

CHAPTER I

INTRODUCTION

1.1 Background

The Indonesian Government has a clear leverage over social media platforms when it comes to regulating their conduct. After all Indonesia has an internet penetration rate of 73.7%,¹ Indonesian users make up a significant portion of social media users on sites like YouTube, TikTok, Facebook etc. As companies are unlikely to sever a huge consumer market, companies often comply with the Government's regulatory requirements, even if with hesitation. Alternatively, social media platforms have now replaced mainstream media and is now seen as primary sources of news, especially by younger generations. Resultantly, any shift the Government attempts to make to tighten its control on these platforms is met with immediate attention and often criticism.²

In recent years, governments across the world have sought to tighten its regulations on social media platforms once it became clear just how influential social media is in determining the policies of a state.³ Indonesia followed suit, especially after COVID-19 and the subsequent criticism of the Government's

¹ DataReportal, "Digital 2021: Indonesia". <https://datareportal.com/reports/digital-2021-indonesia>, last accessed on 18 September 2022.

² Freedom House, "Freedom on the Net 2021 – Indonesia". <https://freedomhouse.org/country/indonesia/freedom-net/2021>, last accessed on 18 September 2022.

Kontras, "Virtual Police Data Update". <https://kontras.org/2021/04/22/pemutakhiran-data-virtual-police/>, last accessed on 18 September 2022.

³ Jacob Mchangama, Joelle Fiss, "The Digital Berlin Wall: How Germany (Accidentally) Created a Prototype for Global Online Censorship", last accessed on 18 September 2022.

handling of the pandemic. The Government put great focus on preventing and suppressing any false information spread online about COVID-19, the National Police going as far as to issue a directive enabling police to charge individuals with criminal charges if found to be spreading such false information.⁴ In addition to these efforts, as of April 2021, the Government has requested social media platforms to take down 1,094 pieces of content which it deemed as misinformation relating to COVID-19.⁵ Other than COVID-19, the 2019 presidential elections also served as a catalyst for the Government to tighten regulations on social media. In particular the Government ordered Internet Service Providers (“ISP”) to sever access to social media sites like WhatsApp, Facebook, Twitter and Instagram to prevent the spread of misinformation and disinformation (the deliberate dissemination of false information).⁶

But even before COVID-19 and the presidential election, websites were frequently blocked on the basis of Article 40 of Law No.19 of 2016 concerning Electronic Information and transactions (“ITE Law”). This article authorizes the Ministry of Communications and Information Technology (“KOMINFO”) to directly block access to online content or order ISPs to prevent access if the content constitutes “negative content”. However, as to what falls under this

⁴ Media Indonesia, “Polri Terbitkan Aturan Khusus Soal Hoaks dan Penghinaan Presiden”. <https://mediaindonesia.com/politik-dan-hukum/301449/polri-terbitkan-aturan-khusus-soal-hoaks-dan-penghinaan-presiden/>, last accessed on 18 September 2022

⁵ Kementerian Komunikasi dan Informatika Republik Indonesia, “KOMINFO Takedown 1.094 Konten Hoaks Vaksin Covid-19 di Media Sosial”. <https://aptika.kominfo.go.id/2021/04/kominfo-takedown-1-094-konten-hoaks-vaksin-covid-19-di-media-sosial/>, last accessed on 18 September 2022.

⁶ TechCrunch, “Indonesia restricts WhatsApp, Facebook and Instagram usage following deadly riots”. <https://techcrunch.com/2019/05/22/indonesia-restricts-whatsapp-and-instagram/>, last accessed on 18 September 2022.

definition is quite broad and includes pornographic, defamatory, immoral content and content in violation of social norms.⁷

It would be remiss to not highlight the impact of Article 27(3) of the ITE Law on online content regulation as it widened the scope of what amounts to online defamation and is often the basis for holding individuals criminally liable for their online speech. The law encapsulates content published unintentionally and any act which makes the content accessible to others. In addition to the law being criticized for being overly broad, the law is often met with criticism for its disproportionate penalties in comparison to similar offline offenses, penalties under this Article can lead to a four year prison sentence and/or a fine of 750 million rupiahs.⁸

While the amended ITE Law signals the Government's aim to crackdown on regulating online speech, the enactment of Regulation of the Ministry of Communication and Informatics Number 5 of 2020 on Private Electronic System Operators ("MOCI 5/2020") was a big step towards realizing that aim. The Ministerial Regulation governs the conduct of private Electronic System Providers or *Penyelenggara Sistem Elektronik* ("PSE"), this includes social media platforms, ecommerce platforms, communications services as well as search

⁷ Kementerian Komunikasi dan Informatika Republik Indonesia, "Ragam Konten yang Bisa Diadukan Melalui aduankonten.id". <https://www.kominfo.go.id/content/detail/10331/ragam-konten-yang-bisa-diadukan-melalui-aduankontenid/0/videografis>, last accessed on 18 September 2022.

⁸ Human Rights Watch, "Turning Critics Into Criminals: The Human Rights Consequences of Criminal Defamation Law in Indonesia". <https://www.hrw.org/report/2010/05/03/turning-critics-criminals/human-rights-consequences-criminal-defamation-law>, last accessed on 18 September 2022.

engines. The regulation obliges ESPs to register under the law through the Ministry's Online Single Submission system. Through this regulation, the ministry aims to supervise the conduct of ESPs through an integrated system,⁹ the registration requirement also guarantees the requirement for ESPs to provide access to their electronic systems and data if law enforcement requests it.¹⁰ For example, ESPs have four hours in urgent situations or 24 hours to comply with a request from the ministry to remove violative content. Prior to July 2022, it seems the regulation would not be tightly enforced and many companies operated without registration however since then KOMINFO released a statement enforcing the regulation and obliging all PSEs to register themselves within 20 July 2022. As online platforms like Paypal and Steam failed to meet the deadline, these sites had their access temporarily blocked by the Ministry until they registered the company in accordance with the regulation.¹¹

Nonetheless the long-term impact of this registration requirement on the dissemination of online speech remains unprecedented, since even before its enactment, KOMINFO has taken down more than 20,000 pieces of social media content for spreading terrorism and radicalism.¹² In fact, online content regulation

⁹ Kompas, "Tujuan KOMINFO Wajibkan WhatsApp dkk Daftar PSE, Jaga Ruang Digital hingga Wujudkan Keadilan". <https://tekno.kompas.com/read/2022/07/18/14010047/tujuan-kominfo-wajibkan-whatsapp-dkk-daftar-pse-jaga-ruang-digital-hingga?page=all>, last accessed on 18 September 2022.

¹⁰ Article 3(4), MOCI 5/2020.

¹¹ CNBC Indonesia, "KOMINFO Buka Blokir Paypal Hanya 5 Hari, Ini Alasannya". <https://www.cnbcindonesia.com/tech/20220801072130-37-359986/kominfo-buka-blokir-paypal-hanya-5-hari-ini-alasannya>, last accessed on 18 September 2022.

¹² Kementerian Komunikasi dan Informatika Republik Indonesia, "KOMINFO Blokir 20.453 Konten Terorisme Radikalisme di Media Sosial". <https://aptika.kominfo.go.id/2021/04/kominfo-blokir-20-453-konten-terorisme-radikalisme-di-media-sosial/>, last accessed on 18 September 2022.

was not restricted to only legislative means, as seen in how the Government dissolved the Indonesian Telecommunication Regulatory Body (“BRTI”) which was meant to regulate issues regarding online platforms, in favour of appointing the KOMINFO to assume the responsibilities of BRTI in order to ‘streamline bureaucracy’.¹³

The issue of regulating content online closely intertwines with the freedom of expression. The freedom of expression was first regulated under Article 23 of Law No. 39 of 1999 concerning Human Rights (“1999 Human Rights Law”) as a ratification of Article 19 of the Universal Declaration of Human Rights. The right not only includes the freedom to impart one’s own beliefs through electronic media but also to seek and receive information.¹⁴ However, as stated under Article 19 of Law No.12 of 2005 which ratified the International Covenant on Civil and Political Rights, the freedom of expression can be subject to restrictions when it is provided by law and are necessary:

- ”(a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.”

Evidently, this entails that any restriction the Government imposes towards people’s right to express and seek information has to be provided by law and

¹³ VOI, “Through The Presidential Decree, Jokowi Disbanded 10 Non-structural State Agencies And Institutions,”. <https://voi.id/en/berita/21306/lewat-perpres-jokowi-bubarkan-10-badan-dan-lembaga-negara-nonstruktural>, last accessed on 18 September 2022.

¹⁴ Article 19, Law No.12 of 2005 Concerning the Ratification of International Covenant on Civil and Political Rights.

necessary. A requirement that the Jakarta State Administrative Court found was not met when the Government blocked and slowed down internet access in Papua during times of protest and escalating violence in 2019, violence which stemmed from the military's suppression of the independence movement in Papua.¹⁵

Despite this, internet shutdowns are only one of the many methods that the Government can choose to adopt to regulate the internet. In 2021, a "Virtual Police" program was enacted to monitor social media platforms for false news and any content which could violate Article 28(2) of the ITE Law, as it may constitute as inflicting hatred on a discriminatory basis.¹⁶ This program would then send warnings directly to users to remove any content which fall under hate speech, However reports by KontraS, a human rights organization, have revealed that the Virtual Police also targets users who criticize the Government and instead have warned these users to delete content, a far cry from the program's intended purposes alleges KontraS.¹⁷

Moreover, the Government may also request social platforms to take down specific content, this is facilitated by artificial intelligence tools which are programmed to detect content violations and flag such content. A supervising task force monitors the system and reviews the flagged content, before submitting requests to the online platform or ISP to remove or block the content. In any case,

¹⁵ National Commission on Human Rights (Komisi Nasional Hak Asasi Manusia), "Standar norma dan pengaturan hak atas kebebasan berpendapat dan berekspresi", 2020, p. 48.

¹⁶ KOMINFO, "Virtual Police untuk Edukasi Masyarakat dan Beri Peringatan Potensi Tindak Pidana". <https://www.kominfo.go.id/content/detail/32896/virtual-police-untuk-edukasi-masyarakat-dan-beri-peringatan-potensi-tindak-pidana/0/berita>, last accessed on 18 September 2022.

¹⁷ KontraS, "Virtual Police Data Update". <https://kontras.org/2021/04/22/pemutakhiran-data-virtual-police/>, last accessed on 18 September 2022.

the state also encourages a culture of self-censorship by showing that criticisms of the Government online can constitute violative content and result in doxing and other real-life repercussions.¹⁸

Accordingly, this leads to concerns on whether the Government's online content regulation is in violation of the freedom of expression protected under international law. One such foreign law which has been met with similar concerns was the German Network Enforcement Law ("NetzDG") which came into effect on 1 October 2017. The law obliges online platforms with more than 2 million users to remove content inconsistent with local laws and regulates the procedure undertaken when requesting social networks to take down illegal content. The law also imposes substantial penalties if companies do not comply within certain time frames.¹⁹ Thus, the law shifts the responsibility to regulate online content to online platforms rather than the state, leading to a co-regulatory private and public partnership regime. In response to these concerns, Germany has stated that it enacted the law after the increasing spread of hate crime online since 2015 and voluntary efforts by platform operators have not led to sufficient improvements. In addition, Germany has also amended the draft law before formally enacting it to minimize the risk of 'over blocking' content and a potential infringement of the freedom of speech.²⁰

¹⁸ Freedom House, "Freedom on the Net 2021 – Indonesia". <https://freedomhouse.org/country/indonesia/freedom-net/2021>, last accessed on 18 September 2022.

¹⁹ DW, "Germany implements new internet hate speech crackdown". <https://www.dw.com/en/germany-implements-new-internet-hate-speech-crackdown/a-41991590>, last accessed on 18 September 2022.

²⁰ Federal Government of Germany, "Answers to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in regard to the Act to Improve

In contrast, while laws in Indonesia and Germany attempt to shift the responsibility of regulating online content to ISPs and social platforms, the American Government protects online intermediaries from being held liable for content published on their platforms. Section 230, Title 47 of the United States Code concerning the Protection for private blocking and screening of offensive material provides that: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”. The law was enacted with the consideration that it is infeasible to expect online platforms to prevent violative content on their site, and that online platforms should be a platform for controversial or political speech without censorship.²¹ Pursuant its broad constitutional protections for free speech, the United States Supreme Court blocked a law in Texas which would punish online platforms for removing political speech. The proposed law would enable users to sue social platforms if they allege they have been censored due to their personal viewpoint and allow the Texas attorney general to enforce violations towards the social platforms.²²

Ultimately, although disparities in how states regulate online content are a given due to the history of a state and its own cultural, economic and political aims. Human rights are universally protected and any exception to it cannot be

Enforcement of the Law in Social Networks (Network Enforcement Act)”, 1 June 2017. <https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/Legislation/GermanyReply9Aug2017.pdf>, last accessed

²¹ Electronic Frontier Foundation, “Section 230 of the Communications Decency Act”. <https://www.eff.org/issues/cda230>, last accessed on 18 September 2022.

²² NPR, “Supreme Court blocks Texas social media law from taking effect”. <https://www.npr.org/2022/05/31/1102289944/supreme-court-blocks-texas-social-media-law-from-taking-effect>, last accessed on 18 September 2022.

made based on such basis. In any event, exceptions to the freedom of speech must be provided by law and also necessary to protect a legitimate interest.

1.2 Formulation of Issues

1. What are the differences between Indonesia's regulation of online content and the regulatory regimes of the United States, Germany and International Human Rights Law?

2. To what extent does the content regulation in Indonesia comply with international human rights standards?

1.3 Research Purpose

1. To compare the different regulatory regimes of content moderation under Indonesia, the United States, Germany and International Human Rights Law.

2. To analyze the extent Indonesia's content regulation complies with international human rights standards.

1.4 Research Benefit

To provide an insight on whether the Indonesian Government's current enforcement of content moderation laws is in compliance with human rights and how Indonesia could benefit from the practice of other states.

In Chapter 1 of my thesis, I will introduce the context of the issue, the developments which led to the regulation of online speech, the correlation with

human rights and the preliminary differences between the legislation of different states.

Chapter 2 consists of a literature review on freedom of speech and regulating online speech as well as the relevant theoretical frameworks relating to these topics.

Chapter 3 will explain the research methodology used for this thesis, the sources of data and the approaches adopted.

Chapter 4 will address the two Issues. The first part will concern how different states regulate online speech and whether Indonesia can adopt aspects of it to be in compliance with its human rights obligations. Whereas the second part will concern the prevailing laws and regulations relating to online speech in Indonesia.

Lastly, Chapter 5 contains the conclusions for this thesis which will summarize the findings found overall and also contains the recommendations suggested to solve the issues formulated.