# INDONESIA ABUSE OF DEFAMATION CLAUSE IN ARTICLE 27 SECTION (3) OF ELECTRONIC INFORMATION AND TRANSACTION LAW

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**ABSTRACT**

*In August 2020, Jerinx SID – a musician from Bali – was arrested by Indonesian Police over allegations of hate speech and defamation towards Ikatan Dokter Indonesia (IDI). He was charged with Law no. 19 of 2016 on Electronic Information and Transaction and is an amendment from the previous Law no. 11 of 2008 on EIT. Jerinx SID is not the only victim of this law, based on data from the Indonesian Supreme Court, in 2018, there were 292 decisions on EIT special criminal cases, where the most popular cases were crimes related to defamation who were prosecuted by the authorities with the basis of the aforementioned EIT Law. Hence many scholars, NGOs, activists, or even the general public consider that the law has been one of the controversial legislation in Indonesia. SAFEnet has stated that authorities often use the law's articles as a 'catch-all'. An example of the article within the law is Art. 27 section (3) on defamation. The utilization of Art. 27 section (3) of EIT Law has been criticized as a censorship tool to suppress citizens' freedom of expression, which is guaranteed under Art. 28E section (3) of the 1945 Constitution. The method used for this research is normative legal research with a literature study of secondary data, which includes primary and secondary legal sources. Henceforth, this study aims to identify and analyze the legal implication of EIT Law's 'catch-all' article, especially Art. 27 section (3) on defamation, since the article has quite a profound history of its use in several case laws. This study is expected to highlight improper use of Art. 27 section (3) of EIT Law 2016, which suppresses freedom of expression. This study is also expected to contribute to several recommendations of Art. 27 section (3) interpretation limitation to negate its use as a 'catch-all' article.*

Key words: EIT Law, ICCPR, Defamation, Freedom of Expression, 'Catch-all' Article.

## INTRODUCTION

Freedom of expression is essential and also a fundamental aspect that all human beings share and obtain as their common rights. As stipulated in the United Nations Universal Declaration of Human Rights (UDHR), Art. 19;

> *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."*

This article guarantees every human being the enjoyment of freedom of expression. The Indonesian government and people also believe in such cause, hence why in Indonesia, the enjoyment for the people to express their opinions and speech is guaranteed and protected under the Constitution of 1945, Chapter X Art. 28F stipulates that;

> *"Every person shall have the right to communicate and to obtain information for the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process, and convey information by employing all available types of channels."*

In any case, it has gone to the consideration of many people that even the right to freedom of expression should be the fundamental right that should be fulfilled. Without a doubt, limitation of expression is often conducted in numerous countries, one of which is in Indonesia. This could be seen in the arrest of various citizens of Indonesia because of their statements online.

Cases of arrests such as Jerinx SID, Jarink Hanyuk, and Muhammad Asrul, based on Art. 27 section (2) of EIT Law on defamation, have caused an outcry from the Indonesian public to raise concerns on freedom of expression in the country. This article aims to look at how Article 27 (3) is implemented in Indonesia and understand the legal implications of Art 27 (3) to the freedom of expression in Indonesia.

After thorough research regarding freedom of expression in the EIT Law in Indonesia, some scholars or researchers or authors have conducted similar research topics. However, our issue mainly focuses on the implications between case to case basis on the Indonesian EIT law Art. 27 section (3) on defamation and its abusive impact on freedom of expression in Indonesia.

For comparison, there will be two examples provided. First, *The Role of the Law on Electronic Information and Transactions in Overcoming Challenges of Democracy in Indonesia*. The paper by Ahmad Tholabi Kharlie, et al., elaborates on the EIT Law role towards Indonesian democracy. He emphasized the EIT Law as a whole is a form of necessary restriction towards freedom of expression and opinion in the name of nomocracy and the rule of law.[1] The second example is *Penegakan Hukum Terhadap Tindak Pidana Pencemaran Nama Baik Menurut Pasal 27 ayat (3) Undang-Undang Nomor 11 Tahun 2008 Tentang*

[1] Kharlie, A. T., Fathudin, & Helmi, M. I. (2019). The role of the law on electronic information and transactions in overcoming challenges of democracy in Indonesia. *International Journal of Advanced Science and Technology*. p.1183.

*Informasi dan Transaksi Elektronik* by Bambang Sutrisno, et al. The paper in question focuses on the problems of EIT Law implementation, it elaborates on the perpetrators' modus operandi and factors that hinders the execution of EIT Law.[2]

By doing this research, the authors hope that this research would be beneficial for the Government of Indonesia, the literature community, the development of law, and, last but not least, the readers. For Indonesia's government, this research paper is useful as evidence that there are still legal implications on the implementation of EIT Law, which can develop more insights and knowledge regarding the issue. For the community of researchers and authors alike, this research paper would be beneficial to exponentially advance the knowledge on freedom of expression and the implications of the implementation of EIT Law here in Indonesia. For the development of laws here in Indonesia, this research paper is hoped to be one of the references for the possibility of a future review of the law so that the implications of the EIT are desired to be eradicated. Finally, for the readers, this research paper would be beneficial as it is useful for the readers to gain more in-depth knowledge regarding the current situation of the implementation and the implications of EIT Law in Indonesia.

## RESEARCH QUESTION

1. How does Art. 27 section (3) EIT Law implemented in Indonesia?
2. How the implementation of Art. 27 section (3) EIT Law in Indonesia complied with Art. 19 ICCPR?

## LITERATURE REVIEW

Several defining factors serve as a ground basis for literature review in this research; The EIT Law, Freedom of Expression, Censorship, Defamation, and the nature of the article of the law itself that contains the "catch-all" element. The first literature review is the Indonesian Electronic Information and Technology Act of 2016 (EIT Law), which is a government-issued state law that regulates the use and benefits of electronic information such as video sharing, social networking/social media, *et cetera*, which aims to be utilized as a tool to smarten the people, develop the national trade and economy, increase the efficiency and effectiveness of public service, give opportunities for people to gain knowledge and information, and providing security, justice and legal certainty for the users of electronic information.[3]

Second, Freedom of Expression comes to play, which is the right of every person since birth that has been guaranteed by the constitution and the state. Therefore, as a rule of law and democracy, the Republic of Indonesia is authorized to organize and protect the implementation. Furthermore, Freedom of Expression of the significant pressure from any party as well freedom of thought is regulated in changes to the four Constitution Laws of the Republic of Indonesia Art. 28 E paragraph (3) that every person shall have the right to the freedom to associate, to assemble and to express opinions.

The third literature review for this research is censorship, which often occurs in modern society to suppress information deemed subversive. It is for the protection of the greater good of the people.[4] Censorship in itself can control what can or cannot be distributed, while assuming that all individuals of state require protection from such threatening/offensive material.[5] The nature of censorship is essentially an involuntary act, which means that the action of censoring contents or materials is done by one party without the other subject having the right to or the ability to communicate or have any disclosure regarding the censorship.[6] The majority of censorship is often symbolic censorship, but it does not rule out the possibility of censorship being imposed as a means for moral reasons or for protecting some parties interests (e.g., political, religious reasons).[7] Two types of an entity can do censorship; by the government through laws/bills/legislations, and by private sectors – which means the private companies themselves who provide the platform are also the ones who perpetrate the censorship (e.g., Instagram's Community Guidelines against pornographic content or contents that deemed to be sensitive to be viewed).[8]

Next comes defamation. According to Edwin Bingireki, Defamation is a publication by a person about another person who lowered the other person standing in society.[9] A more comprehensive definition provided by Silvano Domenico Orsi in 2011 stated that defamation is a communicated statement with a claim, be it expressly stated, implied, or implied to be factual, that results in an individual, business, government, group, or even a nation to be imaged negatively.[10] However, in Indonesia, the context of defamation is best described by Soesilo, that defamation is an attack towards a person's honor and reputation, be it a legal entity or human, that is not related to sexual affairs.[11] The last critical defining factor that serves as a literature review of this research is the nature of the catch-all articles (pasal karet/rubber article). "Catch-all" articles is not a legal term but a media term in narrating an article, which is generally multiple interpretations so that it is used arbitrarily by both the public and law enforcers.

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2 Sutrisno, B., & Paksa, F. B. B. (2019). Penegakan Hukum terhadap Tindak Pidana Pencemaran Nama Baik menurut Pasal 27 Ayat (3) Undang-Undang Nomor 11 TAHUN 2008 tentang Informasi dan Transaksi Elektronik (UU ITE). Mizan, *Jurnal Ilmu Hukum*. https://DOI.org/10.32503/mizan.v8i1.495.

3 Indonesian Electronic Information and Technology ("EIT") act of 2016 articles 3 and 4.

4 Anastaplo, G. (2019, November 08). Censorship. Retrieved September 01, 2020, from https://www.britannica.com/topic/censorship.

5 Marx, G. (2001). Censorship and Secrecy: Legal Perspectives. *International Encyclopedia of the Social & Behavioral Sciences*, 1581-1588. DOI:10.1016/b0-08-043076-7/02840-0.

6 *Ibid*.

7 *Ibid*.

8 Hudson, D. L., Jr. (2019, April 01). Free speech or censorship? Social media litigation is a hot legal battleground. Retrieved September 01, 2020, from https://www.abajournal.com/magazine/article/social-clashes-digital-free-speech

9 Magalla, A. (2018). Defamation What a Term, a True Definition of the Term. *SSRN Electronic Journal*. https://DOI.org/10.2139/ssrn.3292032 , p.8

10 *Ibid*. p.8.

11 Soesilo, R. (1991). *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*. Politeia. https://perpustakaan.setneg.go.id/index.php?p=fstream&fid=763&bid=15046&fname=KITAB UU HUKUM PIDANA.pdf. p.194

Moreover, In the context of the catch-all article on Art. 27 section (3) of the EIT Law, Sugiharto from S stated that Art. 27 section 3 in the EIT Law is considered as a catch-all article, that is, it is considered to be the ultimate 'tool' to ensnare a legal case related to EIT.[12]

## METHOD OF RESEARCH

This research is normative legal research based on library research to obtain secondary data in the legal field.[13] This research also is a descriptive study. Descriptive in nature, because this research aims to obtain a complete picture (description) of the legal conditions that prevail in certain places and at certain times that occur in society.[14]
This study uses a case approach and conceptual approach to obtain information from various aspects regarding the issues discussed.

The case approach analyzes cases related to the issues, while the conceptual approach is completed by looking at the law's doctrines.[15] The case study in this research is about the legal aspects of Art. 27 section (3) of the EIT Law. This type of research is literature research conducted to obtain data related to the object of research. In central research, data collected is secondary data obtained through library materials such as laws and regulations such as EIT Law and various court decisions, reputable books, journals, and documents that explain the object of research. Sources of information from library materials consist of primary legal materials and secondary legal materials.

## ANALYSIS ON IMPLEMENTATION OF ARTICLE 27 SECTION (3) EIT LAW IN INDONESIA

### 1. Elements of Art. 27 Section (3)

To understand the implementation of Art. 27 section (3) of EIT Law in Indonesia. First, it is necessary to analyze the article from a legal perspective.

> *"Any person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Documents with contents of affronts and/or defamation."*

The legal perspective analysis will break down Art. 27 section (3) of EIT Law. The first element is '*Any person*' this element implies that the law's subject is for every person in Indonesia, including legal entities, regardless of their nationality.[16] The second element '*who knowingly and without authority*', which means the subject of law acts deliberately without possessing the right to do the act, the word '*dengan sengaja*' or 'deliberately' implies the subject of law has manifested the intent to do the act (*mens rea)*.[17] The third element '*distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Documents'* means the subject of law conducts either distribution, transmission, and makes something accessible digitally.[18]

The keywords in this element pursuant to Art. 27 section (1) elucidation of EIT Law are '*distributes'* means sending electronic information and/or documents to multiple parties, '*transmits'* means sending the electronic information and/or electronic documents to a single party,[19] and '*causes to be accessible'* means the action of distribution and/or transmission has caused the electronic document and/or electronic information to be known by another party or the public.[20]

The fourth element is '*with contents of affront and/or defamation*'. Pursuant to EIT Law elucidation for Art. 27 section (3), the words '*affront*' and '*defamation*' have the same intent and meaning as such words in the Indonesian Penal Code. However, it is important to note that both the words *'affront'* and '*defamation*' fell into the same category, which is **defamation**, and regulated from Art. 310 section (1) of the Indonesian Penal Code. For the sake of clarity, both '*affront*' and *'defamation*' terms hereafter will be referred to as 'defamation'. According to Soesilo, defamation means an attack towards a person's honor and reputation not related to sexual affairs.[21]

Pursuant to the elucidation of Art. 27 section (3) EIT Law, the elements of defamation follow the cumulative element stated in Art. 310(1) of the Indonesian Criminal Code.[22] First, there must be a deliberate action. Second, it attacks a person's honor or reputation. Third, there is an accusation. And fourth, the accusation is made public. Fifth, the action is not for self-defense nor the public good.

Therefore, to indict someone under Art. 27 section (3) of EIT Law, the act must be done by a person be it foreign or Indonesian including legal entity, without any right to do the act nor for self-defense or public good, sending documents or information to a single party or multiple parties, with the intent for the contents damaging towards a person's honor and reputation to be publicized.

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12 Sugiharto, B. (2016, December 28). "Pasal Karet" UU ITE Jadi Pamungkas Jeratan Hukum. Retrieved September 1, 2020, from https://www.cnnindonesia.com/teknologi/20161228182458-185-182719/pasal-karet-uu-ite-jadi-pamungkas-jeratan-hukum.
13 Soekanto, S. (1986). *Pengantar Penelitian Hukum*. Jakarta, Indonesia: Universitas Indonesia Press. p. 50.
14 Abdulkadir, M. (2004). *Hukum dan Penelitian Hukum*. Bandung, Indonesia: Citra Aditya Bandung. p. 50.
15 *Ibid*. p. 94-95.
16 Chandra, Septa. (2013). Perumusan Ketentuan Pidana dalam Peraturan Perundang-Undangan di Indonesia. *Jurnal Hukum PRIORIS, 3(3),* p. 123.
17 *Ibid*. p. 125.
18 Molina, K., Nugraha, P., Adzkia, F., & Desmonda, A. (2016). Indonesian Electronic Information and Transactions Law Amended. https://www.whitecase.com/publications/alert/indonesian-electronic-information-and-transactions-law-amended.
19 *Ibid.*
20 *Ibid.*
21 *Op.cit.* Soesilo, R. p.194.
22 *Ibid.*

**2. Criminal Liability of Perpetrators of Criminal Acts under Art. 27 section (3) of EIT Law**

The brief definition of criminal liability, as proposed by Simons, is a psychic state. More comprehensively, according to Simons, the basis of culpability in criminal law is a particular psychic condition within the person committing the criminal act and the existence of a relationship between the mental state and the deed that has been done in such a way that the person can be accused for committing such deed.[23] Hence, it can be deduced that the core of culpability in criminal law, as proposed by Simons are:

a. a person's psychic or mental state; and
b. The connection between the psychological state and the actions performed

Therefore, criminal liability is the culpability of the person towards the committing of the criminal act. While the essential existence of a criminal offense is based on the principle of legality, the theoretical basis to punish the perpetrator is called the principle of error. Criminal liability is essentially a mechanism established by criminal law to cope with violations of 'agreement to reject' a particular act.

In the early development of criminal law theory, criminal liability can only be imposed on humans as the subject of natural law. A non-human legal entity cannot take legal action because they are considered incapable of doing so. Thinkers of the past maintain this school of thought. However, due to the development of crimes in society, new theories and ideas have emerged to broaden criminal liability scope to include legal entities. These crimes that present urgency to the development of criminal law theory are often crimes related to the economy carried out by individuals and corporations.[24] It concerns the EIT Law, under Art. 1 point 21 of EIT Law, criminal liability lies in any person who is a subject of law, including a person, individuals, whether foreign nationals, as well as legal entities. Therefore, any immoral actor who uses electronics and other media to conduct actions against the law can be held accountable.[25] Hence, the EIT Law recognizes a broader scope of criminal liability, including individuals and legal entities.

In addition to the scope of the criminal law subject, this chapter will also explain the types of offense to clarify each criminal liability element respectively. At this point, it should be underlined that regarding this topic, many parties consider Art. 27 section (3) of the EIT Law to be an ordinary offense (*gewone delic*). This understanding is misleading due to two factors: the essence of the offense of insult under Art. 27 section (3) and the historical perspective of the offense.

Firstly, the crimes of insult and defamation essentially attack someone's honor or reputation, resulting in the honor or reputation to be tainted or damaged. In determining whether the act of insult or defamation has been committed, content and context are essential factors that are taken into consideration. Understanding the context means knowing the state of mind of the victim and the perpetrator, the intent and purpose of the perpetrator in disseminating information, and the interests involved in such dissemination. In this process, the opinion of experts, such as linguists, psychologists, and communication experts may be needed.

However, an intrinsically defiled or damaged reputation can only be assessed by the person in question. This means under the EIT Law, the victim can subjectively judge the content or parts of the Information or Electronic Documents which allegedly taint their reputation to determine whether or not defamation has been committed. This is also an implication of The Constitution's protections for a person's dignity as a human right. Overall, legal protection is given solely to the victim of defamation or insult. Meanwhile, context simply plays a role in providing objective value to content.

Secondly, the provisions of Art. 27 section (3) of the EIT Law historically refers to the provision of defamation under the Criminal Code ("KUHP"), particularly Art. 310 of the Criminal Code and Art. 311 of the Criminal Code. In the Criminal Code, defamation is strictly regulated as crimes on complaint (*klacht delic*).[26] Whereas under the EIT Law, before its amendment, it is unclear whether Art. 27 section (3) is a 'crimes on complaint' or merely an offense. Be that as it may, insult or defamation under the pre-amendment EIT Law has been declared a 'crimes on complaint' by the Constitutional Court under Decision no. 50/ PUU-VI/2008. In consideration of the Constitutional Court, Item [3.17.1] the Court explains:

> *"Whereas apart from the Court's considerations described in the previous paragraph, the validity and interpretation of Art. 27 section (3) of the EIT Law cannot be separated from the main legal norms in Art. 310 and Art. 311 of the Criminal Code as a genus delict that requires a complaint (klacht) to be able to be prosecuted, must also be treated to acts prohibited in Art. 27 section (3) of the EIT Law, so that the status quo must also be interpreted as an offense requiring a complaint (klacht) to be prosecuted before the Court".*

From the explanations above, it tends to be presumed that the action, as stated in Art. 27 section (3) EIT Law is crime on complaint. Conversely, after the amendment, the provisions on insult or defamation in Law no. 19 of 2016 (the amended EIT Law) constitute crime on complaint.[27] This means to be convicted by this article, the victim of the defamation must complain to the official authorized to receive the complaint, namely the Police investigator or the Civil Servant Investigator ("PPNS ITE").

**3. Legal Implications of Article 27 Section (3) EIT Law**

To clarify the "catch-all" article element from Art. 27 Section (3) EIT Law, the author will analyze how that article is applied in court decisions. Numerous cases use Art. 27 section (3) on the defamation of EIT Law as a legal basis here in Indonesia.

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[23] Hiariej, E. O. S. (2016). Prinsip-prinsip hukum pidana. Yogyakarta, Indonesia: Cahaya Atma Pustaka. p. 156.
[24] Ningrum, H. W. (2018). Sejarah dan Perkembangan Pertanggungjawaban Korporasi. Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi, 1(2), 139–155. https://DOI.org/10.24090/volksgeist.v1i2.1633.
[25] *Vide,* Art. 1 point 21 EIT Law.
[26] Crime on complaint is an offense that requires a complaint to process the case further. See on Hiariej, E. O. S. (2016). Prinsip-prinsip hukum pidana. Yogyakarta, Indonesia: Cahaya Atma Pustaka. p. 145.
[27] *Vide,* Art. 310 and Art. 311 of the Criminal Code.

One of the first and most prolific cases is Prita Mulyasari v. Omni International Hospital, or what the society often refers to as "*Coin for Prita"*.

The Prita and Omni Hospital case originated when Prita had an illness and was falsely diagnosed by the Hospital with dengue fever.[28] She later wanted to file a complaint via e-mail to the Hospital and she also forwarded the same e-mail to her friends. After that, the e-mail spread like wildfire on numerous social media platforms, text messaging apps, etc.[29] She was then charged with EIT Law Art. 27 section (3) on defamation by Omni International Hospital. The Tangerang District Court then ruled her guilty and ordered her to pay damages to Omni International Hospital of Rp 204 million.[30] Through the verdict's news, the people helped her by establishing a fundraising called *"Coin for Prita"*, and successfully racked up Rp. 825 million.

The Prita Mulyasari v. Omni International Hospital case was essentially a controversial and monumental case regarding the use of the EIT Law Art. 27 section (3) on defamation, as it contains various legal implications due to the nature of the "catch-all" article it possesses. As aforementioned regarding the elements of Art. 27 section (3) on defamation, the element that is 'problematic' within this case is the fourth element – '*with contents of affront and/or defamation*', in which the action of Prita Mulyasari – by sharing her complaint e-mail to her friends and families – implies the effort of limiting freedom of expression and/or opinion.[31] This can be seen from the e-mail sent by Prita Mulyasari titled *"Penipuan Omni International Hospital Alam Sutera Tangerang"* ("Omni International Hospital Alam Sutera Tangerang Fraud"),[32] which has the original purpose of spreading awareness and of criticizing the Omni International Hospital as a form of public monitoring in the health sector with the hope that the Omni International Hospital can improve the quality of its services in the future,[33] was at the issue of being accused as containing defamation by Tangerang District Court.

This action by the court to rule Prita as guilty of "*knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Documents with contents of affronts and/or defamation."* sure causes legal implications in which the elements of Art. 27 section (3) and the use of it, maybe bent towards the need of a party/institution/individual/group. Essentially, the legal implication based on this case is as a censorship weapon against Indonesia's citizens.

Therefore, there are fears that criticism could be prosecuted under EIT Law. However, thankfully a judicial review of Prita's case by the Supreme Court nullified the decision. The reason for nullification is because after reexamination by the judges, Prita is proven not to have an intention (*mens rea*) to defame Omni International Hospital.[34]

Another case example with the same type of legal implication can also be found in Muhammad Reza v. PT Takabeya Perkasa Grup. In this case, Muhammad Reza – or better known as Epong Reza, was a journalist who investigated the regent bother of Bireuen regarding the use of subsidized petrol for private companies benefit,[35] and released an article titled *"Merasa Kebal Hukum Adik Bupati Bireuen Diduga Terus Gunakan Minyak Subsidi Untuk Perusahaan Raksasa" ("Feeling immune from the law, the Bireuen Regent's younger brother is suspected of continuing to use subsidized oil for giant companies").*[36] From that on, one of the companies that he wrote about, PT. Takabeya Perkasa Group, reported his article from his Facebook to the authorities on December 21st 2018.[37]

With a similar result to that of the Prita Mulyasari v. Omni International Hospital case, the Muhammad Reza v. PT. Takabeya Perkasa Group, also shares the same problematic element implementing Art. 27 section (3) on defamation – element number four; '*with contents of affront and/or defamation*'. The use of its "catch-all" nature of this article was prominent because the Regent brother should have submitted *'Hak Pengajuan Mekanisme Sengketa Pers'* ('Rights to Submit Press Dispute Mechanisms') beforehand, and to not use the EIT Law.[38] Unfortunately, during the trials, the judge of the court ignores the use of Law no. 40 of 1999 on Press, which could essentially give protection to Epong Reza, as he is a journalist and protected under such law. This was done on the judgment that if Epong Reza published the news on electronic mass media (e.g., online newspapers), then he would have a 'professional' capacity to cover and write such news, and hence he would be protected by the Press act.[39] However, in this case, Epong Reza posted his news from MEDIAREALITAS.COM also to his personal Facebook page. Therefore the judge ruled that it is a 'personal' capacity which means he covers the story not as a journalist but as a person. Hence he is not protected by the Press law.[40] This gives rise to numerous legal implications, one of which is to be used as a tool for silencing journalists or any individuals or entities from reporting or gathering information/data that is deemed to might have repercussions from the investigated party.

Not just from those two cases, but other criminal cases/or criminalization with the same conclusion often occur in Indonesia. This can be seen from the data gathered from the SAFEnet Annual Report 2018 from the Supreme Court of Indonesia,

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28 Supreme Court of Republic Indonesia Decision Number 822K/Pid.Sus/2010, p. 12.

29 *Ibid*.

30 Shubert, A. (2009, December 22). Indonesian court cases spawns social movements. Retrieved September 07, 2020, from http://edition.cnn.com/2009/WORLD/asiapcf/12/22/indonesia.prita/index.html

31 Putusan PK Prita Mulyasari: Catatan Bersejarah Kehidupan Kebebasan Berekspresi di Indonesia. (2017, June 05). Retrieved September 05, 2020, from https://icjr.or.id/putusan-pk-prita-mulyasari-catatan-bersejarah-kehidupan-kebebasan-berekspresi-di-indonesia/

32 Wiryawan, S. M., S.H., Anggara, S.H., Wagiman, W., S.H., Abidin, Z., S.H., & Eddyono, S. W., S.H. (2009, October). "Pidana Penghinaan adalah Pembatasan Kemerdekaan Berpendapat yang Inkonstitusional". Retrieved September 06, 2020, from http://lama.elsam.or.id/downloads/1362992736_amicus_curiae_prita.pdf

33 Supreme Court of Republic Indonesia Decision Number 822K/Pid.Sus/2010, p. 32.

34 Supreme Court of Republic Indonesia Decision Number 225 PK/PID.SUS/2011, p. 39.

35 According to President Regulation no. 191 of 2014, subsidized petrol such as *Premium* or *B30 Biosolar* is targeted for select groups of individuals or entities. (e.g., small businesses, public transportation, etc.). See on https://pertamina.com/id/konsumen-yang-berhak-menggunakan-biosolar-b30-subsidi

36 Abaikan UU Pers, Wartawan Kena Pidana. (n.d.). Retrieved September 06, 2020, from https://www.law-justice.co/artikel/61821/abaikan-uu-pers-wartawan-kena-pidana/

37 *Ibid*.

38 Law no. 40 of 1999 on Press, Art. 4 section (4).

39 Supreme Court of Republic Indonesia Decision Number 42/Pid.Sus/2019/PN Bir, p. 10.

40 *Ibid*, p. 17-18.

it is known that in 2018 alone, 149 criminal cases went to the court based on defamation.[41] Proves the nature of the "catch-all" element of Art. 27 section (3) on defamation is still acutely and widely used as means of censorship tool or limitation of freedom of expression and expression, it also proves the existence of the abuse on such article, to bend interpretations and the "catch-all" element of the article for the benefit of a party/individual/entity, in effort to silence critics on specificc stories that are deemed to harm on the other party.

**ANALYSIS ON IMPLEMENTATION OF ARTICLE 27 SECTION (3) EIT LAW COMPLIANCE WITH ARTICLE 19 OF ICCPR**

The implementation of Article 27 section (3) of EIT Law reap a lot of split reactions; whether it is arbitrary, whether the use is justified, but most importantly, whether the implementation does follow international standards like those outlined in Article 19 of International Covenant on Civil and Political Rights (ICCPR) which guarantees the people's right to have an opinion and to express information without coercion or interference that may limit the freedom.

Notwithstanding, freedom of expression is not an outright right and can be restricted where it is fundamental and done proportionately. Under the ICCPR, the opportunity of articulation must be limited by law. It is vital to regard the rights of reputations of others, the protection of national security, or the protection of public order[42], or of public morals[43].[44] Because of those parameters, defamation and hate speech laws can be legitimate as securing the rights of reputations of others, insofar as they are not overbroad. However, several rights guaranteed under ICCPR are allowed to derogate freedom of expression. Freedom of expression must not encroach:

a. Freedom from discrimination (Article 2 of the ICCPR)
b. Freedom from cruel, inhuman or degrading treatment (Article 7 of the ICCPR and Article 37(a) of the CRC)
c. Freedom from arbitrary interference with home, family, correspondence or reputation privacy (Article 17 of the ICCPR).
d. The right of children to special protection (Article 24 of the ICCPR and Article 3 of the CRC)

Regardless of whether specific limitations on the opportunity of articulation that are intended to ensure these rights are reasonable will rely upon more explicit thought of the limitations concerned and the conditions.

Henceforth, The Human Rights Committee has clarified its view that the prerequisite under article 19 section (3) that a measure restricting freedom of expression be 'necessary' forces a significant weight of justification on government. It has expressed that this compares to a prerequisite that any 'restrictive measures must conform to the principle of proportionality':

> *"They must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected ...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law. The principle of proportionality must also take account of the form of expression at issue and the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain."*[45]

Further Said:

> *"When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.*"[46]

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41 Juniarto, D. (2018). Jalan Terjal Memperjuangkan Hak-hak Digital: Laporan Tahunan SAFENet 2018. Retrieved September 07, 2020, from https://safenet.or.id/wp-content/uploads/2019/06/Laporan-Tahunan-SAFEnet-2018.pdf, p.15

42 Article 19 section (3) of ICCPR permits restrictions aimed at securing public order. The Commission has noted that "Is wider than the concept of 'public order' in a sense usually understood in Anglo-Australian law. It reaches out to the total of rules which guarantee the working of society or the arrangement of major standards on which society is established. It likens it to the 'police power' in United States law, allowing guidelines in light of a legitimate concern for authentic public purposes. This force must itself, anyway be practiced in a way predictable with fundamental human rights.." The limitation on the promotion of unlawful activity would appear to be admissible under this heading. The Human Rights Committee has considered this point specifically about counter-terrorism measures such as offenses of "encouraging", "praising" or "justifying" terrorism. See on the Human Rights Committee, General Comment, No. 34, note 4, para 46.

43 Respect for "public morals" is an admissible justification for restricting the right to freedom of expression, subject to compliance with the conditions provided in 19(3) of the ICCPR. In its *General Comment No. 34*, the Human Rights Committee stated: "The Committee observed in general comment No. 22, that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition". Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination. As noted earlier, restrictions on this ground are also required to be sufficiently precise to comply with the requirement that restrictions be 'provided by law'. See on the Human Rights Committee, *General Comment No. 34*, note 4, para 32.

44 *Vide*, Art. 19 section (3) ICCPR "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are 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, or public health or morals."

45 *Op.Cit.* Human Rights Committee, para 34.

46 *Ibid.* Para. 35.

Finally, freedom of expression assumes a significant function in maintaining other human rights. Accountability also Transparency for human rights abuses is enhanced by freedom of expression, making it an essential precondition to guaranteeing the proper protection of rights.[47]

Suppose the implementation of article 27 section (3) of EIT Law has met Article 19 of the ICCPR threshold. In that case, it is best to consider certain actions that the government may or may not have done after implementing such a law. The action aforementioned is whether the government, in imposing article 27 section (3) of EIT Law on defamation, fulfill the criteria for a state to *"invoke a legitimate ground for restriction of freedom expression."* which have the elements of threat, and its necessity and proportionality of imposing such law. For example, this can be seen in previous cases in the Prita Mulyasari v. Omni International Hospital case or Muhammad Reza v. PT. Takabeya Perkasa Group, in which both cases might entail a reason for the government to impose such ruling on defamation upon them, but do not fulfill the necessity or proportionality of such a clause's imposition.

Conclusively, the implementation of article 27 section (3) of EIT law is important as a means of protection from defamation. However, the threshold must be clear, as Indonesia currently has no limitation or criteria for what constitutes defamation to render the clause's application.

## CONCLUSION

Based on the elements of Art. 27 section (3) of EIT Law, there are thresholds to be met before a person could be convicted under the article. The threshold in which defamation must be levied with intent to attack a person's honor or reputation, that the perpetrator did not do so in the name of self-defense or public good, and that the article fell under the scope of crimes on complaint after constitutional review and amendment. However, in practice, the legal implication of Art. 27 section (3) of EIT Law is used in an abusive manner, which results in problems related to freedom of expression, as shown in the examples of Prita Mulyasari and Epong Reza, among other cases. This does not mean freedom of expression must be unrestricted. The limitations related to freedom of expression in the ICCPR can indeed be regulated by law which in this case, the Indonesian government can foster with a note also that limitation must be necessary for respect of the rights or reputations of others, for the protection of national security, public order, or public health or morals. However, the absence of more rigid rules regarding this matter regarding these rights is then a crucial article that is often misused.

Where critics and press journalism could be prosecuted on the grounds of the article in question. To provide a light of hope for further improvements to overcome such abuse and persecutions, the authors recommend several actions. Firstly, for the Government of Indonesia, the authors recommend the government look into and revise the regulation, alongside the legislators, to neutralize the "catch-all" nature of Article 27 section (3) on defamation as well as other regulation that has the same nature. Secondly, the government is recommended to supervise future court proceedings so that the use of the "catch-all" articles no longer occurs, and it is also recommended for the government to be transparent if such an event of persecution under the "catch-all" article does happen. Thirdly, for the legislators of the law, the authors recommend that the legislators, alongside researchers and government, to look into the existing cases and the regulation and revise the EIT act so that the nature of the "catch-all" elements of Article 27 section (3) on defamation cease to exist, along with other articles that has the same "catch-all" nature. Fourthly last, but certainly not the least, for the citizens of Indonesia. It is recommended for Indonesia's citizens to share, cover, write any story or gather information/data as they would. However, please keep in mind that the citizens might still have to take certain precautions or extra steps while waiting for the rules to change so that there would not be any sensitive material/content posted in the electronic media.

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