

FREEDOM OF SPEECH IN CYBERSPACE IN HUMAN RIGHTS PROTECTION PERSPECTIVE

(Freedom of speech in Cyberspace: Human Rights Perspective)

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ABSTRACT

The application of information technology, media and communication do not only affect to the State becoming more borderless, but they have changed the community behaviour globally. Most of people overcome the cyberspace era as a moment to deliver the freedom of speech and to address their personnel actualization. However some people worried this matter precisely as a threat against harmony and dignity of one's privacy. Some lawsuits often happening in the cyberspace, especially concerning the transformation of information, communication activity, even more in speech of one's opinion. One of the greatest lawsuit is vilification of one's honour between Mrs. Prita Mulyasari and Omni International Hospital in Jakarta. Indonesia has built a policy in respect of information technology act by placing into effect the Act No. 11 year 2008 concerning Electronic Information Transaction Act since April 2st, 2008. Law products in regard to cyberspace is deemed by government as a very essential act to guard the law reinforcement to well improve the implementation of information technology, media, and communication for everyone. Nevertheless, the existence of this act should be monitored during its implementation in order not to oppose to the state ideology and human rights. Freedom of speech is also being admitted as a basic human rights and it received a protection assurance from Human Rights Universal Declaration in 1948. Everyone posses a right of freedom in opinions and speech; the right covers a freedom to hold an opinion without interference and a freedom to seek, to obtain and to broadcast the informations or ideas through whatever media regardless the state border. This proposal offers the format of supervision and protection by the state of Indonesia on freedom of speech in cyberspace within human right perspective. The effort to synchronize regulations in vertical and horizontal directions becomes further goal as because there are still a lot of flexible clauses in determining the limit of a freedom of speech as a crime. Freedom is only confined by the Law, people spirit, community order. The three foundations sufficiently represent the management of freedom of speech in a state.

Keywords : Human Rights, cyberspace and freedom of speech

HUMAN RIGHTS AND FREEDOM OF SPEECH

Human Rights

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.¹

In the *Universal Declaration of Human Rights* there are thirty articles describing the civil, political, economic, social, and cultural rights that should be enjoyed by human in every country. The rights are the manifestation of human dignity, which is reflected from the freedom of thought, freedom of religion, from fear and misery.

John Locke, Montesquieu, and Rousseau² express various human rights, namely:

- a. Freedom for themselves
- b. Freedom of religion
- c. Freedom of assembly and association
- d. Write of Habeas Corpus Rights
- e. Freedom of thought and freedom of the press.

Freedom Of Speech In Cyberspace

Freedom of speech is one of the human rights inherit by human in the world as stated in Article 19 of the UDHR (Universal Declaration of Human Rights), the article states that everyone has the right to freedom of opinion and speech, including the right to hold opinions without interference and to seek, receive and convey information and ideas through any media regardless of boundaries (region).

The freedom of speech rights in regard of speaking and giving opinion which associated with IT is often leads to victim suspected of breaking these limits. Actually the freedom of speech rights itself is regulated in the article 28 of the 1945

¹United Nations Human Rights. 2013. *What is Human Rights*. <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx> (diakses pada tanggal 19 February 2013)

² Sulaiman Hamid. 2002. *Hak Asasi Manusia dalam Lembaga Suaka Hukum Internasional*. Jakarta: PT. RajaGrafindo Persada. hal. 27.

Constitution Republic of Indonesia, which states that freedom of association and assembly, speech with oral and written, and so on are stipulated by law.

In the case freedom of speech in the cyber world and human rights issues, there are some provisions about the rights and principles of internet freedom, as shown on the official website [Internet Rights & Principles Coalition](http://internetrightsandprinciples.org/campaign/)³ explaining the 10 Principles and Human Rights on the Internet.

- 1) Universality and Equality. All humans are born free and equal in dignity and rights, which must be respected, protected and fulfilled in the online environment.
- 2) Rights and Social Justice. The Internet is a space for the promotion, protection and fulfillment of human rights and the advancement of social justice. Everyone has the duty to respect the human rights of all others in the online environment.
- 3) Accessibility. Everyone has an equal right to access and use a secure and open Internet. Speech and Association. Everyone has the right to seek, receive, and impart information freely on the Internet without censorship or other interference. Everyone also has the right to associate freely through and on the Internet, for social, political, cultural or other purposes.
- 4) Privacy and Data Protection. Everyone has the right to privacy online. This includes freedom from surveillance, the right to use encryption, and the right to online anonymity. Everyone also has the right to data protection, including control over personal data collection, retention, processing, disposal and disclosure.
- 5) Life, Liberty and Security. The rights to life, liberty, and security must be respected, protected and fulfilled online. These rights must not be infringed upon, or used to infringe other rights, in the online environment.
- 6) Diversity. Cultural and linguistic diversity on the Internet must be promoted and technical and policy innovation should be encouraged to facilitate plurality of speech.
- 7) Network Equality. Everyone shall have universal and open access to the Internet's content, free from discriminatory prioritization, filtering or traffic control on commercial, political or other grounds.
- 8) Standards and Regulation. The Internet's architecture, communication systems, and document and data formats shall be based on open standards that ensure complete interoperability, inclusion and equal opportunity for all.
- 9) Governance. Human rights and social justice must form the legal and normative foundations upon which the Internet operates and is governed. This shall happen in a transparent and multilateral manner, based on principles of openness, inclusive participation and accountability.

FREEDOM OF EXPRESSION AND ACT NO.39 YEAR 1999

As a member of United Nations, Indonesia cannot let go of taking moral and legal responsibility to uphold and Implement the Universal Declaration of Human Rights stipulated by the United Nations. Based on the provision of Article 1 of the Universal Declaration of Human Rights, Indonesia adopts the provision of the Universal Declaration of Human Rights into the Act No.39 Year 1999 on Human Rights, which states:

"Human rights are a set of rights inherent in human nature and existence as a creature of God Almighty, and it is a gift from God that must be respected, upheld and protected by the laws, government and, everyone for the respect also protections of human dignity"

With regard to the freedom of expression stipulated in Article 19 of the Universal Declaration of Human Rights, Act No. 39 of 1999, set in Article 14 states that:

- (1). *Every person has the right to communicate and obtain information needed to develop the personal and social environment*
- (2) Every person has the right to seek, obtain, possesses, keep, and convey information by using available means.

But the freedom of expression itself in Indonesia is not yet maximal, in the way that it still threatened with the existence of Article 310 on defamation/vilification, and Article 311 Criminal Law Code on contempt. Criminal Law Code does not provide a clear understanding on the limits of defamation, so these Articles are used to penalize someone who is considered to have been detrimental to others through the expression in Cyberspace.

FREEDOM OF SPEECH AND INFORMATION AND ELECTRONIC TRANSACTION ACT

The Act No.11 year 2008 on the Information and Electronic Transaction Act is the umbrella law for all transactions and activities in the internet and electronic media. Although journalists and bloggers are now have to be cautious of the Article 27 (3) due to frequently used article by the law enforcement to prosecute them as criminals. The articles make all documents and writings publish on the website and blog is prone of object lawsuit. The complete content of Article 27 (3) as shown below:

Any person intentionally and with no right distributing and/or transmitting and/or making accessible Electronic Information and/or Electronic Document, which has an element of abusive and/or defamation/vilification.

In this formulation there are three elements that must be considered, namely;

³ [Internet Rights & Principles Coalition](http://internetrightsandprinciples.org/campaign/). 2013. 10 Internet Rights & Principles.
<http://internetrightsandprinciples.org/campaign/>. (accessed on 19 Februari 2013)

1. Element of intent and without right;
2. Elements distribute, transmit, make accessible of the Information and and / or Electronic Document;
3. Elements of contempt and/or defamation/vilification.

The inclusion of the word "no right" obtains criticism from various communities as an exaggeration (Sutan Remy Syahdeini, 2009; 223). Is it possible to exists an official authority that is allowed/grant the right to distribute, transmit, create accessible information and electronic documents that have an element of abusive and/or defamation/vilification? When compared to the insults formulation between Information and Electronic Transaction Act and the Civil Law Code then it can only be found two similarities of elements namely the element of intention and the element of attacking the honors or reputation. While Article 310 of the Civil Law Code demands that the action must be done in public.

However, construction formulation of Article 27 paragraph (3) is "distributing, transmitting, creating accessible information and/or electronic documents", that stated not needed any element of in public.

In some countries, criminal law act on defamation/vilification is often misused by the authorities to restrict criticism and silencing public debate (Anggara et al, 2010; 65). The severe criminal sanctions threat, such as imprisonment could give impact which will freeze the freedom of speech. The possibility to misuse the criminal law on defamation/vilification is always exists. Defamation/vilification is a very subjective. The absence of an official interpretation regarding limitation defamation/vilification raises the possibility of misuse or implementing excessive restriction on freedom of speech practices.

Article 27 paragraph 3 is also questioned by the Press Council, they even filed judicial review to the Constitutional Court. Article 27 paragraph 3 of the Information and Electronic Transaction Act is closely related to the section 320 and 311 of the Criminal Law Code. Judicial review on the two sections of the Criminal Law Code has been filed to the Constitutional Court with the case No.14/PUU-VI/2008, the submitted file was rejected as mentioned in the conclusion of trial by Constitutional Court Harjono as the chief of judge in the constitutional assembly.

Reputation, dignity, or honor of a person is one of the legal interests protected by the criminal law because it is part of the constitutional rights of citizens assured by the 1945 Constitution. Therefore if criminal laws give certain criminal sanction threats to the attack of someone's reputation, dignity, or honor, then action is not contrary to the 1945 Constitution. (www.hukumonline.com; 2008).

As a comparison, it should be observed the opinion of a Government Expert, Dr. Mudzakir presented in the Constitutional Court.

Measurement used in the criminal law is objectivisely subjective. Subjective as in feeling the humiliation. Objectivisely is objectively measured where in general the action was done. (Government Expert Document for Section 310, 311 Criminal Law Code test; 2008)

Judicial review attempt on Article 27 (3) Information and Electronic Transaction Act
May be viewed as a form of concerns on the severe threats on punishment as stated in Article 45.....

FREEDOM OF SPEECH IN CYBER SPACE IN HUMAN RIGHTS PROTECTION PERSPECTIVE

Freedom of speech is a part of human rights, which freedom is manifested from the submission speech orally or written in any media without any obstruction from any party. Speech is a form of opinion. Freedom of opinion is a part of basic human rights. Human rights as the rights inherent in the human nature as a creature of God Almighty, is a gift of God to put humans in status and dignity as human beings.

A freedom of speech is recognized as a "basic human rights" and gets protection assurance in the Universal Declaration of Human Rights 1948. In Article 19 of the UDHR states that *"Everyone has the right to freedom of thought and speech (the right to freedom of opinion and speech), this right shall include freedom to hold an opinion without interference and the freedom to seek, receive, and impart information and ideas, through any media regardless of state boundaries."*

From this provision it can be seen that in order the freedom of opinion to be implemented well then it must be given freedom assurance and immunity, so the person are not afraid of the retaliation of any party. However there are some restrictions on the freedom of speech. In any system of international and national human rights, it is recognized that freedom of speech can be restricted only to a very limited criteria, and should be made with great care and must be in accordance with the International Covenant and Political Rights (ICCPR).

Freedom of opinion in cyberspace will be very different, as was done with other media. In the UN Charter explained that freedom of opinion can only be restricted by local law act, community spirit, and social order. Three things are sufficiently represent in managing freedom of opinion in a country. It can be said that the public will govern and limit the submission of public opinion.

Similarly, the norms prevailing in society is expected to be a constraint for those who went too far when found in cyberspace.

Meanwhile, in the 1945 Constitution the protection of freedom of speech is specifically regulated in Article 28E Paragraph (3) and Article 28 (F). In Article 28E Paragraph (3) of the 1945 Constitution of the Republic of Indonesia stated, *"Everyone has the*

right to develop themselves through the fulfillment of basic needs, the right to education and to obtain the benefits of science and technology, arts and culture, in order to improve the quality of life and for the welfare of mankind."(CONTENT OF ARTICLE TO BE CORRECTED)

Furthermore, Article 28F of the 1945 Constitution states, *"Every person has the right to communicate and obtain information to develop personal and social environment, and the right to seek, obtain, possess, keep, process and convey information by using all available channels."*

The cyber world has a major role in the stand-up for human rights, especially the rights of opinion implemented by speech through cyberspace. The cyberspace is a means to communicate without limits, thus it is grant to create a sense of justice and the protection in the freedom of opinion only if the user rights or user service is regulated in order to implement their right without any fear. However, the implications would be different if applied in any media; it is depending on the nature of the medium. Of course this does not make an excuse to restraint freedom of speech in society.

From the description above it can be concluded that the freedom of speech in the world is part of the basic rights of human beings. However the implementations of these freedoms have to be concerned of other human rights so as not to cause disadvantage to others. Restrictions to the freedom of speech in the cyber world are needed to give protections to the human rights. Restrictions are necessary to respect other rights and freedom of others, restrictions are made to meet the demand of fairness in accordance with morality consideration, religion values, security, and public order, as well as needed in a democratic country.