

Digital Rights Situation in Indonesia

**— Legal Analysis under
International Human Rights**

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Table of Contents

1. Persecution of Defamation
2. Persecution of “Fake News”
3. Persecution of Speech Related to Ideology, Religion, and Abortion
4. Government Regulation on Content
5. Surveillance Without Safeguards

1. Persecution of Defamation

General Comment No.34 on ICCPR Article 19: Freedoms of opinion and expression

“States parties should consider the **decriminalization of defamation** and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and **imprisonment is never an appropriate penalty.**”

“The mere fact that forms of expression are considered to be **insulting to a public figure is not sufficient to justify the imposition of penalties**, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.

1. Persecution of Defamation

The New Penal Code (RKUHP)

CHAPTER V CRIMINAL OFFENSES AGAINST PUBLIC ORDER

1. Defamation of State Symbols, Government or State Institutions, and Population Groups

Paragraph 2 Defamation of the Government or State Institutions

Article 240

- (1) Any person who **in public orally or in writing insults the government or a state institution**, shall be punished with a **maximum imprisonment of 1 (one) year and 6 (six) months** or a maximum fine of category II.
- (2) In the event that the Criminal Offense as referred to in paragraph (1) results in a riot in the community, shall be punished with a **maximum imprisonment of 3 (three) years** or a maximum fine of category IV.

Article 241

- (1) Every person who **broadcasts, shows, or attaches writings or pictures** so that they are visible to the public, listens to **recordings** so that they are audible to the public, or **disseminates by means of information technology containing insults against the government or state institutions**, with the intention that the contents of the insult are known to the public, shall be punished **with imprisonment of up to 3 (three) years** or a maximum fine of category IV.
- (2) In the event that the criminal offense as referred to in paragraph (1) results in a riot in the community, the perpetrator shall be punished with a **maximum imprisonment of 4 (four) years** or a maximum fine of category IV.

1. Persecution of Defamation

The New Penal Code (RKUHP)

CHAPTER II CRIMINAL OFFENSES AGAINST THE DIGNITY OF THE PRESIDENT AND/OR VICE PRESIDENT

2. Assault on the Honor or Dignity of the President and/or Vice President

Article 218

(1) Every person who **Publicly attacks the honor or dignity of the President and/or Vice President**, shall be punished with imprisonment for a maximum **period of 3 (three) years** or a maximum fine of category IV.

(2) It shall not constitute an assault on honor or dignity as referred to in paragraph (1), if the act is committed in the public interest or in self-defense.

Article 219

Every person who **broadcasts, shows, or attaches writings or pictures** so that they are visible to the public, listens to **recordings** so that they are audible to the public, or **disseminates by means of information technology** that contains attacks on the honor or dignity of the President and / or Vice President with the intention that the contents are known or better known to the public, shall be punished with a **maximum imprisonment of 4 (four) years** or a maximum fine of category IV.

1. Persecution of Defamation

The Amended ITE Law

Article 27A

Every person who **intentionally attacks the honor or the good name of another person** by accusing someone of something with the intention of **making the matter known to the public in the form of Electronic Information and/or Electronic Documents** carried out through an Electronic System.

Article 45

(4) Every person who deliberately attacks the honor or good name of another person by accusing them of something, with the intention of making the matter known to the public in the form of Electronic Information and/or Electronic Documents carried out through the Electronic System as intended in Article 27A, shall be **punished with a criminal offense, imprisonment for a maximum of 2 (two) years** and/or a fine of a maximum of IDR 400,000,000.00 (four hundred million rupiah).

→ **Restriction of FREEDOM OF OPINION AND EXPRESSION, RIGHT TO PUBLIC PARTICIPATION**
(ICCPR Article 19, UDHR Article 19) (ICCPR Article 25, UDHR Article 21)

2. Persecution of “Fake News”

Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda

“**General prohibitions on the dissemination of** information based on vague and ambiguous ideas, including “**false news**” or “non-objective information”, are incompatible with international standards for restrictions on freedom of expression, ... and **should be abolished.**”

The Three-Part Test (The Permissible Limitations Test) under ICCPR Article 19(3)

1. Prescribed by Law
2. Legitimate Aim
3. Necessary, Adequate and Proportionate

2. Persecution of “Fake News”

The New Penal Code (RKUHP)

CHAPTER V CRIMINAL OFFENSES AGAINST PUBLIC ORDER

4. Disturbance to Public Order and Peace

Paragraph 7 Broadcasting or Dissemination of False News or Notices

Article 263

(1) Any person who **broadcasts or disseminates news or notification, knowing that such news or notification is false**, which causes unrest in the community, shall be punished with a **maximum imprisonment of 6 (six) years** or a maximum fine of Category V.

(2) Any person who broadcasts or disseminates news or notification when it is **reasonably suspected that such news or notification is false** which may result in a riot in the community, shall be punished with **imprisonment for a maximum period of 4 (four) years** or a maximum fine of category IV.

Article 264

Any person who **broadcasts news that is uncertain, exaggerated or incomplete**, while he knows or reasonably suspects that such news may cause unrest in the community, shall be punished with a **maximum imprisonment of 2 (two) years** or a maximum fine of category III.

2. Persecution of “Fake News”

The Amended ITE Law

Article 28

(3) Every person who deliberately distributes Electronic Information and/or Electronic Documents which of the person are aware that it **contain false notifications that cause unrest in the society**.

Article 45A

(3) Every person who deliberately distributes an Electronic Information and/or Electronic Documents which they knows contains a false notifications which cause an unrest in society as intended in Article 28 Paragraph (3) shall be punished with **imprisonment for a maximum of 6 (six) years** and/or a fine a maximum of IDR 1,000,000,000.00 (one billion rupiah).

→ Legitimize **24/7 monitoring and mass surveillance** by the “War Room” of MOCI and the “Virtual Police Program” of the National Police

3. Persecution of Speech Related to Ideology, Religion, and Abortion

The New Penal Code (RKUHP)

CHAPTER I CRIMINAL OFFENSES AGAINST STATE SECURITY

1. Crimes against State Ideology

Paragraph 1 The Spread and Development of Communism/Marxism-Leninism or Other Concepts Contrary to Pancasila

Paragraph 2 Elimination and Replacement of Pancasila Ideology

Article 188

(1) Every person who **disseminates and develops the teachings of communism/marxism-leninism or other ideologies that are contrary to Pancasila in public orally or in writing**, including disseminating or developing **through any media**, shall be punished with a **maximum imprisonment of 4 (four) years**.

Article 190

(1) Every person **who expresses his/her desire in public orally, in writing, or through any media to negate or replace Pancasila as the basis of the state**, shall be punished with a **maximum imprisonment of 5 (five) years**

3. Persecution of Speech Related to Ideology, Religion, and Abortion

The New Penal Code (RKUHP)

CHAPTER VII CRIMINAL OFFENSES AGAINST RELIGION, BELIEFS, AND RELIGIOUS LIFE OR BELIEFS

1. Crimes against Religion and Belief

Article 302

- (1) Every person who publicly incites with the intention that a person will **not embrace a religion or belief adopted in Indonesia**, shall be punished with a **maximum imprisonment of 2 (two) years** or a maximum fine of category III.
- (2) Any person who by Violence or Threat of **Violence forces a person to have no religion or belief or to change religion or belief adopted in Indonesia**, shall be punished with imprisonment for a **maximum period of 4 (four) years** or a maximum fine of category IV.

→ Restriction of

**FREEDOM OF THOUGHT,
CONSCIENCE AND RELIGION**
(ICCPR Article 18, UDHR Article 18)

**FREEDOM OF OPINION
AND EXPRESSION**
(ICCPR Article 19, UDHR Article 19)

**RIGHT TO EQUALITY
AND NON-DISCRIMINATION**
(ICCPR Article 26, UDHR Article 2, 7)

3. Persecution of Speech Related to Ideology, Religion, and Abortion

The New Penal Code (RKUHP)

CHAPTER XV CRIMINAL OFFENSE OF DECENCY

3. Showing pregnancy prevention and abortion tools

Article 408

Any person who **openly demonstrates, offers, broadcasts in writing, or shows in order to obtain a pessary to a child**, shall be punished by a **maximum fine of category I**.

Article 409

Any person who without right **openly demonstrates a device for the termination of pregnancy**, offers, broadcasts in writing, or shows **how to obtain a device for the termination of pregnancy**, shall be punished with a **maximum imprisonment of 6 (six) months** or a maximum fine of category II.

→ **Restriction of SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS, FREEDOM OF OPINION AND EXPRESSION**

(The Convention on the Elimination of All Forms of
Discrimination Against Women(CEDAW) Article 16, 10)

(ICCPR Article 19, UDHR Article 19)

4. Government Restrictions on Content

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

“66. ... States should refrain from imposing disproportionate sanctions, whether **heavy fines or imprisonment**, on Internet intermediaries, given their **significant chilling effect on freedom of expression.**”

“68. States should refrain from adopting models of **regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression.** They should avoid delegating responsibility to companies as adjudicators of content, which empowers corporate judgment over human rights values to the detriment of Users.”

4. Government Restrictions on Content

The Amended ITE Law

Article 27

(1) Any Person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with **contents against propriety**.

Article 45

(1) Any Person who satisfies the elements as intended by Article 27 section (1), section (2), section (3), or section (4) shall be sentenced to **imprisonment not exceeding 6 (six) years** and/or a fine not exceeding Rp1,000,000,000 (one billion rupiah).

→ **Specificity? Foreseeability?**

4. Government Restrictions on Content

The Amended ITE Law

Article 40

(2) The Government protects the public interest from all types of disturbances as a result of misuse of an Electronic Information and Electronic Transactions **which disrupt the public order**, in accordance with statutory provisions.

(2a) The government is obliged to prevent the **dissemination and use of** an Electronic Information and/or Electronic Documents which contains a **prohibited content** in accordance with the provisions of statutory regulations.

(2b) In carrying out prevention as intended in Paragraph (2a), **the Government has the authority to terminate access and/or order Electronic System Operators to terminate access** to Electronic Information and/or Electronic Documents that contain unlawful content.

The Amended MR5/2020

Article 13

(1) Private Electronic System Operators shall be **obligated to take down the prohibited Electronic information and/or Electronic document** as referred to in Article 9 paragraph (4).

(2) The obligation to perform take down as referred to in paragraph (1) shall include **Access Blocking** on Electronic information and/or Electronic document that can facilitate the dissemination of such prohibited Electronic information and/or Electronic document.

→ Legitimize the government's **content and account removal, block of website/app, and internet shutdown**

4. Government Restrictions on Content

The Amended MR5/2020

Article 16

(7) Private Electronic System Operator who is instructed to perform Access Blocking (take down) as referred to in paragraph (5) shall be obligated to perform Access Blocking (take down) on the Prohibited Electronic Information and/or Electronic Document **at the latest 1 x 24 (one times twenty-four) hours after the instruction letter for Access Blocking (take down) is received.**

(9) For urgent Access Blocking (take down) request on Prohibited Electronic Information and/or Electronic Document as referred to in Article 14 paragraph (3), Private Electronic System Operator shall be obligated to perform Access Blocking (take down) on Prohibited Electronic Information and/or Electronic Document and/or Electronic information and/or Electronic document that can facilitate the accessibility of such Prohibited Electronic Information and/or Electronic Document immediately without delay **at the latest 4 (four) hours after the warning is received.**

Article 14

(3) Request as referred to in paragraph (1) is urgent in the case it contains:

- a. terrorism;
- b. child pornography; or
- c. **content causing unsettling situation for the public and disturbing public order.**

5. Surveillance Without Safeguards

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin

“33. ... Other rights such as freedom of expression, association, and movement **all require privacy to be able to develop effectively**. Surveillance has also resulted in **miscarriages of justice, leading to failures of due process and wrongful arrest.**”

“62. Strong independent oversight mandates must be established to review policies and practices, in order to ensure that there is **strong oversight of the use of intrusive surveillance techniques and the processing of personal information**. Therefore, there must be no secret surveillance system that is not under the review of an effective oversight body and **all interferences must be authorized through an independent body.**”

5. Surveillance Without Safeguards

Law No. 8 of 1981 on the Criminal Procedural Code (KUHAP)

Law No. 5 of 1997 on Psychotropic (Psychotropic Law)

Law No. 31 of 1999 on the Eradication of the Crime of Corruption (Anti-Corruption Law)

Law No. 36 of 1999 on Telecommunications (Telecommunications Law)

Law No. 30 of 2002 on the Commission for the Eradication of Corruption (Anti-Corruption Commission Law, KPK Law)

Law No. 15 of 2003 on the Eradication of the Crime of Terrorism (Anti-Terror Law)

Law No.21 of 2007 on the Eradication of the Crime of Trafficking in Persons (Anti-Trafficking Law)

Law No. 35 of 2009 on Narcotics (Narcotics Law)

Law No. 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering (Money Laundering Law)

Law No. 17 of 2011 on State Intelligence (State Intelligence Law)

Law No. 18 of 2011 on the Judicial Commission (Judicial Commission Law)

Law No. 11 of 2008 on Electronic and Transaction (ITE Law)

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5. Surveillance Without Safeguards

The Amended ITE Law

Article 31

(1) Any Person who knowingly and without authority or unlawfully carries out interception or wiretapping of Electronic Information and/or Electronic Records in certain Computers and/or Electronic Systems of other Persons.

(2) Any Person who knowingly and without authority or unlawfully carries out interception of the transmission of nonpublic Electronic Information and/or Electronic Records from, to, and in certain Computers and/or Electronic Systems of other Persons, whether or not causing alteration, deletion, and/or termination of Electronic Information and/or Electronic Records in transmission.

(3) Interception excepted from one as intended by section (1) and section (2) shall be **interception carried out in the scope of law enforcement at the request of the police, prosecutor's office, and/or other law enforcement institutions as stated by laws.**



Incapable of providing necessary degree of **independence and objectivity to prevent the abuse of surveillance powers**

5. Surveillance Without Safeguards

The Amended MR5/2020

Article 37

Request as referred to in Article 36 shall be **granted by Private Electronic System Operator** at the latest within the period of **5 (five) calendar days** as of such request is submitted by the Contact Person of the Law Enforcement Institution.

Article 41

Request as referred to in Article 39 shall be granted by Private Electronic System Operator at the latest within **5 (five) calendar days** as of such request is submitted by the Contact Person of the Law Enforcement Institution.



Article 38

2. The use of **access for the purpose of law enforcement** shall be performed **within a reasonable period of time** and shall be accountable.

Article 43

3. The use of access for the purpose of supervision shall be performed **within a reasonable period of time** and shall be accountable.

