anti-porn law exacerbates the situation as it contains too flexible, if not absurd, articles on defining pornography.[33] Particularly in Indonesia, the absent of detailed mechanism and technical know-how on blocking and entering also becomes one of the most serious problems. On the other hand, Indonesia has yet to establish independent agency to identify and control the practice of blocking and filtering.

For the time being, the Ministry of Communication and Information Technology solely regulates the information sharing and carries out the duty of information monitoring. After the ITE Law passed in 2008, the ministry started its efforts to curb online pornography and other sites that disrupt the public order. Strict limitations also applied to the sites suspected of inciting religious defamation and terrorism. So far, the ministry has yet to fight against the sites that contain security or conflict issues, as well as the content on political criticism toward the government and the state ideology.

Referring to the aforementioned dimensions of blocking and filtering of internet content, the Indonesian case belongs to social dimension and deals with public morality and religious view. During the blocking and filtering, internet content that linked to radicalism and terrorism came to the surface in certain period of times. However, the frequent monitoring of such sites is no longer updated. Today, we still witness numerous sites displaying radicalism content that are easily accessed by the internet users.

b. Blocking and Filtering Related to Religious Defamation

The ministry's massive blocking practice took place when a Europe film "Fitna", which was harshly criticized to insult Islam, went viral among net users. The film was made by Geert Wilders, Netherland's member of parliament from the Freedom Party, and available for public in world's number one video site YouToube. Religious groups in Indonesia urged the ministry to block the

[31] See the full version at http://trustpositif.kominfo.go.id/.
[32] See the full version at http://www.nawala.org/.
[33] See "Salah Blokir Karena Kominfo Terlalu Bersemangat", at http://inet.detik.com/read/2010/08/11/163754/1418467/398/salah-blokir-karena-kominfo-terlalu-bersemangat?topnews, accessed on Nov. 20, 2013.

sites that displaying "Fitna". Not less than the Indonesian Ulema Council (MUI) asked the government to block YouToube for spreading the movie.[34]

Following the public demand, the ministry officially wrote to the internet providers and ordered them to block all videos related to Fitna. The memo was sent to 146 internet service providers (ISP) and 30 network access provider (NAP) in the country. The government said that the movie could trigger inter religious harmony in the global level.[35] Several sites displaying videos such as YouToube, MySpace, Multiply, Rapidshare and Metacafe were not accessible for internet users across the country. The total ban made all services, not just those related with Fitna film, in the sites were cut off.

This bold action brought financial impact for many of internet providers. The Association of Indonesian Internet Service Providers (APJII) admitted that many providers received numerous lawsuits from commercial corporations that use the sites for product test, market research, market segmentation and creativity display.[36] The internet users also signed several petitions demanding the communication minister to lift the ban of those sites.[37] The Facebook users joined this campaign and collected 2,600 signatures for the petition that said:[38]

> "We, Indonesian internet users, feel objected for the Communication and Information Ministry's blocking on sites displaying the movie of Fitna. The movie is undoubtedly misleading, but we should not supposed to reject the film. All we have to do is educating the internet users to carefully digest the information and not be easily provoked. Prohibiting Indonesian internet users from accessing the movie is stupid. Indonesian people do not need stupidity, we need education."

After the mounting criticism, the government, without clear Lawful mechanism, lifted the blocking of those sites.

The same case took place in 2012 when the US-produced film Innocence of Muslim, which ridiculed Islam and portrayed the prophet Muhammad as a womanizer, sparked demonstration across the world. The Coordinating Political, Legal and Security Affairs Ministry asked the Communication and Information Technology Ministry to block the trailer from being accessed inside the country.[39] Google, as the owner of YouToube, announced on Nov. 13, 2012, that it had blocked 16 links featuring the videos related to the movie.[40]

Issues surround blocking and filtering got another spotlight when Facebook uploaded a competition to draw Prophet Muhammad's sketch. Radical Islamic group such as Islamic People's Forum (FUI) and United Front of Indonesian Muslim Students (KAMMI) protested the drawing contest and urged the government to block the Facebook site. However, the government, which learned from the previous case of Fitna, did not immediately block the site. Some countries like Pakistan imposed total ban for the site following this event.[41] To respond the criticism related

---

[34] See "MUI Desak Pemerintah Blokir Situs yang Memuat Film Fitna", at http://www.eramuslim.com/berita/nasional/mui-desak-pemerintah-blokir-situs-yang-memuat-film-quot-fitna-quot.htm, accessed on Nov. 20, 2013.
[35] See "Download Surat 'Ultimatum' Menkominfo untuk Pemblokiran", at http://www.detikinet.com/index.php/detik.read/tahun/2008/bulan/04/tgl/04/time/175015/idnews/918570/idkanal/447,accessed on Nov. 20, 2013.
[36] See "Special Reports Pemblokiran Situs Youtube Digugat", at http://www.chip.co.id/special-reports/pemblokiran-situs-youtube-digugat.html, accessed on Nov. 20, 2013.
[37] See http://www.petitiononline.com/siteblok/petition.html.
[38] See http://www.facebook.com/group.php?gid=11356068090.
[39] See "Menko Polhukam Minta Tifatul Blokir Film Anti Islam di YouTube", at http://inet.detik.com/read/2012/09/13/150236/2017527/398/menko-polhukam-minta-tifatul-blokir-film-anti-islam-di-youtube?id771108bcj, accessed on Nov. 20, 2013.
[40] See "16 Video 'Innocence of Muslims' Diblokir di YouTube", at http://inet.detik.com/read/2012/09/13/171756/2017970/398/16-video-innocence-of-muslims-diblokir-di-youtube, accessed on Nov. 20, 2013.
[41] See "Panggil ISP, Kominfo akan Blokir Facebook?", http://www.arrahmah.com/index.php/news/read/7894/panggil-isp-kominfo-akan-blokir-facebook, accessed on Nov. 20, 2013.

with *"Everybody Draw Muhammad Day" event in Facebook, the Communication and Information Minister took several actions:*[42]

1. The ministry wrote to Facebook to drop the event and block the account.
2. Block the URL of "Everybody Draw Mohammed Day" through massive trust in Indonesia.
3. Requested Internet Service Providers to block the account, since it violated the Article 21 of Law No. 36 Year 1999 on Telecommunication and Article 28 (2) of Law No. 11 Year 2008 on Information and Electronic Transaction. The two articles state that every citizen is prohibited from spreading the information that incites racial and religious hatred against individual or society.
4. Called on Association of Internet Café Owners to block the site.

In his statement, the communication minister said that one's freedom should never disrupt another's. As much as relieving, his statement created another concern since he used the momentum to raise the plan of ministerial regulation on multimedia content.

The minister's attempt to bring back the ministerial regulation draft prompted criticism, especially from the Alliance of Independent Journalist (AJI). The alliance believed that the Facebook case could not justify the ministry's plan to censor, block and filter internet content. AJI stressed that the ministry should not use the case to go with the draft that seen dangerous for democracy. According to AJI, the regulation draft is a real threat for press freedom and will likely become "censorship 2.0", where the internet service providers are allowed to filter, block and erase the suspected illegal content. AJI said that the draft was contradicted to Article 28F of the 1945 Constitution and Article 4 (2) of the 1999 Law No. 40 on Press.[43]

Blocking of internet content to prevent the spread of terrorism took place soon after the bombing of JW Marriott and Ritz Carlton hotels on July 17, 2009. A site concerning on Islamic fundamentalism arrahman.com, run by Muhammad Jibril, was considered as provocative and supporting terrorism.[44] The site once posted the photo of Amrozi, Muklas and Imam Samudra, three actors behind Bali Bombing, after they were executed for masterminding the terror action. The National Police eventually busted Jibril for his allegation in supporting terrorism on August 26, 2009. Arrahman.com posted the case of Jibril, who was accused of receiving terrorism-related funds from Saudi Arabia, before being terminated by the Communication and Information Technology Ministry.[45] Later, the ministry dropped the band and the site is no available for the public to access.

c. Blocking and Filtering of Pornography-related Internet Content

The blocking and filtering of internet content displaying pornography found its heyday when the private videos of then-called Peterpan front man Nazriel Ilham or Ariel and his two close girl friends Cut Tari and Luna Maya, both of them are soap-opera stars, went viral. Not only did the video become the national scandal and raised everyone's concerns, the case also brought world's attention as the three of them became trending topic in microblogging site Twitter.

---

[42] See "Pemerintah Akhirnya Keluarkan Perintah Blokir!", at http://m.detik.com/read/2010/05/20/135758/1360788/398/pemerintah-akhirnya-keluarkan-perintah-blokir/?i991101105 accessed on Nov. 20, 2013.

[43] See "AJI: RPM Konten Multimedia adalah Sensor", at http://www.ajiindonesia.org/index.php?option=com_content&view=article&id=224:aji-rpm-konten-multimedia-adalah-sensor-20&catid=14:alert-bahasa-indonesia&Itemid=287, accessed on Nov. 20, 2013.

[44] With blue and white background in the site, arrahman.com posted mostly foreign news that related with Muslim people around the globe. The site heavily stressed on the western countries' occupation in several Muslim countries. The site also frequently delivered statements that discrediting the western countries and their allies.

[45] See "Situs Arrahmah Milik Muhammad Jibril Tak Bisa Diakses", at http://metrotvnews.com/index.php/metromain/newsvideo/2009/08/26/89056/Situs-Ar-rahmah-Milik-Muhammad-Jibril-Tak-Bisa-Diakses, accessed on Nov. 20, 2013.

The Communication and Information Technology Ministry immediately ran investigation to verify the content of the videos. The ministry also stated that people involved in the video-making could be charged with Article 27 (1) of ITE Law and could face up to six years in prison.[46] The minister said that the video scandal that showcased pornographic content was really dangerous for the country's young generation, vowing to take firm action against it.[47] To follow up the statement, the ministry established a memo No. 1598/SE/DJPT.1/KOMINFO/7/2010 which ordered all internet service providers in Indonesia to block the videos.[48] The ministry, through its Trust+ campaign, claimed to have blocked no less than one million of pornographic content in internet.[49]

The massive campaign of Trust+, despite the ministry's success claim, was in fact targeted many wrong sites that promoting equal rights for transsexual and gay people. It happened since the ministry did not have a clear mechanism on how to work the blocking and filtering practices. The site of International Gay and Lesbian Human Rights Commission (IGLHRC.org) experienced so-called overblocking in February 2012. There were at least three internet service providers that blocked the site: Indosat, Telkomsel and Lintas Arta.[50]

Responding the situation, human rights watchdogs in the country filed a complaint to the internet providers' association APJII on Oct. 6, 2012. The providers then stopped the ban toward the IGLHRC site.[51] In another case, Our Voice, an organization promoting the rights of LGBT, also experienced overblocking in April 2013. The site, which is available at ourvoice.or.id, was blocked by internet service provider XL.[52] Other providers such as Indosat, 3, Axis and Smartfren also allegedly blocked the site due to several keywords like "gay" and "lesbian", terms that closely related to sexual disorder.[53] In fact, there are more sites that suffered from overblocking during the campaign of Trust+.[54]

D. RESTRICTION EXPRESION WITH THE THREAT OF CRIMINAL SANCTIONS

The uses of communication and information technologies, including the Internet medium, have resulted in various legal issues for the users, in the form of prison sentences or other sanctions as consequences. Communicating ideas, viewpoints, opinions and writings using electronic means and systems, or through the Internet, on one hand, is a part of the freedom of opinion and expression, which assists the dissemination of information and ideas, including building social movements. On the other hand, its use often meets with the snares of law and criminal sanctions.

---

[46] See "Menkominfo Ancam Pembuat Video Enam Tahun Penjara", at http://www.kapanlagi.com/showbiz/selebriti/ menkominfo-ancam-pembuat-video-enam-tahun-penjara.html, accessed on Nov. 20, 2013.
[47] See "Internet a risk to nation, says Indonesian minister", at http://news.theage.com.au/technology/internet-a-risk-to-nation-says-indonesian-minister-20100617-ygsv.html, accessed on Nov. 20, 2013.
[48] See "Indonesia Moves to Block Pornographic Web Sites", at http://www.nytimes.com/2010/07/23/world/asia/23indo.html?_r=2&, accessed on Nov. 20, 2013.
[49] See "Kominfo Telah Blokir Satu Juta Situs Porno", at http://www.republika.co.id/berita/trendtek/internet/12/08/11/m8l0yx-kominfo-telah-blokir-satu-juta-situs-porno, accessed on Nov. 20, 2013.
[50] See "Dianggap Pornografi, Provider Blokir Konten LGBT", at http://tatamaya.com/2012/09/04/dianggap-pornografi-provider-blokir-konten-lgbt/, accessed on Nov. 20, 2013.
[51] See "Human Rights Website Banned", at http://starobserver.com.au/news/2012/02/17/human-rights-website-banned/72150, also see "IGLHRC Website Banned", at http://iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1481.html, accessed on Nov. 20, 2013.
[52] See "Kronologis Pemblokiran Website Our Voice oleh Provider XL", at http://www.suarakita.org/2013/07/kronologis-pemblokiran-website-our-voice-oleh-provider-xl/, accessed on Nov. 20, 2013.
[53] See "Kronologis Pemblokiran Website Our Voice oleh Provider XL", at http://www.suarakita.org/2013/07/kronologis-pemblokiran-website-our-voice-oleh-provider-xl/, accessed on Nov. 20, 2013.
[54] See Donny B.U., Arah Tata-Kelola Internet Indonesia: Censorship, Surveillance, Defamation?, at http://donnybu.com/2013/12/03/arah-tata-kelola-internet-indonesia-censorship-surveillance-defamation/. According to Donny, other sites experiencing overblocking include MalesBanget.com in August 2011. The main reason of the blocking was the word "males", literally means lazy, and "bang", a popular nickname for adult men in Indonesia. The two words were blacklisted in the Trust+ campaign. Axis, Indosat, 3, and Telkomsel allegedly relied on the list when blocking the site. The CarFreeDay.com was also blocked in September 2013. The website domain was allegedly used to display pornography 10 years ago. Telkom Speedy allegedly blocked the site.

Since the enactment of Law of Electronic Information and Transactions (ITE Law) in 2008, there have been a series of case related to the charges of libel and/or defamation of character, and charges of dissemination of information resulting in hate or hatred between individuals/groups based on ethnicity, religion, race and social class (SARA). These cases result in reports to the police, detention and prison sentences, and civil suits, including those resolved through mediation. Various other consequences also occur, including demands to apologies, expulsion from institutions of employment or school,[55] and other sanctions.

The cases related to the communication of opinion and expression since 2008, based on case reporting by Elsam, show the following aspect: first, there are 32 cases related to the charges of libel and/or defamation of character, including cases reported to the police, processed in court, resolved through mediation, or by other sanctions. Second, there are 5 cases related to dissemination of information resulting in hate or hatred between individuals and/or groups based on SARA. It is presumed that the actual number of cases is larger, due to lack of news reporting or other reporting.[56]

These cases also show that (i) all forms of media and types of information using electronic means are subject to sanction, including legal and other sanctions, (ii) criticism and opinion of a policy, including advocacy, often result in police reports as libel, (iii) use of legal criminal sanction as the main option instead of other alternative dispute resolution methods, and (iv) people subject to these cases come from all walks of life.

The enactment of ITE Law has worsened the situation of the freedom of opinion and expression, due to weaknesses in its formulation and implementation. Charges of libel and/or defamation of character, and SARA-loaded information are easily reported to the police, resulting in detention and incarceration. This is exacerbated with the lack of understanding in part of the law enforcement in the implementation of the law.

The case of Prita Mulyasari shows the deplorable situation of the protection of the freedom of opinion and expression. This case shows a whole range of dimensions: (i) use of electronic means (e-mail) to communicate opinion backfires with a charge of libel and/or defamation of character, (ii) reported to the police, threatened with concurrent criminal and civil sanctions, (iii) experience of detention and prison without a strong basis, (iv) sanctioning by a court showing the incompetence of the law enforcement in evaluating cases related to libel and/or defamation of character and freedom of opinion and expression.

Prita Mulyasari was finally acquitted in a judicial review in the Supreme Court, noting that Prita's action was an articulation of the freedom of opinion and expression and protection of human rights, after lower courts have declared Prita was guilty of defamation, and in a civil suit sanctioned her to pay a fine to the amount of hundreds of millions. Prita also had to deal with the case for over 4 years.

---

[55] An example is the case of Wahyu Dwi Pranata, a student of Dian Nuswantoro (Udinus) University in Semarang, Central Java. He was forced to resign from the school because of his criticism of his campus. His writings were published in online media, namely Facebook account and Kompasiana blog. Wahyu was summoned by the rector and other officials, and given the choices of being reported to the police based on libel in ITE LAW, or resigning. The rector claimed that Wahyu has resigned and the issue was considered to have been concluded. See "Kritik Kampus, Mahasiswa Semarang Dipaksa Mundur", in http://www.tempo.co/read/news/2013/09/19/058514741/Kritik-Kampus-Mahasiswa-Semarang-Dipaksa-Mundur.
Another example is the case of Berry Cholif Arrahman, a student in State High School No. 1, Pakong, Pamekasan, East Java. He was threatened with expulsion after a Facebook complaint about his teacher. He complained about his teacher forcing him to cut his hair. The school denied expelling Berry, stating that it only made him sign a statement to not repeat his offense. See "Menggerutu di Facebook Siswa SMA Pamekasan Dipecat', in http://www.tempo.co/read/news/2013/02/24/058463445/Menggerutu-di-Facebook-Siswa-SMA-Pamekasan-Dipecat, accessed on 20 November 2013.

[56] Information is based on media news reports. Case information are cases reported in news and do not fully reflect final case positions.

Prita's acquittal was partly due to widespread public attention, forcing the judicial institution to act properly. However, in many cases, the law enforcement often easily detains and imprisons people, disregarding attempts to make peace or alternative resolution methods. Reports of people claiming of defamation, or pressure from a public claiming that a religion has been desecrated, are the main factors causing Law enforcement to ensnare various forms of expression through electronic systems. At this point, the guarantee of the freedom of opinion and expression is being threatened, not only from the public, but also from the judicial institution that evaluates and tries various viewpoints, opinions and expressions, done through electronic means.

a. The Problematic Formulation of ITE Law

During its formulation, a number of controversies has stemmed from ITE Law. Criticism has arose especially regarding the formulation of articles on the prohibition of electronic information containing (i) decency, (ii) libel and/or defamation of character, and materials containing SARA, and the severity of the sanctions to the prohibitions, either incarceration or fines. The formulation of the articles, being very loose, open to interpretation and unclear, results in opinions and expressions being easily reported to the police on the charges of libel, defamation of character, desecration of religion or other SARA expressions. The possibility of severe sanctions also has the consequence that law enforcement easily detaining subjects.

The criticism of the formulation of ITE Law is related to the prohibitions and the legal sanctions, because the Law has a number of irregularities: (i) severity of criminal sanctions for libel and/or defamation of character, (ii) duplication of the criminal act of intimidation, regulated in Articles 27 (4) and 20; (iii) the possible criminalization of all information, with the wording 'false news' resulting in uncertainty in Article 28 (1), and 'disseminating information' in Article 28 (2); and (iv) the formulation of criminalization norms without a clear philosophical basis, and over criminalization.[57]

Specifically, Article 27 (3) on libel and/or defamation of character contains an uncertain definition, in relation to the explanation of the elements: (i) the element of 'intentionally and unlawfully' and; (ii) the element of 'distributing, transmitting and allowing access'. Not all of the elements have been explained in ITE Law, which causes problems as several of the terms (distributing and transmitting) are technical ones that have no similarity between information technology practice and the actual world.[58]

Such a formulation repeats the problem in the Penal Code and various other Laws related to libel and/or defamation of character,[59] decency and desecration of religion. In these Laws, there are many occurrences of incompatibility with the protection and guarantee of the rights of freedom of opinion and expression. This happens in spite the close relations between the criminal acts of libel or defamation of character and freedom of opinion and expression, and opinions of religion or belief.

Article 27 (3) of ITE Law on libel and/or defamation of character has actually been reviewed in the Constitutional Court, which declared it to be constitutional. It claimed that libel, as regulated in the Penal Code (occurring off line), could not encompass the definition of libel and/or defamation of character occurring on line. Thus, according to the Constitutional Court, elements of libel in the Penal Code cannot be satisfied by libel occurring online.[60]

---

[57] See Anggara, Supriyadi WE, and Ririn Sjafriani, *Kontroversi ITE LAW, Menggugat Pencemaran Nama Baik di Ranah Maya*, (Jakarta: Degraf Publishing, 2010), pp. 35-36.
[58] *Ibid*, pp. 65-68.
[59] See Supriyadi Widodo Eddyono, Sriyana, and Wahyu Wagiman, *Analisis Situasi Penerapan Hukum Penghinaan di Indonesia*, (Jakarta: ICJR and TIFA, 2012).
[60] See Elsam, Laporan Penelitian Dua Kebebasan Dasar di Indonesia dalam Putusan MK: Studi Putusan MK Terkait Kebebasan Beragama atau Berkeyakinan dan Kebebasan Berekspresi, 2010, unpublished.

Related to dissemination of hatred with SARA nuances is the appearance of a large number of cases, as opinions in electronic means about a certain religion or belief are charged as dissemination of information intended to incite hate or hatred between individuals or groups based on ethnicity, religion, race and social class (SARA). Before the enactment of ITE Law, Indonesia has a legal instrument to punish people charged with libel or desecration of religion. This is regulated in Article 156 or 156a of the Penal Code, based on Law No. 1/PNPS/1965 on the Prevention of Abuse and/or Desecration of Religion. Unfortunately, this regulation is also problematic, not only in the formulation, but also in the violation of the right of the freedom of religion and belief. The provision in ITE Law adds to the threats to expression and opinion on religion and belief.

The shambolic state of the implementation of ITE Law, especially of the article of libel and defamation of character, proves even more strongly the problematic issue in the formulation, which did not fulfil the basic rules and principles of criminal law. The formulation of Article 27 (3) and ITE Law in general contradicts the principle of *lex certa* (clear and resolute), and also contradicts the principle of *lex scripta* (not violating existing written Law). Results of a number of court verdicts in which the defendants were charged with Article 27 (3) of ITE Law show that the judges interpreted the elements of the article arbitrarily. This shows that there is no unity of interpretation of the intent and elements of the article. Thus, in its interpretation, Article 27 (3) also shows a contradiction to the principle of *lex stricta*, namely that the interpretation of a legal provision has to be rigid. The following section will discuss the verdicts related to the implementation of Articles 27 (3) and 28 (2) of ITE Law.

b. The Implementation of ITE Law

Many of the cases appearing since the enactment of ITE Law have targeted the use of various media in information systems and electronic means, not limited to publicly accessible media ('mass media' or 'in public'), but also other, more personal forms of media. Almost all forms of media can be ensnared using ITE Law, including (i) online news media, (ii) online discussion forum, (iii) Facebook, (iv) Twitter, (v) blog, (vii) e-mail, (viii) short message service/text message, (ix) compact disc, (x) blackberry messenger status, (xi) advocacy medium, and so on.

All viewpoints, opinions, expressions, done intentionally or not, intended to defame or not, done privately or in public, could be subject to charging, detaining and incarceration. The public becomes more afraid to speak up, communicate opinions, criticise the government and its apparatus, including complaining the poor service of government and private institutions through the Internet and other electronic means. This is the worst effect of the implementation of the articles of ITE Law, which indirectly proves itself as a regulation to control the public, and also functioning as a means of vengeance. Why does ITE Law become a tool for control and vengeance, instead of an instrument to protect the rights of the freedom of expression?

b.1. Discussion of the Elements of Article 27 (3) of ITE Law

Courts have interpreted the elements of the criminal act as stipulated in Article 27 (3) of ITE Law as follows: (i) anyone, (ii) intentionally and unlawfully, (iii) distributing and/or transmitting and/or allowing access to electronic information and/or electronic documents, and (iv) containing libel and/or defamation of character.

The element of 'intent' refers to the intent of the perpetrator of an act, requiring a mental state of the perpetrator that stimulates, or at least, accompanies, the perpetrator while doing the criminal act. The benchmark to evaluate intent is visible commission of an act by the perpetrator, and thus intent needs to be delineated. The perpetrator has to be knowledgeable or aware and desires the result to happen. There are three forms of intent: i) direct intent, ii) oblique intent, and iii)

conditional intent. Almost all descriptions of court verdicts describing the element of 'unlawfully' refer to the definition.

In almost all verdicts, there has been no issue with the interpretation of the element of intent in the description by the panel of judges. The difference lies in whether the act of the defendant is intentional as charged or not. In several cases, the opinions communicated through electronic means as medium are initially not intended as libel or defamation of character, although reported as such.

1. The Element of 'Unlawful'

ITE Law does not explain the element of 'unlawful', so judges in formulating these elements refer to general definitions in criminal law. In the case of Diki Chandra, the panel declares that the element of unlawfully contains the unlawful nature of the acts of distributing and transmitting and allowing access to electronic information, so the acts of distributing and transmitting and allowing access to electronic information becomes punishable by law. Based on that interpretation, the panel of judges declare that Article 27 (3) of ITE Law specifies the element of unlawfully, so that people have the right to perform acts of distributing, transmitting and allowing access to electronic information without criminalization.

Such opinion shows a confusion of the panel of judges in formulating the element of 'unlawful' using their own interpretation. This could later be seen in the consideration about in which conditions the acts of distributing, transmitting or allowing access to electronic information whose contents are libellous can be permitted. The judges immediately refer to Article 310 of the Penal Code, stating:

> "Considering, that ITE Law does not specify or clarify with regard to in which condition or which prerequisites, a person who distributes, transmits or allows access to electronic information whose contents are libellous in nature can be permitted, it has to be found in the source of libel law in Chapter XVI Book II of the Penal Code, on libel (Article 310), as all forms of libel are always defamatory".[61]

The judges later explain that in libel there is an element of unlawful (Article 310 (3) of the Penal Code), and libel is not criminalized when done for the benefit of the public, or in self-defence, and these two conditions allow the perpetrator to distribute, transmit and allow access to electronic information, despite the libellous content.

In the Leco Maba case, the judges only explain that the element of 'unlawful' as 'the defendant having no rights or permits from a party of authority'.[62] This opinion is similar to the Prabowo case, namely that the element of 'unlawful' refers to committing an act outside the rights of a person based on position, authority or power, in violation of the law. The nature of 'unlawful' has two elements: (i) formal, namely that all written parts of the definition of the criminal act have been fulfilled, and (ii) material, that the act has violated or endangered the interests of the law being protected by the formulators of the law in a certain formulation of an offense.[63]

Both verdicts show that what is regulated in Article 27 (3) of ITE Law remains an offense that is yet to be interpreted properly. Judges still need various references to interpret this element. When the judges describe the element in depth, it is easy to find the basis for their argument, but as in Leco Maba case, the judges merely state that the element of 'unlawful' as being the act of the defendant with 'no rights or permits from a party of authority'. Such a wording is not an adequate and clear explanation, as in the context of acts charged as libel and/or defamation of character,

[61] Verdict No. 1190/PID.B/2010/PN.TNG.
[62] Verdict No. 45/Pid.B/2012/PN.MSH.
[63] Verdict No. 232/Pid.B/2010/PN.Kdl

often there is a correlation with the implementation of the right of the freedom of opinion and expression. At which conditions a person communicating their viewpoint is declared to have no right and needs to obtain permit from those in authority? Besides, with the lack of explanation of the element of 'unlawful' in Article 27 (3) ITE Law, and then the references to articles in the Penal Code, one becomes more convinced that the article is irrelevant.

2. The Element of 'Distributing and/or Transmitting and/or Allowing Access to Electronic Information and/or Electronic Documents'

The element of 'distributing and/or transmitting and/or allowing access to electronic information and/or electronic documents' is a new formulation in the language of criminal Law, and thus judges need to explain the element based on certain references or explanation of experts summoned to court. Judges also explain the meaning of 'distributing', 'transmitting' and 'allowing access' in reference to the Essential Dictionary of the Indonesian Language (KBBI, third edition, published by Balai Pustaka 2003). The meanings of 'electronic information' and 'electronic documents' refer to the definitions in ITE Law. In the verdict in the Prabowo case, the panel of judges explain as follows:

> Distributing: the act of widely disseminating information and/or electronic documents through electronic media. The widespread dissemination act also contains the definition that the information is spread from one party to another. Distributing information means the act of disseminating possessed information to individuals, groups or a large mass of people;
>
> Transmitting: publishing information into an electronic media network publicly accessible without regard of location or time (anytime and anywhere). Transmitting is the activity of sending, continuing or forwarding information through electronic media and/or electronic instruments. Transmitting information means distributing or giving information from one person to another;
>
> Access: the act of interacting using independent electronic systems in a network (referring to Article 1(15) of ITE Law). Allowing access means an activity to make possible others accessing information and/or electronic documents. The access of electronic information and or electronic documents is the same as distribution, only the target is a whole group of people or many persons;
>
> Electronic information: one part of or a group of electronic data, including but not limited to writing, sound, illustration, map, design, photograph, electronic data interchange, electronic mail, telegram, telex, telecopy or similar, letters, marks, numbers, access code, marks or perforation that have certain meaning or can be understood by persons who can understand such data (referring to Article 1 (1) of ITE Law);
>
> Electronic document: all information created, continued, sent, received or stored in analogue, digital, electromagnetic, optical or similar forms, that can be seen, shown and/or listened to through a computer or electronic system, including but not limited to writing, sound, illustration, map, design, photograph, or similar, letters, marks, numbers, access code, marks or perforation that have certain meaning or can be understood by persons who can understand such data (referring to Article 1 (4) of ITE Law).[64]

[64] Verdict No. 232/Pid.B/2010/PN.Kdl.

In the Diki Chandra case, the panel of judges explain that ITE Law does not provide an explanation of this element, and reference to the Essential Dictionary is required to interpret it.

> "Considering, that there is no explanation on the three acts in ITE Law, the Essential Dictionary defines distributing as the act of conveying (spreading, sending) to a number of people or a number of locations, in the context of the offense of libel using information technology means according to ITE Law The act of distribution is interpreted as the act in any form and means that have a nature of conveying, spreading, sending, giving, disseminating electronic information to another person or another location in committing electronic transaction using information technology."
>
> "Considering, that transmitting is the act of sending or forwarding a message for a person (instrument) to another person (instrument), so the act of transmission is defined as an act using a certain method or through a certain instrument to send or forward electronic information using information technology to a person or instrument (electronic instrument) in an attempt to commit electronic transaction."
>
> "Considering, that the act of 'allowing access' to electronic information contains a wider meaning than distributing and transmitting, if associated to the object of the offense according to Article 27 (3) of ITE Law, the act of allowing access is performing acts using any manner through electronic instruments using information technology to electronic data or a group of electronic data in committing electronic transaction, which results in the electronic data readily accessible by another person or another electronic instrument."[65]

In the Leco Maba case, the panel of judges merely explained the definition of 'electronic information' and 'access' referring to ITE Law, without explanation of 'distributing', 'transmitting' or 'allowing access'. The panel opined that the elements are interchangeable, so if one of the components has been fulfilled, the whole element is considered fulfilled.[66] However, it can be presumed that the panel of judges lack adequate reference to explain the entirety of the elements.

Inadequacy of reference also occurred in the A. Hamidy Arsa case, resulting in the panel not explaining the elements adequately. The panel, in explaining distributing and/or transmitting and/or allowing access, mentioned "Considering, that what is meant with this element is sending or disseminating".[67] The judged did not explain further the meaning of 'distributing', 'transmitting' and 'allowing access'. The meanings of 'electronic information' and 'electronic documents' are only described based on the formulation in ITE Law.

Based on these definitions, all acts using electronic systems could be ensnared. In various cases, Article 27 (3) has been applied in almost all forms of electronic distribution or transmission and using any medium, inasmuch as they agree with the definition or electronic information and documents. Thus, it is not surprising that the article has been applied to acts of using social media such as Facebook and Twitter, personal blogs, text messages or even BlackBerry Messenger statuses.

3. The Element of 'Libel and/or Defamation of Character'

In general, all of the verdicts related to the description of this element refer to the definition in the relevant article in the Penal Code. In the Diki Chandra case, the element 'containing libel and/or defamation of character' is referred to the article on libel in the Penal Code.

---

[65] Verdict No. 1190/PID.B/2010/PN.TNG.
[66] Verdict No. 45/Pid.B/2012/PN.MSH.
[67] Verdict No. 23/Pid.B/2011/PN-JTH.

> "Considering, that this element in the formulation of the offense in Article 27 (3) ITE Law is the element of the condition of the object of electronic information and or document, in which the nature of unlawfulness of the act of distributing and or transmitting and or allowing access to electronic information, and at the same time as the guarantor or legal protection, self-esteem and dignity, in relation to one's good name and honour, and this offense is *lex specialis* of the forms of general libel, specifically libel as defined in the Penal Code.
>
> "Considering, that…. the phrase containing libel in the formulation of Article 27 (3) ITE Law contains the juridical meaning of all forms of libel in Chapter XVI of the Penal Code, ranging from simple defamation, slander, libel, submission of false charge, falsely casting suspicion to libel of a deceased person while the phrase of defamation refers to harming of character (the standard form) in Article 310 (1) of the Penal Code;"[68]

In the consideration of the Prabowo case, the panel explained regarding the element of libel and/or defamation of character, that libel can be interpreted as all acts that belittle the self-esteem and dignity of a person, in spoken words or in writing. Defamation of character is interpreted as an act that harms the character and honour of a person.[69]

The judges refer to the opinion that 'slander' is an attack to the character and good name of a person, and resulting in humiliation of the target. The character attacked here refers to the good name of the target, and does not refer to honour as in sexual honour. There are six forms of slander in the Penal Code: (i) oral defamation, (ii) written defamation, (iii) slander, (iv) simple defamation, (v) deliberate false charge, and (vi) deliberate false accusation. Libel is interpreted as the act of falsely accusing a person to have committed an act, either in violation of law or not in violation of law, while the fact is that the accused person to not be proven to commit the act they are accused of.

The panel also added that the article on slander demands intent in the act of the perpetrator, requiring a mental state of the perpetrator that stimulates, or at least, accompanies, the perpetrator while doing the criminal act. The benchmark to evaluate intent is visible commission of an act by the perpetrator, and thus intent needs to be delineated. Intent means that the perpetrator has to be knowledgeable or aware and desires the result to happen.[70]

There is also descriptions of 'libel and/or defamation of character' that are much less clear, such as in A. Hamid Arsya case. The panel explained defamation of character as 'ruining the community's positive evaluation of a person's character'.

> "Considering that what is meant with libel and/or defamation of character is attacking a person's honour and good name, and defamation of character as ruining the community's positive evaluation of a person's character."[71]

The implementation of Article 27 (3) of ITE Law has a number of issues: (i) related to 'intent' to commit libel and/or defamation of character, (ii) implementation of the element of 'unlawful', (iii) interpretation of the element of 'libel and/or defamation of character' in the Law. The Prita Mulyasari case is an excellent example of these problems. In the cassation court, there was a dissenting opinion from the judges, in relation to the intent of the statement in correlation to the element of 'intent' and 'unlawfully'. Two judges declared that the act committed by Prita

[68] Verdict No. 1190/PID.B/2010/PN.TNG.
[69] Verdict No. 232/Pid.B/2010/PN.Kdl.
[70] Verdict No. 232/Pid.B/2010/PN.Kdl.
[71] Verdict No. 23/Pid.B/2011/PN-JTH.

Mulyasari is not part of public interest, and one other judge claimed that it is a criticism for the public interest.

> "In observation of the intent, the statement of the defendant cannot qualify as libel or defamation of character, as the intent is to warn the public so they do not experience health services as she did."[72]

The element of intent is not limited to the intention to distribute, transmit or allow access, but must be correlated further with the goal of a statement or act and the form. This context is missing from the ruling in Article 27 (3) on libel and/or defamation of character, because the law does not categorise the offenses as ruled in the Penal Code. As a result, charges of libel and/or defamation of character force the judge to refer to the categories of the offenses of slander in the Penal Code, raising an issue about proving the definitions of 'in public' or 'public interest'.

The element of 'unlawfully', interpreted as acts done outside the rights of a person based on position, authority or power, in violation of the law, has a dangerous implication to the protection of the freedom of opinion and expression. In cases with charges of slander, in which there is a harmed party targeted by a statement, 'unlawfulness' might be correctly interpreted, but in many cases, when viewpoints, opinions or expressions are made through personal blogs or Facebook, these can be wrongly targeted as libel and/or defamation of character.

Regarding the element of 'libel and/or defamation of character' as mentioned earlier, Article 27(3) ITE Law, which does not recognize categories of the offense, targets various forms of slander as regulated in the Penal Code. In the construction of the charges by the prosecutor and the application in court, it is very easy for a person to be charged with slander, reported to the police and imprisoned. In cases of viewpoints, opinions and expressions that are not directed to a certain party, comments to news links, or complaints told to a limited audience, there have been criminal charges hurled. There are many such cases, such as Ade Armando, who wrote an opinion in his own personal blog, and charged with defamation of character.

There is also the case of Johan Han, a motivator, who admitted that his writing on Facebook had no certain intent, and was merely a commentary to a certain issue. When the party claiming to be harmed protested, Johan removed the status and apologized. However, Johan was reported to the police and charged.[73] The case has actually shown a lack of intent to slander or defame character, which is proven by the immediate removal of the status following a protest, and an apology.

These cases represent scores of other cases in which people who upload information are being reported to the police and charged. The law has a problem, and arbitrary implementation of the law without adequate protection of human rights, has demonstrably threaten expression, without regard of any intent or otherwise to commit libel or defamation of character.

b.2. Discussion of the Elements of Article 28 (2) of ITE LAW

ITE Law does not provide an explanation of the elements of the crime as stipulated in Article 28 (2), namely that "anyone intentionally and unlawfully distributing information intended to incite hate or hatred between individuals or groups based on ethnicity, religion, race and social class (SARA)." In general, in various verdicts, judges describe the elements of Article 28 (2) as follows: (i) anyone, (ii) intentionally and unlawfully, (iii) distributing information intended to incite hate or hatred between individuals or groups based on ethnicity, religion, race and social class (SARA). However, in other cases, the elements are defined as follows: (i) anyone, (ii) intentionally and unlawfully distributing information, and (iii) intended to incite hate or hatred between

[72] Verdict No. 822 K/Pid.Sus/2010.
[73] See "Gara-Gara Komentar di Facebook, Johan Jadi tersangka", at http://regional.kompas.com/read/2013/08/14/0922570/Gara.gara.Komentar.di.Facebook.Johan.Jadi.Tersangka, accessed on 20 November 2013.

individuals or groups based on ethnicity, religion, race and social class (SARA). The following is the court's interpretation in elaborating these elements:

1. The Element of 'Intent'

The element of 'intent' in verdicts generally is interpreted as determination or willingness, or intent to gain certain consequences. Such act is done with consequences that are foreseeable or actually occurring: (i) intent as a natural or virtually certain consequence, (ii) intent as awareness of consequences. Intent as awareness of consequences (*dolus eventualis*) is the occurrence of a certain act or consequence according to the formulation of criminal law as the realisation of the possible consequences in part of the perpetrator.

In the Alexander Aan case, judges declared that his actions have fulfilled the element of intent as awareness of consequences, referring to the fact of the Facebook statement by Alexander Aan on the possible risk after a warning from another party about the information he uploaded, although Alexander Aan has declared that his action was only to learn about science, because he liked new and controversial things, and had no intent to disparage beliefs of Muslims and he did not realise that people misunderstood his actions.[74]

This is an important point on the charge of religious desecration, on one hand, there is an attempt to open debating spaces though forums such as Facebook, but on the other hand, regarded as an act of desecration of religion. The act of opening debating spaces is then regarded as an act of hatred, and there are parties who claim that their belief has been desecrated. The Alexander Aan case is similar to that of Mirza Alfath, whose Facebook comment has been interpreted as intent to slander and desecrate a religion. The element of intent is placed in the perspective of an evaluating party, instead of the actual intent of the charged party.

2. The Element of 'Unlawful'

The element of 'unlawful' is defined as an act in defiance of formal law, namely an act prohibited by formal law with the consequence of sanctions to anyone who commit and fulfil the elements of the act as mentioned in formal criminal law. In the formulation of laws, in each criminal provision, unlawful acts or offenses have been formulated.[75] Such a description is found in many cases charged with violation of Article 28 (2) ITE Law.

However, the elaboration of the element of 'unlawful' in the case of Alexander Aan was confusing and did not correlate to the criminal act committed. The judges declared:

> "Considering, that the fact uncovered in the court session, that the defendant works as a candidate public servant in the Regional Development Board of Dharmasraya Regency, and not as a journalist, thus the act of the defendant to post or provide links on the Internet on his Facebook account with the profile named Alex An or the Facebook group Atheis Minang, regarding a new information that is controversial in the society as it is debatable, by using the computer facilities belonging to the government of Dharmasraya Regency, is blatantly in violation with the authorities of a candidate public servant of the Dharmasraya Regional Development Board, and in violation of the mission and vision of Dharmasraya Regional Development Board, and besides the defendant's act was done without permission from the authorities, in this case the Minister of Communication and Information, and thus the defendant's act is classified as unlawful."

Such an elaboration causes confusion, as it elaborates the element of unlawful by noting that the defendant is not a journalist, the use of government computers, acting not in authority as a

[74] Verdict No. 45/PID.B/2012/PN.MR.
[75] Verdict No. 45/PID.B/2012/PN.MR.

candidate public servant, and having no permit from the Minister of Communication and Information Technology. This argument means that Alexander Aan is prohibited from posting or linking new information because he is not a journalist, he is prohibited from using Facebook on government computer, and finally, there is absolutely no relevance between disseminating information and requiring permission from the Minister of Communication and Information Technology.

Another elaboration of the element of unlawfulness, for example in the case of Dedi Rachman AK Ismail, the judges declared unlawful act as *zonder bevoegheid*, or having no right to do such an act and in opposition of other persons' rights. The panel declared:

> "Considering, that the cause of death… is not the authority of the defendant to declare, but the defendant had declared the cause of death to be… in a group posting…."
>
> "Considering, that the statement of the defendant in his status in Facebook social network in the group… has violated the rights of people of the… ethnic group."

Such a consideration shows that an opinion, if not declared by those having authority to pronounce thus, is 'unlawful', and an opinion is also regarded as 'unlawful' if the rights of other groups are violated. In the indictment, it was clear that various statements of the defendant and the other group members were more in the form of discussion. With such an argument, expressions and discussions in a forum such as in Facebook are easily declared as being 'unlawful', especially such an opinion is regarded as 'unlawful' if the person declaring the opinion does not have an authority to do so.

3. The Element of 'Distributing Information'

Another element of Article 28 (2) of ITE Law is the element of 'distributing information'. The wording in the article differs from Articles 27 and 29, in which the element is worded 'distributing and/or transmitting and/or allowing access to electronic information and/or electronic document. It is not known whether Article 28 (2) uses the term 'distributing information' instead of 'electronic information and/or electronic documents'. The Law also does not clarify the definition of the element 'distributing information'.

The use of the term 'distributing information' has broad consequences, referring to all types of information and all types and forms of distribution, not limited to 'electronic information' or 'electronic documents', while ITE Law is supposed to regulate electronic ones. The wording of Article 28 (2) shows that the law has lost its regulatory essence.

The panel of judges, referring to the verdict in the Alexander Aan case, interpreted the element of 'distributing information' as follows:

> "Considering, that what is meant with distributing information in this element is distributing through the Internet, and the act was committed by posting or linking a content to show up on the Internet medium with certain intent by the creator."[76]

The opinion of the judges seem to connect the element of 'distributing information' with the act committed by Alexander Aan through his Facebook account, by directly stating it as 'distributing through the Internet' committed by 'posting or linking a content to show up on the internet medium'. Further, the judges tried to explain the meaning of 'posting' and 'linking' by referring to sources that are presumably arbitrarily selected from the internet without attempt to find out more adequate sources.

[76] Verdict No. 45/PID.B/2012/PN.MR.

> "That what is meant with posting is the act or attempt to make an article show up on the Internet, either in blog articles or in statuses in social networks such as Facebook or Twitter (source: *delevdiel.wordpress.com/2011/12/05/pengertian-posting-2*)."
>
> "That what is meant with link (or hyperlink) is a reference in a hypertext document to another document or resource. As in a reference in literature combined with a data network and in accordance to the goals of the text protocol (source: *bloggersorong.com/pengertian-link.html*)."[77]

Unlike the verdict in the Alexander Aan case, the case of Dedy Rahman AK Ismail, who posted in a Facebook group related to ethnic groups, the judges elaborated the meaning of 'distributing information' by explaining that 'information' in Article 28 (2) of ITE Law refers to 'electronic information' as elaborated in the law.[78] In its consideration, the judges stated, "*Considering, that what is meant with information in this element is electronic information as meant in Article 1 (1) of Law No. 11 of 2008…*". In the verdict, the panel of judges did not interpret 'distributing' and only elaborated Facebook, "*Considering, that the Facebook program [sic!] is a media of communications existing in the cyber world or electronic world*".

In the application, referring to the cases of Alexander Aan and Dedy Rahman, the element of distributing information is contested with their unwillingness to retract their opinions or material delivered through Facebook. This unwillingness is regarded as 'distributing information', which according to Alexander Aan is a form of freedom of expression and intended to stimulate debate.

> "... in accordance to the evidence presented in court, confirmed by witnesses and the defendant, is based on malice, due to opposition to the content either in the defendant's Facebook account with the profile name Alex An, and in the Facebook group Atheis Minang. However, the defendant as the owner of the Facebook account Alex An, or as an admin in the Facebook group Atheis Minang, refused to remove the content, and has been warned by the group Gerakan 10.000 Urang Minang memblokir Atheis Minang…."

In the case of Dedy Rahman, a warning from another party to his Facebook post is regarded to satisfy the element of distributing information.

> "Considering, that based on the facts uncovered in court, the defendant's explanation and evidence pointing that the defendant has written a status or posted a writing in the Facebook social network in the group Rungan Samawa, and the defendant continued to write comments even though having been warned several times by other members of the group Rungan Samawa."[79]

In Article 28 (2), the element of 'distributing information' is always connected to the content of the information being distributed, namely to incite hate or hatred between individuals or groups based on ethnicity, religion, race and social class (SARA). In the case of Alexander Aan, the judges declared that the posted or related content only desecrated a certain religion in Indonesia, and proved intent to incite hate or hatred between individuals or groups based on ethnicity and religion, specifically Minang and Islam. In the Dedy Rahman case, the judges declared that the defendant's writing was directed towards a certain ethnic group, namely Balinese, and not directed towards the general public, and can incite hatred from the Sumbawa ethnic group to the Balinese in relation to manslaughter.

[77] Verdict No. 45/PID.B/2012/PN.MR.
[78] Verdict No. 102/PID.B/2013/PN.SBB.
[79] Verdict No. 102/PID.B/2013/PN.SBB.

In the Sebastian Joe case,[80] the Ciamis District Court did not elaborate the element of 'in public' as it did not discuss the charge related to Article 28 (2) of ITE Law and reached instead a verdict related to Article 156 of the Penal Code, one element of which is 'announcing hatred in public.' In reaching the verdict, there was a reference to the medium used by Sebastian Joe, namely Facebook, declaring that the defendant's writing is part of the public category.

> "Considering, that what has been written by the defendant in his Facebook account is part of the public category, and by writing in public the defendant has the realisation that the information through his writings can be seen/accessed/read by anyone using Facebook and there is no need to befriend him…."

The Ciamis District Court used Facebook to prove the element of 'in public', unlike the Bandung High Court, whose consideration interpreted Facebook as an element of 'distributing information' as in ITE Law.

> "That the defendant's act was committed using an electronic means namely the Internet, that can be accessed/opened, read and used by the general public who read it, and whose content contains and incites hatred…, and has been taken by the Panel of High Judges, and confirmed as its own opinion, and has been done by the defendant intentionally and unlawfully, as ruled in Article 45(2) *jo.* Article 28(2) ITE Law, which is a special law that has to be applied preceding the general Penal Code (*lex specialis derogat legi generali*)."

Referring to those three cases, the issues in interpreting and applying Article 28 (2) lie in: first, intent to distribute information intended to incite hate or hatred between individuals or groups, whose onus is placed on the 'feeling' of the other party who reads and disagrees with the material, and 'feels' that the information incites hatred. In the case of Alexander Aan, it is observable that what is being distributed is a personal opinion, belief and expression, and an attempt to open public debate.

Second, the element of 'distributing information' is easily satisfied when there have been warnings from other parties, such as demands to remove the comment, that is not complied with, while the party publishing the content declare that the act is part of their belief. In this context, a person expressing their free belief or opinion should be protected, instead of forced to recant and imprisoned. This is especially when the belief delivered in the public sphere has the context of opening discussion and debate.

Third, while the evaluation of a viewpoint or expression delivered in the public sphere is finally done by an authorised body, there is a huge potential of discriminatory implementation. The opinion of a certain majority will be protected, at the expense of the protection of minority groups. In the context of religious beliefs, conceptions about beliefs and manifestations in the public sphere of minority groups are always inadequately respected, both in the legal system and in the public sphere.

b.3. Severe Sanctions Encouraging Pre-trial Detention

In ITE Law, various generally prohibited acts are threatened with more severe sanctions than the provisions in the Penal Code or other regulations. Various acts regarded to be intentionally and unlawfully distributing and/or transmitting and/or allowing access to electronic information and/or electronic documents containing violations of decency (Article 27 (1)), libel and/or defamation of character (Article 27 (3)), and extortion and/or threat (Article 27 (4)), are

[80] Verdict No. 278/Pid.Sus/2012/PN.Ciamis, Verdict No.463 Pid/2012/PT. Bdg.

threatened with a criminal sanction of a maximum 6 year incarceration and/or a fine of 1 billion rupiah (Article 45 (1)) of ITE Law.

An act of intentional and unlawful distribution of false and misleading news causing consumer harm in electronic transactions (Article 28 (1)), distributing information intended to incite hate or hatred between individuals or groups based on ethnicity, religion, race and social class (Article 28 (2)), is threatened with a criminal sanction of a maximum 6 year incarceration and/or a fine of 1 billion rupiah (Article 45 (2)) of ITE Law. An act of intentional and unlawful distribution of electronic information and/or electronic documents containing threats of violence or causing fear directed in a personal manner (Article 29) is threatened with a criminal sanction of a maximum 12 year incarceration and/or a fine of 2 billion rupiah (Article 45 (3)) of ITE Law.

The severe criminal sanctions have encouraged the Law enforcement to detain subjects. In its implementation, ITE Law, while specifically regulating the procedural Law, has still generally dependent on the Criminal Procedural Law, including pre-trial detention procedures. The six-year maximum sentence in the cases of libel or defamation of character has encouraged police, prosecutors and judges to arrest and detain subjects, because such a sentencing fulfils the requirements of detaining suspects as regulated in the Criminal Procedural Code.

Article 21 of Law No. 8 of 1981 on the Criminal Procedural Law mentions two requirements of pre-trial detention: objective and subjective. The objective requirement, or the juridical element, is that the charged criminal act entails a sanction of over 5 years of incarceration. This means that detainment can only be enforced to suspects/defendants who committed a criminal act and/or an attempted criminal act and/or abetted a criminal act that is threatened with a prison sanction of 5 years or over. The subjective requirement refers to the concern of the authorities (investigators/prosecutors), that (i) the suspect/defendant is strongly surmised to have committed a criminal act based on adequate evidence; (ii) that there is a condition raising concern that the suspect or defendant will evade, damage or destroy evidence and or repeat their offense. The subjective requirement is the absolute authority of the law enforcement, which is completely immune to protest by any party. This is difficult to evaluate, as often people are detained despite a lack of conditions resulting in a possibility that the suspect will evade, damage or destroy evidence and repeat their offense.

Referring to the provision, violations of Article 27 (3) of ITE Law, in connection to the criminal sanctions in Article 45 (1) of ITE law, the act of libel and/or defamation of character have the objective requirement for detainment. Compare this provision to the articles on libel in the Penal Code, whose sanctions are lower than 5 years and thus suspects/defendants charged with libel as in the Penal Code do not provide adequate legal basis for the law enforcement to perform pre-trial detention.

The implementation of Article 27 (3) *jo.* 45 (1) of ITE Law has resulted in a number of victims, with the detaining of a number of people suspected/charged of libel or defamation of character. Prita Mulyasari, Benny Handoko, and Diki Chandra are the examples, although in a number of cases, their pre-trial detention was suspended.

Prita Mulyasari, who was previously not detained during process by the police, was detained by the prosecutor for 22 days in the Tangerang Women's Correctional Facilities. The Tangerang District Attorney Office reasoned that the detaining was due to concerns that Prita were to escape and destroy evidence, and thus there are subjective and objective reasons to detain her.[81] In this case, there is a difference in the attitudes of the police and the attorney's office, because the police

[81] See "Tahan Prita, Jaksa Cuek Dibilang Tak Manusiawi", in http://www.tempo.co/read/news/2009/06/03/064179683/ Tahan-Prita-Jaksa-Cuek-Dibilang-Tak-Manusiawi, accessed on 20 November 2013.

regarded that detainment was unnecessary due to Prita's cooperative attitude and her small children, so detainment was not required.[82]

Also similar is the case of Benny Handoko, charged with defamation on Twitter. He was detained in Cipinang Correctional Facilities, and his head was shaven, although the detainment was later suspended. During the investigation process by the Jakarta Metro Police, he was not detained, but when the case was forwarded to the attorney's office, he was detained. Again, the attorney's office claimed that his detainment has fulfilled the requirements. He was threatened with a sanction of more than 5 years' incarceration, and was feared to destroy evidence, escape and repeat his offense.[83]

M. Arsyad, who was suspected of libel through a BBM (blackberry messenger) status, was also detained by the South and West Sulawesi Regional Police for a week, before the detaining was suspended.[84] Previously, the police declared that Arsyad's detainment has fulfilled procedures and legal requirements, has satisfied criminal elements and that the suspect was feared to repeat his offense.[85] In another case, Budiman, an elementary school teacher, was also detained for two days, before suspension. He was reported to the police for slandering the Regent of Pangkep on Facebook.[86]

In many of the cases related to defamation of character, court verdicts punishing the defendant often state that the defendant does not need to serve their sentence.[87] This is different from the opinion of many prosecutors, who often demanded detaining of the defendants. In the case of Prita Mulyasari, the prosecutor detained Prita, although verdicts of the Appeal Court at the Banten High Court and the Court of Cassation at the Supreme Court declare that Prita Mulyasari does not need to serve her sentence.[88] In the case of Ira Simatupang, the charges of the prosecutor always demanded detention, but the court verdict finding her guilty declared that she does not need to serve her sentence.

b.4. ITE Law Creates Legal Uncertainty

Many of the suspects/defendants in cases of libel and defamation of character or distribution of indecency, or incitement of hate, are charged with various models of charges. In cases of libel and/or defamation of character, there are several alternatives, such as the primary charge of violation of Article 27 (3) *jo.* 45 (1) of ITE Law, followed by charges of violation of slander articles in the Penal Code such as Articles 310 (2) and (3), 311 (1), and 335 (1.2).[89] Similarly, cases of hate speech resulting in horizontal conflict and desecration of religion, are charged with violation of Article 28 (2) *jo.* 45 (2) of ITE Law as the primary charge, followed by charges of violation of Article 156a of the Penal Code as the secondary charge and Article 156b of the Penal Code as the tertiary charge.[90]

---

[82] See "Polisi: Jaksa Yang Menahan Prita", in http://news.detik.com/read/2009/06/03/135013/1142034/10/polisi-kejaksaan-yang-menahan-prita, accessed on 20 November 2013.
[83] See "Alasan Kejaksaan Tahan Benny Handoko", at http://www.tribunnews.com/nasional/2013/09/06/alasan-kejaksaan-tahan-benny-handoko, accessed on 20 November 2013.
[84] See "Polisi Bebaskan Penghina Nurdin Halid", at http://www.tempo.co/read/news/2013/09/16/063513795/Polisi-Bebaskan-Penghina-Nurdin-Halid, accessed on 20 November 2013.
[85] See "Kasus Status BBM, Polisi Pertimbangkan Tangguhkan Penahanan Arsyad', at http://news.detik.com/read/2013/09/12/160715/2357137/10/kasus-status-bbm-polisi-pertimbangkan-tangguhkan-penahanan-arsyad?nd771104bcj, accessed on 20 November 2013.
[86] See "Kronologis Pemidanaan Terhadap Budiman", at http://lbhperspadang.blogspot.com/2013/02/pemidanaan-terhadap-budiman-menggunakan.html, accessed on 20 November 2013.
[87] An example is the case of Ira Simatupang in Tangerang District Court.
[88] For other cases, see the cases of Ira Simatupang and Sophan Harwanto.
[89] See the cases of Prabowo, Diki Chandra, Prita Mulyasari, and Ira Simatupang.
[90] See the cases of Alexander Aan and Sebastian Joe.

This can be seen in the construction of charges formulated by the prosecutors, in the following cases:

1. Prabowo, charged of having violated Article 27 (3) ITE Law *jo.* Article 311 (1) PC, or violation of Article 335 (1.2) PC.[91]
2. Diki Chandra, charged of having violated Article 45 (1) *jo*. Article 27 (3) ITE Law, or ii) primary: Article 310 (2) PC and subsidiary: Article 311 (1) PC.
3. Ira Simatupang, charged of having violated Article 45 (1) *jo*. Article 27 (3) ITE Law, or ii) Article 310 (2) PC, or iii) Article 311 (1) PC.[92]
4. Prita Mulyasari, charged of having violated Article 45 (1) jo. Article 27 (3) ITE Law; or ii) Article 310 (2) PC, or iii) Article 311 (1) PC.[93]
5. Herrybertus Julius Calame, charged of having violated Article 27 (3) *jo*. Article 45 (1) ITE Law Article 310 (2) PC.[94]
6. Alexander An, charged of having violated Article 28 (2) *jo*. Article 45 (2) ITE Law, Article 156a (a) PC, Article 156a (b) PC.[95]
7. Sebastian Joe, charged of having violated Article 45 (2) *jo*. Article 28 (2) ITE Law, Article 156 PC.[96]

The trend above shows that Internet users are being charged of violating various articles with multiple charges, with the use of same facts regarding to acts, or medium for the acts (such as social medium with Facebook or Twitter, blog, text messages etc.). The indictments of the prosecutors show that articles in the Penal Code related to slander and/or defamation of character and desecration of religion can still be used by the law enforcement to legally process such acts. The multiple nature of the charges mean that the law enforcement will try to prove the first charge, using ITE Law, and if not proven, will move on to the secondary charge, and the rest, based on articles of the Penal Code. This means that on the very same acts, the Law enforcement, either the police or the prosecutor, believe that articles of the Penal Code can be used to ensnare people accused of libel, defamation of character and desecration of religion.

This reality indicates that the regulation of various prohibitions of libel, defamation of character, indecency or desecration of religion in ITE Law is a form of excessive criminalization, except if the sole purpose is to threaten offenders with a more severe sanction. Besides, there are several cases of libel and/or defamation of character occurring after the enactment of ITE Law in 2008 that are only charged with the articles of the Penal Code, even though the acts were committed through electronic information systems. The courts were also capable of pronouncing sentences to such acts despite referring only to the Penal Code.

Such cases in which only the Penal Code was invoked are Ajimuddin, accused of slander through text message, charged with Article 315 PC. He was sentenced for six months incarceration by the Kendari District Court, and later reduced to 2 months with 4 months' probation by the Southwest Sulawesi High Court.[97] There is also the Riza Yanti case, accused of slander through text message, charged of violation of Articles 311 (1) and 310 (1) PC, tried in Bireuen District Court.[98] These two cases show that acts of libel and/or defamation of character or slander, done using electronic means, in these cases text messages, can be charged using the Penal Code.

Referring to these cases, besides confirming that the regulation in ITE Law on libel and/or defamation of character is irrelevant and excessive, also proves that the Constitutional Court has

[91] Indictment No. REG.PERKARA: PDM-78/KNDL/Ep.2/09/2010.
[92] Indictment NO. REG.PERKARA: PDM-33/01/2012.
[93] Indictment NO. REG. PERKARA: PDM-432/TNG/05/2009 dated 20 May 2009.
[94] Indictment NO. REG.PERKARA: PDM-37/SINGA/01/2011.
[95] Indictment NO. REG.PERKARA: PDM-25/PL.PJG/Ep.1/2012.
[96] Verdict No. 278/Pid.Sus/2012/PN.Cms.
[97] Verdict No. 30/Pid.R/2010/PN.Kdi dated 30 September 2010, Verdict No. 1/Pid/2011/PT.Sultra.
[98] Verdict No. 87/Pid.B/2009/PN-BIR.

erred in refusing the request for the judicial review of Article 27 (3) ITE Law. In its verdict, it claimed that libel, regulated in the Penal Code (off line), could not reach the offense of libel and defamation of character in the cyberspace (on line), and the offense of libel and its elements in the Penal Code cannot be fulfilled in on line libel.[99] Such an assumption by the Constitutional Court has proven to be erroneous.

The implementation of the articles in ITE Law and PC in a parallel manner proves that the regulations in ITE Law is duplicatory, which causes a violation of the principle of legal certainty. In the case of Sebastian Joe, who was charged with multiple charges using ITE Law and PC, he became one of the legal uncertainty examples. At the first level, Sebastian Joe was found guilty for violating Article 156 PC and sentenced to four years in prison by the Ciamis District Court. The judges did not mention ITE Law, despite the act having been done through Facebook. However, at the appeals level, Bandung High Court used ITE Law and declared the defendant guilty of violating Article 45 (2) *jo.* 28 (2) ITE Law and the sentence was increased to 5 years imprisonment and a fine of 800 million rupiah.[100]

In the Sebastian Joe case, both courts have different opinions, regarding which Law to be upheld: ITE Law or PC. The construction of the indictment was Article 45 (2) *jo.* Article 28 (2) ITE Law, and Article 156 PC. The Ciamis District Court declared that the interpretation and form of the legal considerations in the alternative indictment were not regulated in the Criminal Procedural Code, resulting in differences, and thus the panel of judges immediately refers to the most appropriate charge based on articles of the Penal Code.

> "Considering, that the interpretation and form of legal considerations in the verification of the alternative charge were not regulated in the Criminal Procedural Code, which results in legal theory and court practice that there are differences in interpretation and application."
>
> "Considering, that in that aspect the Panel of Judges immediately refers to the most appropriate charge based on the legal fact uncovered in the court, which is the Second alternative charge, in which the defendant is charged of violation of Article 156 of the Penal Code."
>
> "Considering, that what has been written by the defendant in his Facebook account is part of the public category, and by writing in public the defendant has the realisation that the information through his writings can be seen/accessed/read by anyone using Facebook and there is no need to befriend him…."

The consideration of Bandung High Court stated a disagreement with the consideration of Ciamis District Court, in which the act of the defendant is a violation of ITE Law. The High Court based its consideration that ITE Law is *lex specialis*.

> "That the defendant's act was committed using an electronic means namely the Internet, that can be accessed/opened, read and used by the general public who read it, and whose content contains and incites hatred…, and has been taken by the Panel of High Judges, and confirmed as its own opinion, and has been done by the defendant intentionally and unlawfully, as ruled in Article 45 (2) *jo.* Article 28 (2) ITE Law, which is a special law that has to be applied preceding the general Penal Code (*lex specialis derogat legi generali*)."

The Ciamis District Court used the medium of Facebook to prove the element of 'in public' in Article 156 PC, unlike Bandung High Court, whose consideration saw Facebook as a medium to

[99] See Elsam, *Laporan Penelitian Dua Kebebasan Dasar di Indonesia dalam Putusan MK: Studi Putusan MK ... Op.Cit*.
[100] Verdict No. 278/Pid.Sus/2012/PN.Ciamis, Verdict No.463 Pid/2012/PT. Bdg.

'distribute information' as in ITE Law. The basis of the differences between the two decisions is not merely regarding in which context which Law should be prioritised, but the medium used, namely Facebook. Penal Code proves itself capable to judge cases related to the use of electronic means as in the verdict of Ciamis District Court, while Bandung High Court only takes issue regarding which law to be applied. Once again, this shows that ITE Law has lost its relevance.

Different persons charged with libel, defamation of character, or slander could be in different positions, threatened with different sanctions or legal consequences. In the case of law enforcement using only articles in ITE Law, they will be facing a much more severe threat of punishment and fine, and a higher chance of detention, as the invocation of ITE Law threatens a six-year incarceration period. On the other hand, when the law enforcement only uses articles in the Penal Code, the criminal punishment is less severe, and there is no objective requirement to detain the perpetrator.

Another issue is the potential of violation of the principle of double jeopardy (*ne bis in idem*), when the Law enforcement uses only Penal Code articles, resulting in acquittal. In another time, the perpetrator could be charged again with the charge of violating articles of ITE Law, despite the act having been done only once. The law enforcement could argue that the articles in PC and ITE Law have different elements, and thus this is not a violation of the principle of double jeopardy.

Besides, in court practice, the judges in elaborating the elements of the act of libel or defamation of character, continue to use the same references in explaining the intent of the elements, as the same jurisprudence has been used in the criminal act of libel as ruled in the Penal Code. The medium of the act, despite using electronic means, such as text messages, still allow courts to elaborate the legal considerations and adapt them to the provisions in the Penal Code.

b.5. The Absence of Human Rights in Legal Considerations

The aspect of human rights protection has rarely been found in various court verdicts related to the cases of libel and distribution of information containing incitement of hate or hatred based on SARA. This happens despite those issues being very closely related, and also vulnerable to, the violation to the freedom of expression and freedom of religion or belief.

There are at least two cases clearly showing how the human right aspect has been considered in verdicts. In the Prita Mulyasari case, the verdict in the judicial review in the Supreme Court declared that Prita Mulyasari's action fall under the scope of freedom of expression, protected by the 1945 Constitution. Through its spokesman Ridwan Mansyur, the Supreme Court declared that the reason in the acquittal of Prita Mulyasari, *inter alia*, was for the interest of protecting the right of freedom of speech and human rights in accordance to the 1945 Constitution.[101] As a note, however, in the previous judicial processes, the issue of human rights, especially freedom of expression, did not appear.

Another case that put consideration on human rights, albeit not satisfactory, is the Alexander Aan case. The panel of judges considered the aspect of Alexander Aan's human rights as a response to his defence that he had the right of freedom of opinion, and as response to the *amicus curiae* letter delivered by the Asian Human Rights Commission (AHRC).

However, the consideration of the panel in the Alexander An (Aan) case was less than adequate. The panel only based it on a textual reading of international human rights provisions, referring to Article 29 (2) of the Universal Declaration of Human Rights and Article 19 (3) of the International Covenant on Civil and Political Rights, without any further study of the development

[101] Stated by the Head of Supreme Court Public Relations Ridwan Mansyur. See "Alasan MA Kabulkan PK Bebas Prita", at http://www.beritasatu.com/hukum/72402-alasan-ma-kabulkan-pk-bebas-prita.html, accessed on 20 November 2013.

of these instruments, such as supporting documents and precedents in their application. In their simple argumentation, the panel concluded that Article 28 (2) ITE Law is valid according to international and national laws. The panel did not further elaborate the elements of the restrictions.

> "International regulations on international human rights are in agreement with Republic of Indonesia's state constitution, namely the 1945 Constitution, specifically Article 29, with the understanding that the freedom of one's rights is not provided unbounded, but there are boundaries in order to not violate other people's basic freedoms."
>
> "Considering, that thus the application of Article 28 (2) of Law No. 11 of 2008 on Electronic Information and Transaction to the defendant is valid according to international and national laws, and therefore the Panel of Judges will consider the elements of the article."[102]

The panel of judges did not analyse further the restrictions as set out in Article 29 (2) UDHR and Article 19 (3) ICCPR. In order to elaborate the intent of the restrictions, the panel should and could have referred at least to the General Commentary of the Human Rights Committee, and internationally-developed principles such as the Siracusa Principles and the Johannesburg Principles.

In the Alexander An case, the panel also put the defendant's human rights into consideration, although in a contradictory formulation. The panel recognized that the defendant has the right of the freedom of expression, but prohibited him from openly declaring it to the public through the Internet, and considered him to have jeopardized Pancasila and disturb the general peace.

> "Considering, that the defendant, who claims to be atheist, based on the freedom of expression which is a right of the defendant, however, that should not be openly declared to the public through the Internet for public knowledge because the State of the Republic of Indonesia is based on the Oneness of God, as declared in the state philosophy and ideology Pancasila and the 1945 Constitution, so the act of the defendant is categorised as jeopardising Pancasila and disturbing the general peace.[103]

Referring to the judges' opinion on the relation between freedom of expression and libel/desecration of religion in the Alexander An case, one needs to appreciate their respect to the defendant's human rights in their consideration. On the other hand, though, their opinion on the application of international human rights norms and standards needs deeper understanding.

The panel of judges declared that expression of nonbelief *'should not be openly declared to the public... for public knowledge*', so it can be interpreted that such nonbelief is recognised, but the nonbeliever must not declare it to the public. This is definitely a threat to the guarantee of the right of the freedom of religion or belief, especially with the statement that declaring unbelief in public is regarded as a 'jeopardising Pancasila and disturbing the general peace'.

In fact, Article 18(2) ICCPR provides regulations on the restriction of the right of manifesting the freedom of religion or belief. The panel only based its judgment on the rulings of Article 29(2) UDHR and Article 19(3) ICCPR as the basis for the restriction of the freedom of opinion and belief. The panel did not explore the relations between Articles 18 and 19 ICCPR, in relation to the guarantee of the right of freedom of religion and belief and the right of the freedom of opinion

[102] Verdict on the Trial of Alexander Aan, p. 39.
[103] Verdict on the Trial of Alexander Aan, p. 44.

and expression, with their restrictions, and instead rashly claimed that Alexander Aan's act 'should not be openly declared to the public through the Internet for public knowledge'.

Similarly with the opinion of Mirza Alfath, who was regarded to have desecrated Islam, through him Facebook comment, he was condemned by the Lhokseumawe Ulemas Deliberation Council, and forced to make a public apology. When observing Mirza's act, his opinion could have been regarded as a criticism to the implementation of Islamic sharia in the present context.

Referring to international human rights standards, the restriction in Article 19(3) ICCPR, in the Alexander An case, the panel has failed in contesting protection of human rights and its restriction. In the context of protecting other people's rights and freedoms, the judges should have ensured that in cases of conflict between rights, the primacy should be held by the most fundamental freedom. The panel also failed to elaborate the meaning of restriction in the context of a democratic state, namely that restriction should not negatively affect the functioning of democracy in a society and the model of the democratic society could refer to a society recognising and respecting human rights based on various international human rights instruments.[104]

In the case of Alexander An, the judges recognized his freedom of expression but prohibited him from openly declaring it to the public through the internet for public knowledge, because it might jeopardise Pancasila and disturb the general peace, without based on satisfactory arguments on 'general peace'. In the context of human rights restrictions, the understanding on protecting general peace is the interpretation of various rules guaranteeing the functioning of a society, or the basic principles of the society, and those encompassing protection of human rights. The panel has failed in balancing protection of the society and protection of the basic rights of an individual.

In the Sebastian Joe case, while there is an argument that the act was an expression of human rights, the panel of judges never made consideration about it. Sebastian Joe was charged of dissemination of information resulting in hate or hatred between individuals/groups based on ethnicity, religion, race and social class (SARA) through Facebook. His legal counsel has argued that the act was one protected by Articles 29 (2), 28E (1) and (2) of 1945 Constitution, and in accordance to Law No. 39 of 1999 on Human Rights (Articles 4 and 22). In this case, once again it is seen that the panel did not take into account the aspects of the defendant's basic rights, on whether his actions were part of execution of human rights or otherwise. The judges also did not explain why the argument was not put into consideration.

In another case, A. Hamid Arsa was charged with two indictments, namely libel and/or defamation of character (Article 27 (3)) and dissemination of information resulting in hate or hatred between individuals/groups based on ethnicity, religion, race and social class (Article 28 (2)). The charges were brought due to his text message about the then-governor of Aceh, Irwandy Yusuf, sent to a number of persons. This case has the dimensions on whether the information was libellous, incitement of hatred, or as criticism to a state official. In the context of human rights, restriction of rights in order to protect other people's rights and freedoms has to give primacy to the most fundamental rights and freedoms, and the restriction must not be invoked to protect the state and its apparatus from public criticism and opinion. Of the many cases reported to the police are cases of criticism or opinion of the government and its apparatus.

Those cases show the weakness of protection, not only of the rights of freedom of opinion and expression, but also the rights of freedom of religion and belief. ITE Law, which regulates the prohibition of dissemination of hate materials only worsen the situation. In previous cases charged with libel or desecration of religion, usually there were comprehensive facts such as

[104] See ELSAM, Kebebasan Berekspresi di Internet, (Jakarta: Elsam, 2013), pp. 36-37.

books or concepts of certain beliefs, while in the cases of Alexander An and Mirza Alfath, short sentences or phrases in Facebook are easily pointed as heretical, libellous and desecratory.

c. ITE Law: The Act of Public Control

The restriction in ITE Law on one side is referred to protect people's rights and reputation. On the other side, it can be understood as an effort to control public thought and expression. The UN Special Rapporteur of the Advancement and Protection on Freedom of Expression, in its account in 2001 to the UN Commission on Human Rights, reported its concerns about the government effort of controlling internet activities. In 2001, several countries had begun to implement the criminal law punishment to its citizens of uploading inappropriate information on the internet. To be precise, for those who uploaded subversive written information or any other form of expression, the banning/the closing of the webpage, even jail punishment would be given.[105]

Action which is considered as an insult or aspersion, as well as an affront and blasphemy towards (any) religion, will be controversial because of the 'vulnerability' of the action as an indiscriminate accusation and a violation towards the rights related to the freedom of thought and expression. The fact that of the Criminal Code is still unreformed, with its far-from-good formulation and indiscriminate application, has made the guaranty towards the rights related to the freedom of thought and expression to be violated oftentimes. The court practices in Indonesia haven't been using the standard of proof to verify the action which is considered as an aspersion, by referring to the standard of restriction on the freedom of thought and expression. It is the situation to be worried about as an outcome of the ITE Law stipulation.

As stated before, ITE Law is problematic in its formulation on criminal act and criminal punishment. The formulation of articles 27, 28, and 29 in the ITE Law, with its insufficient description, results in that of the using of precedence, doctrine, and jurisprudence in the application of the chapters within the Criminal Code. In fact, there are several stipulations in the Criminal Code related to the act of insult, aspersion, affront, and blasphemy towards (any) religion which are still problematic if seen through Human Rights point of view.

These days, the criminal act of aspersion is gradually abandoned. The UN has provided a similar protection towards the implementation of freedom of thought and expression which has been done online, as well as offline. At least, as accounted by the UN Special Rapporteur of the Advancement and Protection on Freedom of Expression, the accusation of insult or aspersion should not be applied to online activities, for there is this same access to the clarification space towards the act which is considered as insulting or threatening.[106]

Contextual with the act which has the subject of decency, it is closely related with the matter of social morality. The 'moral' value which should be seen as a value which comes from multiple views, the practice often executed as a single value welcome and believed by a single major group. There are facts mostly happened in the court practice in Indonesia, that a single value based on the interest of a single major group becomes the basis of the Law enforcer by ignoring the plurality of the society with various moral views.[107] The emergence of the Anti-pornography Law, with its far-from-good formulation, also adds anxiety that the content spreading through electronic means (online) will easily be considered as criminal act towards morality.

---

[105] See Djafar, W. and Indriaswati D. Saptaningrum, *Tata Kelola Internet yang Berbasis Hak, Studi tentang Permasalahan Umum Tata Kelola Internet dan Dampaknya Terhadap Perlindungan HAM*, ELSAM, 2013, p. 8.

[106] The UN Special Rapporteur of the Advancement and Protection on Freedom of Expression, in its report of 2011. The document can be accessed at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/132/01/PDF/G1113201.pdf?OpenElement.

[107] See, for example the criminal case of Erwin Arnanda, the chief editor of Playboy Magazine Indonesia, who was allegedly violating the Criminal Code article 282 on propriety and morality. Erwin had been announced to be guilty before he was released on the Consideration Level in the Supreme Court.

It is just the same as the cases related to the affront and blasphemy towards (any) religion, as stated before; it will be referred to the legislation of the Prevention Act on the abuse and/or affront towards Religion, 01/PNPS/1965, or the Criminal Code article 156a. The regulation formulated far before the legislation reform has been incompatible with the development of the protection for the freedom of religion these days, as has been guaranteed by the "UUD 1945" and its regulations. The regulation restricts a certain belief, and makes it easy for people to be accused for the act of affronting and blaspheming (any) religion. In the practice, there are cases of affronting and blaspheming (any) religion resolved with the regulation, solitarily because of the encouragement of the major group of which belief being affronted or blasphemed; including the act of false accusing.

From the experience of the court practice in Indonesia, the situation of the law enforcer who oftentimes acts based on the encouragement of the majority of people generates the indiscriminative law enforcing. Another problem is the understanding of the law enforcer on human rights develops rather insufficiently which is feared to be the cause of the decisions incompatible with the protection on human rights. In the cases of insult and aspersion for example, there is this potential of misunderstanding by the law enforcer in balancing between 'protecting one's reputation' as the basis of the restriction towards rights, along with the protection towards freedom of thought and expression itself.[108]

d. The Civil Code Enforcement: A Multiple Punishment and High Rated Risk of Large Amount of Fine

The Penal Code and Civil Code punishment are also used to handle several cases dealing with the accusation of insult and aspersion. The conduct of the this two mechanisms makes the accused people to get a multiple punishment and the following impact will be the timidity in presenting any argument, especially in the context of giving any criticism and opinion in public.

One of the obvious subjects is the case experienced by Prita Mulyasari who was sued civilly by Omni International Hospital. The Omni International Hospital, through Sarana Mediatama International, Ltd., by the Civil Code had sued her 700 billion directly to Tangerang National Court. The court sided with the Hospital and made Prita to pay the 370 million-fine and demanded condonation through national media, such as advertisement. In the appeal, Banten, Ltd. also sided with the Omni International Hospital and punished Prita with a fine as much as 204 millions.[109] The loss details stated by Banten, Ltd. is as follows: [i] Material loss of the Omni International Hospital for as much as 161 million as a clarification cost through the national mass media, [ii] material loss for as much as 40 million, [iii] 20 million to the Sarana Mediatama International, Ltd. as the 1st litigant, [iv] 10 million to Dr. Hengky Gozal as the 2nd litigant, [v] 10 million to Dr. Grace Hilza as the 3rd litigant.[110]

Afterwards, Prita proposed a Cassation to the Supreme Court, but the Omni International Hospital decided to revoke its civil lawsuit and proposed reconciliation although in the process there were several requirements which had not been agreed upon, for instance the cancellation of the criminal lawsuit proposed by the Omni International Hospital in the first place.[111] In the Cassation level, the Supreme Court sided with Prita and released her.

---

[108] See Eddyono, S. W., Sriyana, dan Wahyu Wagiman, *Analisis Situasi ... Op.Cit*.

[109] See "Prita: Terlalu Besar Denda Putusan PT Banten", at http://www.republika.co.id/berita/breaking-news/nasional/09/12/05/93620-prita-terlalu-besar-denda-putusan-pt-banten, (accessed in November, 20th 2013).

[110] See "RS Omni Hapuskan Denda Prita Rp 204 Juta", at http://log.viva.co.id/news/read/113060-rs_omni_hapuskan_denda_prita_rp_204_juta, (accessed in November, 20th 2013).

[111] See "RS Omni Cabut Gugatan, Prita Tak Jadi Bayar Denda Rp 204 Juta", at http://tekno.kompas.com/read/2009/12/11/10454256/rs.omni.cabut.gugatan.prita.tak.jadi.bayar.denda.rp.204.juta, (accessed in November, 20th 2013).

There were also cases of insult which only the mechanism of the civil code was applied. Usually, the mechanism is preferred to avoid the criminal lawsuit. But, according to the fact of the cases took place, the execution of the penalty was in the form of paying large amount of fine, which was not equal to the deed had been done. In several cases there were these indications to avoid any drawback, especially in the lawsuit proposed by business groups; it was inadequate.

e. The Mediation: Apology is An Adequate Means to Settle a Dispute

In several cases, the accounts on the act considered as insult and/or aspersion, the offenders were asking for forgiveness (condonation) towards the offended parties. But, there were among the offended parties felt of needing a legal proceeding.

In 2009, Arif Rohmana, a citizen of Kampung Lebak Purut, Kupahandak village, Cimanuk, Pandeglang, Banten, who sent a terrorizing-text-message via phone cell to the First Lady, Ani Yudhoyono, was legally processed after being arraigned of violating the ITE Law on Article 45 (1) and Penal Code on Article 310 (1), and Article 311(1). Arif was arrested by the police officer of Banten Police Region and declared as suspect. Arif asked for forgiveness (condonation) towards the President and his wife, Ani Yudhoyono, with an affidavit—signed and stamped. With the affidavit, the cancellation of Arif's imprisonment was granted and he was released from the captivity.[112] As before, the offender had also asked for a condonation via fax; regretted the act he'd admitted as an aspersion.[113] Afterwards, the Police ceased the legal proceeding and released Arif. In his statement, Arif admitted his wrongdoings and promised to not ever do it again.[114]

In 2012, the Vice Minister of Law and Human Rights, Denny Indriyana, was reported to the police for his comment via Twitter about certain matter related to advocates. Denny was reported by OC Kaligis to the Police with the allegement presumption of innocence and violation towards Criminal Code Article 310, 311, and 315, as well as the ITE Law. Denny had asked for forgiveness (condonation) to the clean advocates who were disturbed and stated that there was a miscommunication related to his statement in the social media (networking).[115] Denny, in his written statement, stated that he regretted his statement in Twitter, related to the presence of the advocates 'who is willing to defend the defendant who pays', which created a miscommunication, especially among advocates.[116] Denny also asked, verbally, for forgiveness to the clean advocates who are liable in their duty by upholding the code of ethics.[117]

Budiman, a teacher in Marang Pangkep Junior High School, was reported to the Police by the Pangkep Regent after posting his updated-status on his Facebook account which was regarded as an insult. Afterwards, the Police arrested him, but soon the captivity was cancelled.[118] Budiman stated his apology to the Regent about his spontaneous act, and hoped the Regent to considerate the condition and to cancel the report. Because of the cancellation of the report, the case was

---

[112] See "Pelaku Teror SMS diancam 12 Tahun", at http://www.suaramerdeka.com/v1/index.php/read/news/2009/09/02/35567/Pelaku-Teror-SMS-Diancam-12-Tahun, (accessed in November, 20th 2013).

[113] See "Pelaku Teror SMS Minta Maaf ke Presiden SBY", at http://log.viva.co.id/news/read/86591-pelaku_sms_teror_minta_maaf_ke_presiden, (accessed in November, 20th 2013).

[114] See "Pengirim SMS Teror ke SBY Dibebaskan", at http://news.detik.com/read/2009/08/31/085237/1192800/10/pengirim-sms-teror-ke-sby-dibebaskan, (accessed in November, 20th 2013).

[115] See "Polda Metro Jaya Periksa Kaligis atas Pernyataan Wamenkumham", at http://www.antaranews.com/berita/329826/polda-metro-periksa-oc-kaligis-soal-pernyataan-wamenkumham, (accessed in November, 20th 2013).

[116] See "Denny Indrayana Meminta Maaf Kepada Para Advokat", at http://www.antaranews.com/berita/329635/denny-indrayana-minta-maaf-kepada-para-advokat, (accessed in November, 20th 2013).

[117] See "Denny Indrayana Meminta Maaf", at http://www.hukumonline.com/berita/baca/lt503b11b287289/denny-indrayana-minta-maaf, (accessed in November, 20th 2013).

[118] See "Budiman Minta Maaf Kepada Bupati Pangkep", at http://koran.tempo.co/konten/2013/02/12/300642/Budiman-Minta-Maaf-kepada-Bupati-Pangkep, (accessed in November, 20th 2013).

considered closed, and purely conceived as a consideration for humanity.[119] Budiman hoped to meet the Pangkep Regent and directly stated his apology upon his action.[120]

Farhat Abbas, in 2013 posted his offensive and discriminative statement on Twitter. He was then reported to the Police and declared as suspect.[121] Afterwards, Farhat Abbas admitted that his action to be reckless and he regretted it. Farhat apologized to several parties via social media, whether it was printed or online. Other than that, he also claimed that he phone-called them to apologize.[122] By phone-call he also asked the complainant to cancel the complaint to the Police. The apology was entailed with an agreement and a pact of reconciliation.[123]

In other several cases, there were many parties reported as doing insult and aspersion, but they were prolonged although the offenders had made apologies. Anton Wahyu Pramono, a public notary in Solo, had been a suspect of sending a terrorizing-text-message to the complainant. Anton was condemned of violation towards the ITE Law Article 29 *jo.* 45 (2) and then brought to the District Court in Solo. Actually, Anton had made an apology to the complainant because they were friends. However, for the apology to be accepted, the complainant asked him to pay for 200 billion rupiah.[124]

In the case which befell upon Yohan Yan, a motivator in Sidoarjo, who posted a comment via Facebook regarding a web-link of certain news of a certain online media, he was asked by the complainant to delete his statement on Facebook. Afterwards, Yohan deleted it and apologize to the offended party, but he was still reported to the Police. Finally, he was a suspect and considered violating the ITE Law Article 45 (1) *jo*. 27 (3). The verdict of Yohan as a suspect was a surprise, considering that he had met the complainant to apologize directly.[125]

In 2013, Olga Syahputra, a host on Pesbukker, a television program in Anteve, was determined as a suspect and considered to be doing an aspersion, detraction, and unpleasant act towards Dr. Febby Karina on a television program. Olga was set to be a suspect for violating the Penal Code Article 310, 311, 355, and also the ITE Law Article 27 (3) jo. 45 (1). Olga, for several times, stated his apology directly on the television program, Pesbukker; through voice message via phone-cell, and lastly he came to the residence of the offender.[126] However, the apology was considered to be insincere and overdue, and the case was brought to the court.[127] The development of the case was still uncertain, whether it would be brought to the court or not.

Nevertheless, there was a case of which both parties were trying to 'clarify' their own opinions. One of the parties proposed an apology from the other, while the other chose to propose a

---

[119] See "Dihina Melalui FB, Bupati Cabut Laporan", at http://daerah.sindonews.com/read/2013/03/21/25/729853/dihina-melalui-fb-bupati-cabut-laporan, (accessed in November, 20th 2013).

[120] See "Guru Budiman Ingin Bertemu Bupati Pangkep", at http://makassar.tribunnews.com/2013/03/21/guru-budiman-ingin-bertemu-bupati-pangkep, (accessed in November, 20th 2013).

[121] See "Anton Medan Minta Polisi Tahan Farhat Abbas", at http://megapolitan.kompas.com/read/2013/05/28/12344821/Anton.Medan.Minta.Polisi.Tahan.Farhat.Abbas, (accessed in November, 20th 2013).

[122] See "Jadi Tersangka, Farhat Abbas Minta Maaf", at http://www.poskotanews.com/2013/05/28/jadi-tersangka-farhat-abbas-minta-maaf/, (accessed in November, 20th 2013).

[123] See "Farhat Abbas Minta Maaf, Sungkem ke Anton Medan", at http://metropolitan.inilah.com/read/detail/1996846/farhat-abbas-minta-maaf-sungkem-ke-anton-medan#.Ulu8mXz4Koo, (accessed in November, 20th 2013).

[124] See "Hotma Sitompul Minta Tangguhkan Penahanan Kliennya", at http://cetak.shnews.co/web/read/2013-07-15/15175/hotma.sitompul.minta.tangguhkan.penahanan.kliennya#.Ulva-3z4Koo, (accessed in November, 20th 2013).

[125] See "Gara-Gara Komentar di Facebook, Johan Jadi tersangka", at http://regional.kompas.com/read/2013/08/14/0922570/Gara.gara.Komentar.di.Facebook.Johan.Jadi.Tersangka, (accessed in November, 20th 2013).

[126] See "Olga Syahputra Bukti Minta Maaf Kepada Dokter Febby Karina", at http://showbiz.liputan6.com/read/716769/olga-syahputra-punya-bukti-minta-maaf-kepada-dokter-febby-karina?wp.shbz, (accessed in November, 20th 2013).

[127] See "Permintaan Maaf Olga Sudah Terlambat", at http://www.borrneonews.co.id/hiburan/selebritas/7028-permintaan-maaf-olga-sudah-terlambat lihat juga: http://www.analisadaily.com/news/52183/permintaan-maaf-olga-sudah-terlambat, (accessed in November, 20th 2013).

clarification. On Benny Handoko's case for instance, there were a set of differences on which and in what context that Benny's statement on Twitter to be clarified. The two parties could not reach any agreement and the show must go on.

f. The Damage of ITE Law: The Rising of the Chilling Effect

As described before, the various cases related to the application of the ITE Law had made an extraordinary fright to the people who expressed their opinion and were brought to the court. Part of them stated their apologies to the offended for they had admitted their wrongdoings, but the others were 'constrained' to apologize because of the real threat over them, whether it was violent threat, criminal punishment, or any other punishment. Legal Aid Institution for the Press, in their year-end record, stated that ITE Law was the most frightful threat in 2009 for the freedom of the press and the freedom of the society to express something.[128]

The various kinds of the outcome coming from the application of the Criminal Code instruments with the risk of imprisonment and large amount of fine also result in the fright of the customers to file complaints or dissatisfactions towards a certain commercial service or product. The case that befell upon Prita Mulyasari had caused a trauma in the society and the consumers of any kind of product were likely to 'shut-up' if there was actually any complaint. The head of the Indonesian Consumers Foundation, Sudaryatmo, stated that the presence of Prita's case had made the society to be hesitant in filing any complaint and the reader's letters to the editor were frequently decreased in quantity.[129]

The further effect is the limited views and expressions because of the legal threat towards them. In the case related to the affront and blasphemy towards (any) religion, the offender party oftentimes dealing with violence; for example, the case of Alexander An and of Mirza Ahmad. Alexander An was reported to the Police, and further he was assaulted by the mass and had to be safe-kept by the Police. Whereas for Mirza, he was arrested by the Police and his house was stone-attacked by the mass after perceived as a heretic for the Islamic religion.[130]

Several cases showed that there were real threats coming from the freedom of thought and of expression. The verdict of the court over the case of Alexander An was a real proof of how expression was not only limited in its blatant information spreading through the internet so that it could become viral, but also considered as a threat towards Pancasila and disturbing the order in the society.

The other effect of the silencing towards the freedom of expression was that the critical opinions which should've become a public control towards the public officials had been threatened. The conveyance of the view/vision through electronic media, of which purpose was to open the public debate-space, was also oftentimes ended in criminal punishment; in several cases, for instance, which were related to the allegement of affronting and/or blaspheming (any) religion which was covered with anxiety, hatred, or hostility. The society was evermore to avoid in stating any opinion or view towards the public officials, also in opening the room for discussion on certain issues which actually was the right for freedom of expression and thought.

g. Conclusion

---

[128] See "Jadi Ancaman Paling Menakutkan, ITE LAW Harus Direvisi", at http://news.detik.com/read/2009/12/30/142054/1268554/10/jadi-ancaman-paling-menakutkan-uu-ite-harus-direvisi?nd771104bcj, (accessed in November, 20th 2013).

[129] See "Gara-Gara Kasus Prita, Konsumen Indonesia Jadi Takut Komplain", at http://finance.detik.com/read/2013/04/16/141552/2221640/4/gara-gara-kasus-prita-konsumen-indonesia-jadi-takut-komplain?f9911023, (accessed in November, 20th 2013).

[130] See "Diduga Menghina Islam Rumah Mirza Alfat Dilempari Batu", at http://diliputnews.com/read/14836/diduga-menghina-agama-islam-rumah-mirza-alfat-dilempari-batu.html, (accessed in November, 20th 2013).

The various kinds of cases exposed above shows the condition in which the guaranty of the freedom in demonstrating the thought and expression was limited evermore—whether in the context of the access blocking/filtering or in the increase of the legal threat towards the users. ITE Law had grown into a retaliation instrument which can be effectively used to limit the public critical voices, to cease the idea/discourse opposing the so-called 'morality', to restrict opinions and views which delivered electronic means with a legal threat in the form of custody. The reckless application of ITE Law without sufficient proficiency by the law enforcer can easily make the people who voiced their opinion ends in jail.

Generally, in the various cases of the ITE Law application, it is clearly seen that human rights have not been an indicator, which should be a consideration by the Law enforcer and the government. ITE Law, of which formulation is laden with the violations over principle and international standard of human rights, also of which application is even farer from the protection of human rights, especially the right of freedom to deliver thoughts and to express. There is this lack of the internalization of the standard, norm, and human rights principle, whether it is the one which is developed through human rights instrument or international and regional court jurisprudence by the law enforcer.

Matching with the over-easiness of the application of the Criminal Code towards information, the issues of internet content blocking and filtering is still performed rashly. The blocking is especially performed towards the web-sites considered as containing pornography which is contrary to ethic codes and moral of the nation. The problem is that we have not had the mechanism to facilitate 'the due process of law' in the process of blocking/filtering. In fact, the action is one of the acts of restriction towards human rights (accessing information in the internet). The ITE Law or any other legal code has not managed a complaint mechanism and a recovery for the victim. But, the exact things which happened were the false blocking, as many were experienced by several organization web-sites who struggled for the rights of LGBT (Lesbian, Gay, Bisexual and Transgender).

Contextual within Indonesia these days, the deliverance of expression and thought through the electronic means, especially through internet medium, the trend is increasing, but on the other side, the threat is also stronger. In fact, the UN has stated that the medium will be important in guaranteeing the rights of the society, bettering the humanity, and supporting the development.

Therefore, observing the various kinds of discovery in the application of ITE Law, as has been stated in the description above, the Institute for Policy Research and Advocacy (ELSAM) recommends several points:

1. The importance of the research and the revision of the ITE Law, especially to give the room to suffice the settlement of the content and the control over it. Besides, to assure there is a harmonization among the international instruments of human rights which are adopted by Indonesian, as the mainframe in the revision of the ITE Law, also inevitable. It is needed in order to settle the protection towards the freedom of thought and expression.
2. The importance of the idea and strategic plan by the nation (government and the House of Representatives) to encourage the emergence of independent organizations, which consists of many parties with various kinds of interest, as an organization specialized in dealing with the internet content independently and impartial.
3. The importance of encouraging the law enforcer to be having sufficient understanding and knowledge on various kinds of guaranty over protection towards human rights, especially the one related to the freedom of thought and expression, therefore it can be implemented in every law enforcing activity. Besides, in relation with the usage of electronic means, it is important to make sure that the law enforcer gaining sufficient

information and knowledge on the information technology peripheral, to ensure the accuracy of actions related to the law enforcing activities concerning information technology.

4. The importance of the law code authority to immediately decriminalize the act of insult and aspersion. The criminal punishment for the act of aspersion is the form of ill-treatment in dealing with the legal expression, and one of the worst forms of the restriction towards human rights. The criminal punishment for the act of aspersion does not only create an ill-issue, but also violates the other human rights, for example the reckless captivity, a distortion and the other kinds of malicious punishment—inhumane and downgrading dignity. The conduct of the punishment towards the act of aspersion should only be applied to the serious wrongdoings, and imprisonment is not the appropriate punishment for the act of aspersion.
5. Before there is a breakthrough in the decriminalization towards the law codes on the act of insult/aspersion, it is important for the Supreme Court to publish legal circular to revoke the law code on the subject, in the application of the code in the field. The law enforcers, investigators, prosecutors, and judges should be able to actively play the part in the effort to not apply the codes by encouraging the conflicting parties to choose mediation as a solution.
6. The importance of ensuring the reformation of the Criminal Code, which is in the same path with the mission and vision of the protection towards the rights and freedom of thought and expression, as well as the right to retrieve information. It is important to avoid the uncertainty in the law-field these days, when there is an obvious disparity between the ITE Law and Criminal Code.

BIBLIOGRAPHY

Books, Essays, and Reports

Chadwik, Andrew and Philip N. Howard. *Handbook of Internet Politics*. London: Routledge, 2009.

Deibert, R. J. "The Geopolitics of Internet Control Censorship, Sovereignty, and Cyberspace", in Chadwick, A. dan Philip N. Howard. *Handbook of Internet Politics*. London: Routledge, 2009.

Deibert, R. J., and N. Villeneuve. " Firewalls and Power: An Overview of Global State Censorship of The Internet", in Klang, M. and A. Murray (eds.). *Human Rights in the Digital Age*. London: Cavendish Publishing, 2004.

Deibert, R. J., John Palfrey, Rafal Rohozinski, and Jonathan Zittrain (eds.). *Access Denied: The Practice and Policy of Global Internet Filtering*. The President and Fellows of Harvard College, 2008.

Djafar, Wahyudi. "Kebijakan Kontrol versus Kebebasan Berinternet: Pengantar singkat tentang perkembangan dan dinamika regulasi terkait internet dan hak asasi manusia di Indonesia, Malaysia dan Filipina". Jakarta: Elsam, 2013.

Eddyono, S. W., Anggara, and Ririn Sjafriani. *Kontroversi ITE LAW, Menggugat Pencemaran Nama Baik di Ranah Maya*. Jakarta: Degraf Publishing, 2010.

Eddyono, S. W., Sriyana, and Wahyu Wagiman. *Analisis Situasi Penerapan Hukum Penghinaan di Indonesia*. Jakarta: ICJR dan TIFA, 2012.

ELSAM. *Kebebasan Berekspresi di Internet*. Jakarta: Elsam, 2013.

ELSAM. "Laporan Penelitian Dua Kebebasan Dasar di Indonesia dalam Putusan MK: Studi Putusan MK Terkait Kebebasan Beragama atau Berkeyakinan dan Kebebasan Berekspresi". 2010. Non-published.

Faris, Robert and Nart Villeneuve." Measuring Global Internet Filtering", in Deibert, R. J., John Palfrey, Rafal Rohozinski, dan Jonathan Zittrain (eds.), *Access Denied: The Practice and Policy of Global Internet Filtering*. The President and Fellows of Harvard College, 2008.

Klang , M. and A. Murray (eds.). *Human Rights in the Digital Age*. London: Cavendish Publishing, 2004.

Kulesza, Joanna. *International Internet Law*. London: Routledge, 2012.

"Laporan Pelapor Khusus PBB Pemajuan dan Perlindungan Kebebasan Berekspresi", in the report of the year 2011. The document can be accessed in: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/132/01/PDF/G1113201.pdf?OpenElement.

Murdoch, S. J. and Ross Anderson. "Tools and Technology of Internet Filtering", in Deibert, R. J. , John Palfrey, Rafal Rohozinski, dan Jonathan Zittrain (eds.). *Access Denied: The Practice and Policy of Global Internet Filtering*. The President and Fellows of Harvard College, 2008.

Nowak, Manfred. *UN Covenant on Civil and Political Rights: CCPR Commentary (2nd rev. ed.)*. Kehlam Rhein: Engel, 2005.

Rundle, Mary and Malcolm Birdling. "Filtering and the International System: A Question of Commitment", in Deibert, R. J., John Palfrey, Rafal Rohozinski, and Jonathan Zittrain (eds.). *Access Denied: The Practice and Policy of Global Internet Filtering*. The President and Fellows of Harvard College, 2008.

Saptaningrum, Indriaswati D. Saptaningrum and Wahyudi Djafar. "Tata Kelola Internet yang Berbasis Hak: Studi tentang Permasalahan Umum Tata Kelola Internet dan Dampaknya Terhadap Perlindungan Hak Asasi Manusia". Jakarta: Elsam, 2013.

Court Verdicts

Constitutional Court Verdict No. 5/PUU-VIII/2010.
Verdict No. 1190/PID.B/2010/PN.TNG.
Verdict No. 45/Pid.B/2012/PN.MSH.
Verdict No. 232/Pid.B/2010/PN.Kdl
Verdict No. 232/Pid.B/2010/PN.Kdl.
Verdict No. 1190/PID.B/2010/PN.TNG.
Verdict No. 45/Pid.B/2012/PN.MSH.
Verdict No. 23/Pid.B/2011/PN-JTH.
Verdict No. 822 K/Pid.Sus/2010.
Verdict No. 45/PID.B/2012/PN.MR.
Verdict No. 102/PID.B/2013/PN.SBB.
Verdict No. 278/Pid.Sus/2012/PN.Cms.
Verdict No. 463 Pid/2012/PT. Bdg.
Verdict No. 30/Pid.R/2010/PN.Kdi.
Verdict No. 1/Pid/2011/PT.Sultra.
Verdict No. 87/Pid.B/2009/PN-BIR.

Online References

"16 Video 'Innocence of Muslims' Diblokir di YouTube", in http://inet.detik.com/read/2012/09/13/171756/2017970/398/16-video-innocence-of-muslims-diblokir-di-youtube, (November, 20th 2013).

"AJI: RPM Konten Multimedia adalah Sensor", in http://www.ajiindonesia.org/index.php?option=com_content&view=article&id=224:aji-rpm-konten-multimedia-adalah-sensor-20&catid=14:alert-bahasa-indonesia&Itemid=287, (November, 20th 2013).

"Alasan Kejaksaan Tahan Benny Handoko", in http://www.tribunnews.com/nasional/2013/09/06/alasan-kejaksaan-tahan-benny-handoko, (November, 20th 2013).

"Alasan MA Kabulkan PK Bebas Prita", in http://www.beritasatu.com/hukum/72402-alasan-ma-kabulkan-pk-bebas-prita.html, (November, 20th 2013).

"Anton Medan Minta Polisi Tahan Farhat Abbas", in http://megapolitan.kompas.com/read/2013/05/28/12344821/Anton.Medan.Minta.Polisi.Tahan.Farhat.Abbas, (November, 20th 2013).

"Berganti Nama Pun, RPM Multimedia Tetap Kekang Pers", dalam http://www.tempo.co/read/news/2010/06/26/173258619/Berganti-Nama-Pun-RPM-Multimedia-Tetap-Kekang-Pers, (November, 20th 2013).

"BlackBerry Diblokir di Indonesia? Bukan Tidak Mungkin", in http://inet.detik.com/read/2010/08/02/150658/1411828/317/blackberry-diblokir-di-indonesia-bukan-tidak-mungkin/?topnews, (November, 20th 2013).

"Budiman Minta Maaf Kepada Bupati Pangkep", in http://koran.tempo.co/konten/2013/02/12/300642/Budiman-Minta-Maaf-kepada-Bupati-Pangkep, (November, 20th 2013).
"Denny Indrayana Meminta Maaf", in http://www.hukumonline.com/berita/baca/lt503b11b287289/denny-indrayana-minta-maaf, (November, 20th 2013).
"Denny Indrayana Meminta Maaf Kepada Para Advokat", in http://www.antaranews.com/berita/329635/denny-indrayana-minta-maaf-kepada-para-advokat, (November, 20th 2013).
"Dianggap Pornografi, Provider Blokir Konten LGBT", in http://tatamaya.com/2012/09/04/dianggap-pornografi-provider-blokir-konten-lgbt/, (November, 20th 2013).
"Diduga Menghina Islam Rumah Mirza Alfat Dilempari Batu", in http://diliputnews.com/read/14836/diduga-menghina-agama-islam-rumah-mirza-alfat-dilempari-batu.html, (November, 20th 2013).
"Dihina Melalui FB, Bupati Cabut Laporan", in http://daerah.sindonews.com/read/2013/03/21/25/729853/dihina-melalui-fb-bupati-cabut-laporan, (November, 20th 2013).
"Download Surat 'Ultimatum' Menkominfo untuk Pemblokiran", in http://www.detikinet.com/index.php/detik.read/tahun/2008/bulan/04/tgl/04/time/175015/idnews/918570/idkanal/447, (November, 20th 2013).
"Farhat Abbas Minta Maaf, Sungkem ke Anton Medan", in http://metropolitan.inilah.com/read/detail/1996846/farhat-abbas-minta-maaf-sungkem-ke-anton-medan#.Ulu8mXz4Koo, (November, 20th 2013).
"Gara-Gara Kasus Prita, Konsumen Indonesia Jadi Takut Komplain", in http://finance.detik.com/read/2013/04/16/141552/2221640/4/gara-gara-kasus-prita-konsumen-indonesia-jadi-takut-komplain?f9911023, (November, 20th 2013).
"Gara-Gara Komentar di Facebook, Johan Jadi tersangka", in http://regional.kompas.com/read/2013/08/14/0922570/Gara.gara.Komentar.di.Facebook.Johan.Jadi.Tersangka, (November, 20th 2013).
"Guru Budiman Ingin Bertemu Bupati Pangkep", in http://makassar.tribunnews.com/2013/03/21/guru-budiman-ingin-bertemu-bupati-pangkep, (November, 20th 2013).
"Hotma Sitompul Minta Tangguhkan Penahanan Kliennya", in http://cetak.shnews.co/web/read/2013-07-15/15175/hotma.sitompul.minta.tangguhkan.penahanan.kliennya#.Ulva-3z4Koo, (November, 20th 2013).
"Human Rights Website Banned", in http://starobserver.com.au/news/2012/02/17/human-rights-website-banned/72150, (November, 20th 2013).
"IGLHRC Website Banned", in http://iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1481.html, (November, 20th 2013).
"Indonesia Moves to Block Pornographic Web Sites", in http://www.nytimes.com/2010/07/23/world/ asia/23indo.html?_r=2&, (November, 20th 2013).
"Internet a risk to nation, says Indonesian minister", in http://news.theage.com.au/technology/internet-a-risk-to-nation-says-indonesian-minister-20100617-ygsv.html, (November, 20th 2013).
"Jadi Ancaman Paling Menakutkan, ITE LAW Harus Direvisi", in http://news.detik.com/read/2009/12/30/142054/1268554/10/jadi-ancaman-paling-menakutkan-uu-ite-harus-direvisi?nd771104bcj, (November, 20th 2013).
"Jadi Tersangka, Farhat Abbas Minta Maaf", in http://www.poskotanews.com/2013/05/28/jadi-tersangka-farhat-abbas-minta-maaf/, (November, 20th 2013).

"Kasus Status BBM, Polisi Pertimbangkan Tangguhkan Penahanan Arsyad', in http://news.detik.com/read/2013/09/12/160715/2357137/10/kasus-status-bbm-polisi-pertimbangkan-tangguhkan-penahanan-arsyad?nd771104bcj, (November, 20th 2013).
"Kominfo Telah Blokir Satu Juta Situs Porno", in http://www.republika.co.id/berita/trendtek/internet/12/08/11/m8l0yx-kominfo-telah-blokir-satu-juta-situs-porno, (November, 20th 2013).
"Kritik Kampus, Mahasiswa Semarang Dipaksa Mundur", in http://www.tempo.co/read/news/2013/09/19/058514741/Kritik-Kampus-Mahasiswa-Semarang-Dipaksa-Mundur, (November, 20th 2013).
"Kronologis Pemblokiran Website Our Voice oleh Provider XL", in http://www.suarakita.org/2013/07/kronologis-pemblokiran-website-our-voice-oleh-provider-xl/, (November, 20th 2013).
"Kronologis Pemidanaan Terhadap Budiman", in http://lbhperspadang.blogspot.com/2013/02/pemidanaan-terhadap-budiman-menggunakan.html, (November, 20th 2013).
"Menggerutu di Facebook Siswa SMA Pamekasan Dipecat', in http://www.tempo.co/read/news/2013/02/24/058463445/Menggerutu-di-Facebook-Siswa-SMA-Pamekasan-Dipecat, (November, 20th 2013).
"Menkominfo Ancam Pembuat Video Enam Tahun Penjara", in http://www.kapanlagi.com/showbiz/selebriti/ menkominfo-ancam-pembuat-video-enam-tahun-penjara.html, (November, 20th 2013).
"Menkominfo: Pemblokiran Situs Porno Berdasarkan Akal Sehat", in http://www.antara.co.id/view/?i=1206456463&c=NAS&s=, (November, 20th 2013).
"Menko Polhukam Minta Tifatul Blokir Film Anti Islam di YouTube", in http://inet.detik.com/read/2012/09/13/150236/2017527/398/menko-polhukam-minta-tifatul-blokir-film-anti-islam-di-youtube?id771108bcj, (November, 20th 2013).
"MUI Desak Pemerintah Blokir Situs yang Memuat Film Fitna", in http://www.eramuslim.com/berita/nasional/mui-desak-pemerintah-blokir-situs-yang-memuat-film-quot-fitna-quot.htm, (November, 20th 2013).
"Olga Syahputra Bukti Minta Maaf Kepada Dokter Febby Karina", in http://showbiz.liputan6.com/read/716769/olga-syahputra-punya-bukti-minta-maaf-kepada-dokter-febby-karina?wp.shbz, (November, 20th 2013).
"Panggil ISP, Kominfo akan Blokir Facebook?", in http://www.arrahmah.com/index.php/news/read/7894/panggil-isp-kominfo-akan-blokir-facebook, (November, 20th 2013).
"Pelaku Teror SMS diancam 12 Tahun", in http://www.suaramerdeka.com/v1/index.php/read/news/2009/09/02/35567/Pelaku-Teror-SMS-Diancam-12-Tahun, (November, 20th 2013).
"Pelaku Teror SMS Minta Maaf ke Presiden SBY", in http://log.viva.co.id/news/read/86591-pelaku_sms_teror_minta_maaf_ke_presiden, (November, 20th 2013).
"Pemerintah Akhirnya Keluarkan Perintah Blokir!", in http://m.detik.com/read/2010/05/20/135758/1360788/398/pemerintah-akhirnya-keluarkan-perintah-blokir/?i991101105, (November, 20th 2013).
"Permintaan Maaf Olga Sudah Terlambat", in http://www.borrneonews.co.id/hiburan/selebritas/7028-permintaan-maaf-olga-sudah-terlambat lihat juga: http://www.analisadaily.com/news/52183/permintaan-maaf-olga-sudah-terlambat, (November, 20th 2013).
"Pengirim SMS Teror ke SBY Dibebaskan", in http://news.detik.com/read/2009/08/31/085237/1192800/10/pengirim-sms-teror-ke-sby-dibebaskan, (November, 20th 2013).
"Polda Metro Jaya Periksa Kaligis atas Pernyataan Wamenkumham", in http://www.antaranews.com/berita/ 329826/polda-metro-periksa-oc-kaligis-soal-pernyataan-wamenkumham, (November, 20th 2013).

"Polisi Bebaskan Penghina Nurdin Halid", in http://www.tempo.co/read/news/2013/09/16/063513795/Polisi-Bebaskan-Penghina-Nurdin-Halid, (November, 20th 2013).
"Polisi: Jaksa Yang Menahan Prita", in http://news.detik.com/read/2009/06/03/135013/1142034/10/polisi-kejaksaan-yang-menahan-prita, (November, 20th 2013).
"Prita: Terlalu Besar Denda Putusan PT Banten", in http://www.republika.co.id/berita/breaking-news/nasional/09/12/05/93620-prita-terlalu-besar-denda-putusan-pt-banten, (November, 20th 2013).
"RPM Konten Terus Ditentang", http://berita.liputan6.com/hukrim/201002/264295/RPM.Konten.Terus.Ditentang, (November, 20th 2013).
"RS Omni Cabut Gugatan, Prita Tak Jadi Bayar Denda Rp 204 Juta", in http://tekno.kompas.com/read/2009/12/11/10454256/rs.omni.cabut.gugatan.prita.tak.jadi.bayar.denda.rp.204.juta, (November, 20th 2013).
"RS Omni Hapuskan Denda Prita Rp 204 Juta", in http://log.viva.co.id/news/read/113060-rs_omni_hapuskan_denda_prita_rp_204_juta, (November, 20th 2013).
"Salah Blokir Karena Kominfo Terlalu Bersemangat", in http://inet.detik.com/read/2010/08/11/163754/1418467/398/salah-blokir-karena-kominfo-terlalu-bersemangat?topnews, (November, 20th 2013).
"Selamat Datang Lembaga Sensor Internet Indonesia", in http://www.politikana.com/baca/2010/02/12/selamat-datang-lembaga-sensor-internet-indonesia.html, (November, 20th 2013).
"Sensor Internet Akan Rugikan Indonesia", in http://www.detikinet.com/read/2010/02/15/122453/1299671/398/sensor-internet-akan-rugikan-indonesia, (November, 20th 2013).
"Situs Arrahmah Milik Muhammad Jibril Tak Bisa Diakses", in http://metrotvnews.com/index.php/metromain/newsvideo/2009/08/26/89056/Situs-Ar-rahmah-Milik-Muhammad-Jibril-Tak-Bisa-Diakses, (November, 20th 2013).
"Special Reports Pemblokiran Situs Youtube Digugat", in http://www.chip.co.id/special-reports/pemblokiran-situs-youtube-digugat.html, (November, 20th 2013).
"Tahan Prita, Jaksa Cuek Dibilang Tak Manusiawi", in http://www.tempo.co/read/news/2009/06/03/064179683/ Tahan-Prita-Jaksa-Cuek-Dibilang-Tak-Manusiawi, (November, 20th 2013).