


An Analysis of Freedom of Speech: Whether the Indonesian Electronic Information and Transactions Law is Contradictory

Dwilani Irrynta^{1*}, Nanik Prasetyoningsih²

^{1,2} Faculty of Law Muhammadiyah University of Yogyakarta, Yogyakarta, Indonesia.

 : dwilani.i.law18@mail.umy.ac.id

Corresponding Author*



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Abstract

Introduction: With the development of technology, people become easier in expressing themselves through social media. However, many people think that the Indonesian Government represses freedom of speech through the Electronic Information and Transactions (EIT) Law as the huge number of related cases keeps increasing, particularly on matters of criticizing the Government.

Purposes of the Research: This article presents to discuss whether the Law does snatch the rights of citizens regarding freedom of speech as the Law essentially aims to protect such rights and shall not contradict the 1945 Constitution of the Republic of Indonesia stating that freedom of speech is a right for every citizen.

Methods of the Research: By using normative legal research, this article examines legal principles and norms of related regulations. The authors analyze the situation faced by the Indonesian people in recent years through library research. The secondary data of literature was collected and reviewed focusing on the statutory approach along with the case approach.

Results of the Research: The findings show that the EIT Law indeed draws controversy among Indonesian people due to the existence of several Articles under the Law that are contradictory to its purpose, namely protecting freedom of speech. By having ambiguousness and multiple interpretations of those several Articles, the Law leads to abuse of power by the Government. Therefore, it is reasonable for many people, as well as civil society organizations, to appeal to the Government to revise the Law and related regulations. It is on the grounds that such actions are necessary to enhance and enforce the protection of freedom of speech.

1. INTRODUCTION

The rise of advances in science and technology has had a great impact on human life. As a part of the development of information and communication technology, the presence of electronic media has brought a new horizon to people's lifestyles and created a new culture in society. Electronic media then brings progress by forming a new world that is considered a world without boundaries. The development of such technology has become increasingly rapid and has been proven to provide benefits for its users. People who come

from various ages and classes can access electronic media through the internet,¹ such as social media, effortlessly as a means of communication and sharing information without limits of distance and time.

Through advances in Information Technology (IT), people have become more creative in expressing their opinions² and channeling their aspirations. Varied media, specifically electronic ones, have become a matter of interest. What then became a problem is the differences in perceptions about the proper means to express opinions, particularly through social media, which then triggered the emergence of conflicts in society. Referring to several cases that have occurred related to expressing opinions through social media, sometimes problems are solely rose by trivial matters. Many people are reported or detained simply on the grounds that they delivered criticism.³ On the other hand, there are also those who insult or harass others but cannot be prosecuted or even acquitted of suspicion just because the reasoning is based on the human rights of the person in question. Consequently, a clash between individual rights that must be respected and the right to freedom of speech⁴ often occurs in many cases related to human rights, particularly in expressing an opinion and/or criticism.

For instance, the Indonesian Government which enacted a Law that is known as the Electronic Information and Transactions (EIT) Law has generated a polemic amongst its people.⁵ It is due to the fact many people believe that numerous Articles under the Law have snatched the freedom of speech on social media. Those Articles, which were essentially made with the aim of protecting the public, eventually backfired people due to ambiguity and multiple interpretations. Thereof, a huge number of people in Indonesia felt threatened and subsequently asked the Government to revise the Law.

Such a situation then raises concerns since Indonesia seems to be getting closer to what the United States (US) has experienced. Constitutionally, all Americans are entitled to freedom of speech in criticizing their government and are allowed to speak out their opinions as enshrined under the First Amendment of the Constitution. However, as a symbol of world democracy, the US is considered to have reneged on the principles of democracy itself. Although they describe themselves as democratic, the governmental system that occurs is totalitarian and does not respect the constitution at all. In addition, Professor Alexander Meiklejohn also assessed that freedom of speech in the United States is a form of reduction from the basic American democratic agreement.⁶

¹ Sabina Mihelj, Adrian Leguina, and John Downey, "Culture is Digital: Cultural Participation, Diversity and the Digital Divide," *New Media and Society* 21, no. 7 (2019): 1465-1485.

² K.Y.S. Putri et al., "Digital Literacy Hoax Information in Indonesian Tourism Area," *Journal of Digital Marketing and Communication* 2, no. 1 (2022): 1-11.

³ Eko Bagus Sholihin, Raegen Harahap, and Yulion Zalpa, "Does the Pandemic Decline or Maintain Democracy? Two Sides Effects of Pandemic on Democracy in Indonesia," *Sunan Ampel Review of Political and Social Sciences* 1, no. 2 (2022): 16-39.

⁴ Fadilah Raskasih, "Batasan Kebebasan Berrpendapat melalui Media Elektronik dalam Perspektif HAM Dikaitkan dengan Tindak Pidana Menurut UU ITE," *Journal Equitable: Jurisprudence Approach* 5, no. 2 (2020): 1-20.

⁵ Wafiyuddin Musyaffak and Moses Glorino Rumambo Pandin, "Historical Paradigm and Polemics in the Right to Freedom of Speech in Public Space in the 21st Century," *Indonesian Journal of Social Studies* 4, no. 2 (2021): 103-110.

⁶ James Weinstein, "Participatory Democracy as the Central Value of American Free Speech Doctrine," *Virginia Law Review* 97, no. 3 (2011): 491-514.

Similar to the situation in the United Kingdom (UK), the new law enacted by their government with the aim to protect the rights related to free speech surprisingly turns out to not protect such rights. Subsequently, as stated in the annual report by Article 19, the UK is in the bottom third of European States in providing freedom of expression.⁷ Based on the report, oligarchic media ownership is on the rise as public service media are eroded resulting in the increase of political control and interference over information. Meanwhile, the Australian government has silenced its citizens through several laws and standards on public servants. They are threatened to be termination if breaching such standards, even with a stray emoji online.⁸

Through this article, the authors analyze whether the EIT Law does have several problematic Articles. In addition, several cases related to criticism of the Government will also be discussed to find out whether the Government indeed abused its authority to criminalize people or merely the people themselves took actions against the Government. Afterward, a Joint Decree which was made as a guideline for the implementation of the EIT Law would also be analyzed to determine whether it is sufficient to overcome the problematic Articles under the Law and able to restore freedom of speech in Indonesia.

2. METHOD

This article is normative legal research that focused on the statutory approach to examine legal principles and norms of regulations on the issue discussed. The research also uses the case approach by reviewing several related cases briefly. Through library research, the authors collect secondary data covering primary legal materials and secondary legal materials. The former consists of legislation and other legal documents while the latter includes books, journals, and internet sites.

3. RESULTS AND DISCUSSION

3.1 EIT Law as a Tool to Penalize People

The theory of freedom of speech is a natural subject of interdisciplinary and comparative study both in the field of politics and law due to the fact it has very abstract general normative philosophical issues.⁹ On the other hand, it also has historical and contextual components that develop traditions of constitutional thoughts,¹⁰ including the political and legal arguments made over time about its precise meaning. Legal systems in numerous States then have varying ratios of comparison between the two. States which have written constitutions and judicial review such as the US as well as many States governed by the European Convention on Human Rights¹¹ are more inclined to the former rather than to the latter. While England considers freedom of speech based on the political

⁷ Jonathan Owen, "UK Slips Down Freedom of Expression Ranking for Attempts to Erode Public Service Media," PRWeek, 2020, <https://www.prweek.com/article/1698464/uk-slips-down-freedom-expression-ranking-attempts-erode-public-service-media>.

⁸ Joshua Krook, "Australians are Quietly Losing Their Right to Free Speech," Oxford Political Review, 2020, <http://oxfordpoliticalreview.com/2020/10/08/australians-are-quietly-losing-their-right-to-free-speech/>.

⁹ David A.J. Richards, "Constitutional Legitimacy, the Principle of Free Speech, and the Politics of Identity," *Chicago-Kent Law Review* 74, no. 2 (1998): 779-822.

¹⁰ *Ibid.*

¹¹ *Ibid.*

value which consequently can influence legislative reform but is not considered a part of the law itself.¹²

According to Seana Valentine Shiffrin, a professor of Law and Social Justice at the University of California, freedom of speech is a rich and ambitious intellectual enterprise.¹³ Such freedom is necessary to develop the thoughts of people as well as enhance the moral quality of relations between one another. On such grounds, Shiffrin argued that protection needs to be provided for freedom of speech taking into account the importance of discovering truth in the working of participatory democracy. In other words, a State needs to provide a specific legal system to protect freedom of speech for its people in a wide scope, ranging from private speech such as personal conversations or letters, art, and religion, to political issues,¹⁴ including criticism against the government.

Thereof, it can be said that freedom of speech is a norm that reflects *fundamental values, organizing principles or standard procedures that resonate in many States after gaining support in various forums including official policies, laws, treaties, or agreements*.¹⁵ Such a norm has been supported by democratic societies globally and widely. It can be seen from the fact that freedom of speech is recognized under the Universal Declaration of Human Rights along with the International Covenant on Civil and Political Rights¹⁶ which was followed by the establishment by various States in their constitutions and statutes. Accordingly, such freedom is one of the categories of human rights that are considered essential.¹⁷ Such right is included in the category of rights with a civil-political dimension. Although the right to express an opinion is considered not as fundamental as the right to life, the right to belief or religion, as well as the right to be free from torture, and it is still possible to be derogated, such right has always been important for fundamental human rights. As part of liberal rights, freedom of speech is a bridge between civil rights, such as the right to be free from state intervention, and political rights. In line with the theory argued by Shiffrin, freedom of speech may be a sign of democratic political order¹⁸ and the basis for the rule of law. Therefore, as a matter of fact, freedom of speech is guaranteed, protected, and restricted by law.

Indonesia, as a State of law where every action of its citizens is regulated by laws and regulations,¹⁹ ensures freedom of speech constitutionally under the 1945 Constitution of the Republic of Indonesia. Such matter is also stated within Law No. 39 of 1999 on Human Rights. Hence, it can be said that freedom of opinion, communication, and obtaining as well

¹² Eric Barendt, "Free Speech in Australia: A Comparative Perspective," *Sydney Law Review* 16, no. 1 (1994): 149-165.

¹³ Eric Barendt, "Thoughts on a Thinker-Based Approach to Freedom Of Speech," *Law and Philosophy* 38, no. 5-6 (2019): 481-494.

¹⁴ *Ibid.*

¹⁵ Mona Lena Krook and Jacqui True, "Rethinking the Life Cycles of International Norms: The United Nations and the Global Promotion of Gender Equality," *European Journal of International Relations* 18, no. 1 (2012): 103-127.

¹⁶ Katharine Gelber, "Norms, Institutions and Freedom of Speech in the US, the UK and Australia," *Journal of Public Policy* 41, no. 2 (2021): 209-227.

¹⁷ Emily Howie, "Protecting the Human Right to Freedom of Expression in International Law," *International Journal of Speech-Language Pathology* 20, no. 1 (2018): 12-15.

¹⁸ Roderik Rekker and Joost Van Spanje, "Hate Speech Prosecution of Politicians and Its Effect on Support for the Legal System and Democracy," *British Journal of Political Science* 52, no. 2 (2022): 886-907.

¹⁹ Efendik Kurniawan et al., "Formulasi Kebijakan Concreto in Abstracto UU ITE," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 9, no. 1 (2020): 64-73.

as conveying information through various media is justified to do and are the rights owned by every human being, including the people of Indonesia.

Although in general the term 'freedom' is usually associated with the absence of barrier, restriction, bond, coercion, constraint, and obligation from certain things or to do something, in this context, it does not mean that it has no limit. The EIT Law is presented to regulate freedom of speech²⁰ through electronic media as well as its restrictions. The Law provides prevention for the negative effects of the development of IT, especially electronic media, such as classifying and regulating the types and forms of crime by using advanced information technology. In addition, the Law also regulates legal enforcement against violations in using IT, one of which is for individuals who use social media.

Nevertheless, there is a tendency for people to worry about expressing opinions and/or criticism on social media. In fact, it is very common that police officers will be involved when people express their opinions and/or criticisms, then, they are dragged to court for allegedly committing defamation, hate speech, or conveying false information. Meanwhile, Vice-Chairman of the People's Representative Council, Aziz Syamsuddin, assessed that the EIT Law initially has taken the principle of justice into consideration. However, in practice, several Articles of the EIT Law are used as a "weapon"²¹ to report each other to the police since their application has multiple interpretations.²² The public is also fed up with the imposition of Articles of the EIT Law regarding defamation and insult against the Government on social media.

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

Thereof, the EIT Law is criticized once again, especially on the issues related to defamation and hate speech, which are regulated under Article 27, Article 28, Article 29, Article 36, and Article 45 paragraph (3). Such issues are what caused, from 2016 to 2020, the EIT Law with its multi-interpretation Articles has resulted in a conviction rate reaching 96.8% (744 cases) with a very high imprisonment rate, reaching 88% (676 cases) according to the data collected by civil society coalition. Furthermore, a report from Southeast Asia Freedom of Expression Network (SaFEnet) concluded that journalists, activists, and critical

²⁰ Ronny Kusuma and Fachrudin Sembiring, "Mapping Legal Professionals and Layfolk on Freedom of Speech According to Constitution, the Electronic Information and Transaction Law," *International Journal of Research in Business and Social Science* 11, no. 1 (2022): 203-208.

²¹ Maulidya Anwar, Maskun, and Judhariksawan, "Effectiveness of the Electronic Information and Transactions Act Against Dating APPS-Based Pornography Crimes," *Justitia Jurnal Hukum* 6, no. 2 (2022): 73-83.

²² Rofiq Hidayat, "Melihat Tren 'Korban' Jeratan UU ITE," *Hukumonline.com*, 2021, <https://www.hukumonline.com/berita/baca/1t6033d91c46c27/melihat-tren-korban-jeratan-uu-ite/>.

citizens are most frequently criminalized by imposing those “elastic” Articles²³ which tend to be multi-interpreted with the aim of silencing critical voices of the people.

The Executive Director of the SaFEnet, Damar Juniarto, revealed that there are at least nine problematic Articles under the EIT Law.²⁴ For instance, Article 26 paragraph (3) concerning the elimination of irrelevant information is considered to have multiple interpretations regarding the issue of information censorship. Subsequently, Article 27 paragraph (1) concerning immorality is considered problematic since it may be used to punish victims of online gender-based violence while paragraph (3) concerning defamation is the Article that is considered the most problematic one. The Article regulates insults and defamation through electronic media. The Article is frequently used to curb the expression of citizens, activists, and journalists. In addition, it is often used to prosecute criminals for those who criticize the Government through social media. Similarly, Article 28 paragraph (2) on the issue of hate speech may suppress religious minorities and repress citizens regarding criticism of the Government. In addition, such an Article is often used to ensnare freedom of expression and journalistic work.

Furthermore, Article 29 concerning threats of violence is also problematic since it may be used to penalize people who have the intention to report to the police. In addition, Article 36 concerning losses may be used to enhance the criminal penalty for defamation. On the other hand, Article 40 paragraph (2a) concerning prohibited content is also considered problematic since it may be used as an excuse for internet shutdown to prevent the spread as well as the use of hoaxes, and paragraph (2b) concerning the termination of access can be an affirmation of the role of the Government which takes precedence over court decisions. Lastly, Article 45 paragraph (3) concerning the threat of imprisonment for defamation is problematic since it may detain the accused during the investigation process.

With the application of the Articles above, which have generated a lot of controversies, it is considered that they have had many impacts on the public, particularly the limited right to freedom of speech in delivering opinions and criticisms. With the rise of numbers ensnared by the multi-interpretation of Articles in the EIT Law excessively, people are reluctant to deliver their opinions and criticisms on social media and even there are some who become silent. Consequently, it doubtlessly obstructs democracy in Indonesia, despite the fact that Article 1 of the 1945 Constitution states that Indonesia is a democratic State whose principle is that decisions are made with respect for human rights.²⁵ Additionally, Article 28E paragraph (3) of the Constitution also affirms that everyone has the right to freedom of association, assembly, and expression which means that freedom of speech and expression is part of human rights.²⁶

²³ Iman Amanda Permatasari and Junior Hendri Wijaya, “Implementasi Undang-Undang Informasi dan Transaksi Elektronik dalam Penyelesaian Masalah Ujaran Kebencian pada Media Sosial,” *Jurnal Penelitian Pers dan Komunikasi Pembangunan* 23, no. 1 (2019): 27–41.

²⁴ Rizky Pratama Putra Karo Karo, “The Reason to Amendment of Article 27 Paragraph (1), Article 28 Paragraph (1) and (2) of the ITE Law that are Considered to Have Multiple Interpretation of the ITE Law in the Time of the Covid-19 Pandemic for Legal Certainty,” *Indonesian Law Journal* 14, no. 1 (2021): 1–18.

²⁵ Fairus Augustina Rachmawati and Januari Nasya, “Implikasi Pasal Multitafsir UU ITE terhadap Unsur Penghinaan dan Pencemaran Nama Baik,” *Seminar Nasional Hukum Universitas Negeri Semarang* 7, no. 2 (2021): 491–508.

²⁶ Ismunarno Setyoningrum, Ana Risky, “Implementasi Pasal 27 Ayat 3 UU Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik tentang Tindak Pidana Cyberbullying pada Akun Twitter sebagai Pencemaran Nama Baik,” *Jurnal Hukum Pidana dan Penanggulangan Kejahatan* 4, no. 2 (2015): 226–233.

Another impact is the lack of guarantee of legal certainty in upholding justice. There is legal uncertainty that occurs due to the arbitrariness of law enforcement to determine the person convicted because such Articles are applied in various means, such as the process of investigation, indictment, detention, revocation of reports to mediation; even the interpretation of the Articles themselves is still unclear.²⁷ Subsequently, arbitrariness occurs when law enforcement convicts people who are ensnared by the EIT Law without comprehensively sorting out which elements have been violated. Such misuse then has the potential to be overcriminalization. For instance, the implementation of the use of Article 27 paragraph (3) of the EIT Law is often misused by authorities as a "weapon" to trap anyone against them.²⁸

It is true that the Government recognizes that public input and criticism are very important in improving government performance and is a manifestation of democracy in the State. Additionally, the President has appealed to the public to be more active in delivering criticism, input, and/or potential maladministration so that government and public service providers will be able to improve efforts continuously. However, the statement by the Government is still reaping polemics among people since the multi-interpretation of Articles under the EIT Law is still applied which often backfires on those who convey them. Such Articles are considered not sufficient in providing protection for the public regarding freedom of speech in criticizing the Government through social media.

Actually, such a situation is foreseen. As stated by a Former Prime Minister of Australia, Robert Menzies, during his speech on World War II, freedom of speech can vanish at any time if the people are not vigilant. Without freedom of speech, there is no democracy. For instance, when the government passes laws limiting free speech on political matters, people cannot make an informed decision about whom to vote for on election day.²⁹ Therefore, it is necessary to revamp the existing legal structure. Because without a good legal structure, the protection of freedom of speech through electronic media will only become a mere discourse.

3.2 Questionable Cases as a Result of the Ambiguity of EIT Law

As mentioned earlier, many people believe that the Government represses freedom of speech through the EIT Law. Further, it also causes people to be afraid of criticizing the Government through social media even though the Government itself has asked the Indonesian people to deliver opinions and criticism through social media to improve public services,³⁰ especially in handling the current COVID-19 pandemic. However, people still believe that several Articles in the EIT Law may ensnare them at any time. It is due to the fact there are many cases of criminal acts related to the delivery of public criticism of the Government through social media.

²⁷ Yosua Julio Lalujan, "Implementasi Undang-Undang Nomor 19 Tahun 2016 tentang Perubahan atas Undang-Undang Nomor 11 Tahun 2008 tentang ITE terhadap Kebebasan Berpendapat di Indonesia," *Lex Et Societatis* 8, no. 4 (2020): 143–152.

²⁸ Fairus Augustina Rachmawati and Januari Nasya, *Op. Cit.*

²⁹ Joshua Krook, *Op. Cit.*

³⁰ Nur Rahmawati, Muslichatun Muslichatun, and M Marizal, "Kebebasan Berpendapat terhadap Pemerintah melalui Media Sosial dalam Perspektif UU ITE," *Widya Pranata Hukum: Jurnal Kajian dan Penelitian Hukum* 3, no. 1 (2021): 62–75.

For instance, prior to the amendment of EIT Law, there was a case that happened to a newspaper columnist named Bersihar Lubis.³¹ He was deemed to have defamed an official and was sued on the reasoning that had violated the EIT Law and was then convicted. The case stems from his writing which was published in a daily newspaper, *Koran Tempo*, on 17 March 2007 entitled *Kisah Interogator yang Dungu* (The Story of a Dumb Interrogator), in which Bersihar criticized the ban on a history book by the Attorney General's Office. The official of the Depok District Attorney's Office was offended by the writing of Bersihar. He then was sued in court due to his writing that contained criticism and was considered insulting to the Attorney General's Office which resulted in Bersihar being sentenced to eight months imprisonment.

Even after the amendment was enacted, the situation did not seem to change. It can be seen in the case of Rавio Patra, a public policy activist as well as researcher, who is known for his critical response to the Government on social media.³² In April 2020, an unknown person hacked his WhatsApp. Then, a group of people claiming to be from the police arrested him on the allegation of spreading incitement to violence through social media by persuading people to carry out looting. However, there were irregularities in the arrestment process since it did not refer to the applicable provisions,³³ namely the police did not provide an arrest warrant and identity. In addition, he was also interrogated without being allowed to present a lawyer. Although eventually Rавio was sent home with the status of a witness to the case of spreading hostile news, such a case generated the public to be more restless. Subsequently, the right to security on social media is being questioned.³⁴

Another example is the case of Farid Gaban, a journalist who reported committing cyber defamation. He criticized the Minister of Small and Medium Enterprise (SME) Cooperative named Teten Masduki on Twitter which pertained to the Government's efforts in providing priority to support corporates during the pandemic. The Chairman of Cyber Indonesia, Muannas Alaidid, reported Farid Gaban that was releasing falsehoods and tricks for allegedly disseminating insults against the Government via social media. During the pandemic, Farid's criticism spoke about Cooperative Minister and SME policy and was not aimed at Teten personally. He stated that criticism must be viewed on the people's aspirations.³⁵

The SAFEnet stated that there were hundreds of reports of complaints related to the EIT Law. Some have been decided by the court and have permanent legal force; the status of other cases in the police is not clear yet; while others settled peacefully. Reportedly, there were three cases in 2008 since the enactment of the EIT Law. Then in 2009, there was one case; there were two cases in 2010; there were 3 cases in 2011. It increased to five cases in 2012. Hereinafter, the number of cases experienced a significant increase in 2013 to 22 cases. In 2014, the number of cases continued to increase to 36 cases. It decreased to 30 cases in 2015. In 2016, it crept up again to 83 cases. Subsequently, there were 52 cases in 2017 and 29

³¹ Fadilah Raskasih, *Op. Cit.*

³² Grandis Ayuning Priyanto and Martinus Sardi, "The Urgency of Protecting Netizen in Freedom of Speech on Social Media," *Media of Law and Sharia* 2, no. 1 (2020): 76–91.

³³ Yoga Apriansah and Bambang Waluyo, "Kajian Yuridis Putusan Praperadilan atas Penangkapan Rавio Patra (Studi Kasus Putusan Pengadilan Nomor 63/ Pid.Prap/2020 PN.Jkt.Sel)," *Humani (Hukum Dan Masyarakat Madani)* 11, no. 1 (2021): 179–192.

³⁴ Grandis Ayuning Priyanto and Martinus Sardi, *Op. Cit.*

³⁵ Herlambang Perdana Wiratraman, "Does Indonesian COVID-19 Emergency Law Secure Rule of Law and Human Rights?," *Journal of Southeast Asian Human Rights* 4, no. 1 (2020): 306–334.

cases in 2018. Fortunately, it decreased to 22 cases in 2019. However, it increased again to 34 cases in 2020.³⁶

From the existing cases, it can be said that apart from the unclear procedure in enforcing the EIT Law, the main problem is the difficulty in distinguishing between criticism and acts of defamation. Regarding the difference between the two, the lecturer of Communication Studies at Muhammadiyah University of Yogyakarta, Indonesia, Fajar Junaedi stated that the two are indeed different. Criticism is aimed at the substance of the problem that occurs, while defamation occurs when the tendency of criticism is an individual or institutional aspect.³⁷ Meanwhile, according to the Executive Director of the SAFEnet, Damar Juniarto, criticisms related to the performance of government officials cannot be categorized as defamation. For example, a person who is upset and angry about the fact that public roads are damaged even though he/she has paid taxes and then expresses disappointment through social media cannot automatically be considered defamation. Such criticism shall be used as an evaluation of the performance of the Government, instead of being charged with defamation or hate speech.

As a middle ground, the existence of the EIT Law may still be maintained and applied with a note that revision shall be made. Although the EIT Law is considered to restrict freedom of speech and expression, especially through social media, the Law, of course, also has an advantage in anticipating the possibility of misuse of electronic media. In addition, the Law does not only provide regulations on defamation, slander, false information, or immoral matters, but also many other regulations regarding the rules of living in cyberspace and the transactions that occur in it which are regulated in detail. Nevertheless, the Government cannot flip a blind eye since it is still necessary to revise or amend the EIT Law, especially the Articles related to freedom of speech and expression which still require more detailed provisions.

3.3 Whether the Joint Decree Can be a Means to Resolve the Ambiguity

Several civil society organizations have encouraged the Government to revise the Articles which are considered crucial as mentioned earlier. It is essential due to the fact such Articles frequently have multiple interpretations³⁸ and have the potential to be used as a tool to penalize people for allegedly committing crimes like defamation or hate speech. So far, the EIT Law has only created fear and silenced the critical thinking of people. If it continues to be implemented without clear boundaries, the Law is seen as potentially being used for the practice of abuse of power, such as interpreting based on the desires of the authorities or interested parties to criminalize others.

At the end of June, the Minister of Communication and Information Technology, the National Police Chief, and the Attorney General issued a Joint Decree which was made as a guideline for the implementation of the EIT Law. It provides an explanation of the definitions, requirements, and linkages with other Laws and/or regulations of Articles that have been considered problematic and have multiple interpretations. The Decree focuses on

³⁶ Rofiq Hidayat, *Op. Cit.*

³⁷ Rosy Dewi Arianti Saptoyo, "Jokowi Minta Masyarakat Aktif Beri Kritik, Warganet: Lalu Kena UU ITE," *Kompas.com*, 2021, <https://www.kompas.com/tren/read/2021/02/09/160000565/jokowi-minta-masyarakat-aktif-beri-kritik-warganet-lalu-kena-uu-ite?page=all>.

³⁸ Vidi Sukmayadi, "The Dynamics of Media Landscape and Media Policy in Indonesia," *Asia Pacific Media Educator* 29, no. 1 (2019): 58-67.

matters related to immorality, gambling, defamation, extortion, fake news, threats of violence, and material losses.

Based on the Decree, Article 27 Paragraph (1) focuses on the act of transmitting, distributing, and/or making it accessible, not on the act of immorality. In other words, any action that is considered immoral is still regulated in Law No. 44 of 2008 on Pornography and/or the Criminal Code i.e., Articles 281 and 282. If a person intentionally saves or retransmits such content which allows the public to see it, only then the person in question can be ensnared by the Article. Such action can be uploading content on social media, replying to comments, or re-opening access to links that have been cut off which then allows public to access them. Similarly, Article 27 Paragraph (2) focuses on the act of transmitting, distributing, and making accessible any content related to gambling that is prohibited or not licensed under statutory regulations.

Article 27 Paragraph (3) emphasizes the action of a person who intentionally distributes, transmits, or makes accessible information whose contents attack another person's honor by accusing something to be known to the public. Any action related to insult, ridicule, and/or inappropriate words does not constitute defamation, likewise with any content in the form of assessment, opinion, evaluation result, or fact. Afterward, the criteria that are considered as dissemination to the public is any content uploaded on social media that can be accessed by the public or through an open group chat. In addition, solely the victim who issues a complaint to the Law Enforcement Apparatus with a note that the victim is an individual with a specific identity, not an institution, corporation, profession, or position. In addition, it can be said that the Article is quite often associated with freedom of the press. Therefore, the Decree specifies that any journalist will not be ensnared as long as the writing is in accordance with the provisions of Law No. 40 of 1999 on the Press. However, if a journalist personally uploads their personal writing on social media or the internet, then the EIT Law would be applied.

Furthermore, Article 27 Paragraph (4) also focuses on the act of transmitting, distributing, and accessing content electronically, particularly in relation to extortion and/or threats perpetrated by a person, organization, or legal entity. Any action deemed to violate the Article is in the form of coercion with the aim of unlawfully benefiting oneself or others or threatening to reveal a secret, or threatening to spread personal data, photos, and/or videos. In addition, there must be evidence as a motive of an economic profit. On the other hand, the spread of fake news referred to in Article 28 Paragraph (1) is any information in the context of electronic transactions such as online trading transactions which send or upload through messaging applications, online broadcasting, social media, marketplace, advertisement, or other electronic transaction services. Nevertheless, the Article cannot be imposed on any party who defaults and/or experience force majeure. In addition, consumer losses because of fake news must be calculated and determined.

Moreover, the offense in Article 28 Paragraph (2) Article is a dissemination of information to the public that creates feelings of hatred or hostility towards an individual or community group based on ethnicity, religion, race, or inter-group relation. The dissemination can be in the form of an image, video, voice, or writing that means to invite or broadcast to others to go along in hating or being hostile. Meanwhile, expressing any opinion, disapproval, or dislike of an individual or community group is not considered a prohibited act, unless there is evidence of such action for having an attempt to persuade or incite hatred or hostility.

Subsequently, Article 29 emphasizes the action of sending information electronically containing threats or intimidation aimed personally by committing physical or psychological violence. The threat must also have the potential to be realized even though it is only being sent once. It can be in the form of message, e-mail, voice, video, writing, or other forms of electronic information. Furthermore, the fear experienced by the victim must be clearly proven and there is a witness who can show these facts, such as changing behavior. Meanwhile, threats that will damage buildings or property cannot be subject to the Article. Further, Article 36 can be imposed on a victim, either an individual or a legal entity, who suffers a material loss, not indirect loss, potential loss, or non-material loss. Additionally, the value of such loss can be calculated and determined by referring to Supreme Court Regulation No. 2 of 2012.

Although it can be said that the issuance of the Joint Decree indicates that the Government has given a positive response by accommodating the aspirations of its people, it does not mean that the problematic issues in several Articles under the EIT Law have been resolved. It is due to the fact there are still unclear legal norms and unmeasurable boundaries contained in the Law. For instance, there are overlapping definitions regarding the forms of the act of "distributing" and "making accessible". Based on the Joint Decree, those two phrases can be confusing since they have similar meanings, namely intentionally making the public see, save, or retransmit the infringing content. On the other hand, the EIT Law describes "distributing" as the act of spreading content to many people, whereas "making it accessible" is any action other than "distributing" and "transmitting". Consequently, the definition in the EIT Law, which is still broad, allows third parties, such as internet service providers, to be criminally responsible.

Herlambang P. Wiratraman, a lecturer at the Faculty of Law, Universitas Airlangga, Indonesia assessed that the Decree is an acknowledgment, not a solution, by the Government that admits there is a real problem with the substance of the EIT Law.³⁹ By issuing the Joint Decree, the Government actually admitted that those Articles discussed earlier are indeed problematic both in terms of the language of the legislation and in their enforcement - otherwise, the Decree would not be needed. In other words, the Decree is a guideline that shall be a transition toward the revision of the EIT Law. The provisions that are already proper and sufficient in the Decree need to be emphasized in the later revision of the Law.

Furthermore, referring to the provision under Law No. 12 of 2011 on the Establishment of Legislation, the legal product that should be issued is a Government Regulation in Lieu of Law. Therefore, the Government is still required to revise the EIT Law as the main solution to restore the principal aim of the Law itself namely, to protect Indonesian citizens from any attack and/or fraud in the digital world. Ideally, to avoid overlapping regulation of criminal acts, the revision of the EIT Law and the revision of the Criminal Code may be conducted hand in hand. Further, the revised EIT Law shall have to meet several requirements, including clarity of understanding and straightforwardness. In addition, there are several other matters that need to be regulated in the later revision of the Law, such as the abolition of criminal sanctions for defamation and restoration of a reputation for those who have suffered losses due to the problematic Articles of the Law.

³⁹ CNN Indonesia, "SKB Pedoman Bukan Obat Atasi Permasalahan UU ITE," CNN Indonesia, 2021, <https://www.cnnindonesia.com/nasional/20210625133307-12-659367/skb-pedoman-bukan-obat-atasi-permasalahan-uu-ite>.

4. CONCLUSION

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

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