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by Laksanto Utomo

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Criminalizing the Freedom of Expression by State during COVID-19 Pandemic in Indonesia

Laksanto Utomo¹

Universitas Sahid, Jakarta, Indonesia

Abstract

During the COVID pandemic, the act of criminalizing the freedom of expression was evident in most countries including Indonesia. Several journalists and human rights activities faced the state hostility and criminalizing assaults over their free expressions. Such acts were considered instances of limitations of the freedom of press and media. The government justified such acts as violation of regional and national regulations and equated them with blasphemy, hate speech, and separatism. The Indonesian government justified the restriction on freedom of expression on the grounds of collective interests, such as public order and public health. The study adopted a justificatory approach within the normative and juristic regulations. This study found that a state categorized the right to free speech as a vehicle of crime during the periods of crisis like COVID pandemic, hence criminalized all free expressions in media and in the public domain and imposed limitation on the freedom of expression. The study recommends to repeal the Indonesian Electronic Information and Transactions (EIT) Law, particularly Article 127, that considers all free expressions as defamation and hate speeches. If needed, such acts should not be criminalized and treated as a civil litigation.

Keywords: Indonesia, media, democratic principles, free speech, hate speech

Introduction

The right to free speech or freedom of expression is a principle which every democratic country offers to its citizens, for empowering them to voice their opinions, agreements and disagreements, and to meaningfully contribute to the success of democracy. The freedom of expression is more than just communication of ideas and opinions; it includes sharing convictions and beliefs on public and private platforms; it helps to understand the general nature of a country's democratic system. The freedom of expression is also seen as a prerequisite to build a civil society, equally applicable to the operations of a state, because if the state violates its duties, individual has the right to resist through expression. Article 19 of the UN Human Rights Council (2017) postulates the freedom of expression as a privilege for all

¹ Faculty of Law, Universitas Sahid, Jakarta, Indonesia

Email: laksanto@gmail.com

individuals has to “hold their own opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Any individual or organization that defends the free expression is actually defending the democratic principles of equality, non-discrimination, regardless of race, color, gender, or political or religious affiliation, among others. State censorship on freedom of expression includes denying access to public spaces for meetings and discussions, including the Internet. While such censorship can be an act of desperation of the state officials, or an attempt to dominate a political situation, asking for the right to freedom of expression should be an act of revolt and resistance, a demand for human equality and justice.

The Indonesian Constitution of 1945 guarantees all human rights including freedom of expression. The government is thus bound by the constitution to respect and protect those rights. In order to comply with the constitutional requirements, there are a number of legislations that protect and fulfill the freedom of expression, directly or indirectly, formally or informally. For instance, Law No. 39 of 1999 on Human Rights provides for the implementation of human rights in general; Law No. 40 of 1999 specifically provides for the right to information, protection of media and press personnel, and right to freedom of expression and peaceful assembly; and Law No. 11 of 2008 as amended by Law No. 19 of 2016 on Electronic Information and Transactions (EIT) Law which monitors and investigates digital attacks and online threats independently and impartially, and ensures data protection and cyber privacy to protect individuals’ rights. Besides, regulation exist that define procedures of handling demonstrations and providing security to individuals and organizations participating in protests and expression of opinion in public.

Indonesia has always supported the protection of freedom of expression as a privilege to be enjoyed by all individuals in a civil society. The Indonesian constitution grants every citizen the right to freedom of expression, peaceful assembly, and association, and a safe and enabling environment in which media outlets, journalists, and human rights organizations are effectively protected and can work safely without intimidation or fear of reprisal, attacks on their right to free speech. However, the state may, ‘limit’ or restrict the freedom of expression on grounds of national security or for public interests. This provision is based on the Covenant on Civil and Political Rights ratified by the Republic of Indonesia. This ratification states that the state can limit and restrict some of the basic rights and freedoms, including the right to free speech and freedom of expression, provided these restrictions or deviations must be regulated in a law. and not discriminatory.

During the pandemic, it was imperative and mandatory for all Indonesian people to participate and follow the COVID appropriate behavior. If the public participation and legal awareness about COVID regulations is low, or if the public criticizes the government for not able to handle the COVID situation, it would be difficult for the state machinery to check the transmission of COVID-19. In other words, the Indonesian government decided to impose criminal sanctions on people who were non-compliant or who influenced others or who openly criticized the policies issued by the government in the name of freedom of expression or their right to free speech.

There are several studies (Boulos, 2022; Waldron, 1993; Zoller, 2009; Zysset, 2019) which have discussed restrictions and throttling of the right to free speech

(Webber, 2009), provided justifications (Bernstorff, 2014; Webber, 2019) and also deemed it equivalent to violation of human rights (Tsakyrakis, 2009). During the COVID-19 period, many governments issued curbs on economic and social activities as well as on the right to freedom of expression (Bolsover, 2020; Khramova, 2020; Sander, 2020). When viewed from the principles of democracy, law and human rights, such restrictions for the handling of the COVID-19 pandemic needs to be debated. It is essential to discuss whether the restriction on right to free speech were justified.

This current study adopted a normative juridical approach with the sociological juridical objective to justify the restriction on right to freedom of expression. Since the right to freedom of expression is a basic human right, the human rights perspective was also studied.

Literature review

- *Freedom of expression as a democratic principle*

Freedom of expression as a democratic principle is acknowledged as a 'liberty' and a 'human right' (Berlin, 1969). As liberty, it requires no constraints on individual freedom to express his views and opinion. As a human right, it is an absolute right to non-interference from any state or non-state agencies, individuals and organizations (Dworkin, 1977). It is also inherently linked with a person's autonomy and human dignity. It has a value to the individual, directly connected with his inner realm of thoughts, beliefs, and convictions, which must be inviolable (Shah & Boyle, 2013). It is of utmost value in democracy, as it determines political participation, criticism of government, media freedom, and the right to voting is also a kind of freedom of expression. John Stuart Mill's defended freedom of expression by highlighting its epistemic value (Mill, 1861). He believed that there could be no justification for the suppression or limitation of the freedom of expression through coercive means, even if the state believes such limitation to be essential. Mill's claim could be inconsistent with the state doctrines or refuting the state's justification, however, he referred to it as a democratic principle.

- *Legal instruments to protect freedom of expression*

The right to freedom of opinion and to convey information has been guaranteed and protected in various legal instruments such as the International Covenant on Civil and Political Rights (ICCPR). Article 19 of ICCPR recognized the 'freedom of expression' as a right that can be exercised 'either orally, in writing or in print, in the form of art, or through any other media of [the individual's] choice' (art 19, para 2). The Indonesian Constitution also guarantees this right vide Articles 28E and 28F and Article 14 of Law no. 39 of 1999 concerning Human Rights. These statutes acknowledge freedom of expression in speech as well as conduct such as peaceful marching and assembling, and similar campaigns. However, if any of these statutes wishes to place a limit on speech based on its content, it must pass strict scrutiny analysis.

Amnesty Indonesia (2020a, 2020b) has identified several problematic laws that have led to the criminalization of human rights defenders and others for simply exercising their right to freedom of expression. Some of these laws include Articles 27, 28 and 29 of EIT Law which criminalized individuals for their freedom of expression, often calling such acts as 'immorality', defamation, and hate speech. These

laws also aimed at silencing the critical voices³⁶ accusing them of “hate speech” and “spreading misinformation”. The Regulation of the Ministry of Communication and Information Technology²⁰ o. 5 of 2020, regarding Private Electronic Service Providers, also threatens the right to freedom of expression. This regulation allows government officials to take actions against online content, under the charge of 'causing public unrest' or 'disturbing public order'. The owner of the content is disallowed by the regulation to challenge this action nor can he appeal against the decision. In other words, this regulation regulates the online content, can access and criminalize users' data, and restrict the medi⁴¹ personnel to disseminate some information. This kind of regulation contravenes the rights to freedom of expression and to individual privacy.

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• *Justifying Limitations on freedom of expression*

In an act of justifying limitations on the freedom of expression, Moller (2014) opines that it is the adjudicative body to assess which of the two interests—the individual's interest in the freedom of expression or the legitim⁴⁶ interest (public interest) pursued by the state—is weightier. Hence the burden of justification falls on those who wish to rest⁶ct the conduct, namely the state. This is consistently a part⁶ liberal tradition, or the 'fundamental liberal principle' (Gaus, 1996) reiterating that 'the onus of justification is on those who would use coercion to limit freedom' (Courtland, Gaus, & Schmidt, 1996; Feinberg, 1987). This applies to the freedom of expression as well; it is necessary clarify the process of reasoning: whether the individual or the state is accountable to justify the restriction placed on the freedom of expression

Rawls (2005) called such justification of limitations on the freedom of expression as a prerequisite, which must be a 'public reason', or a reason unacceptable and publicly revealed to all. Rawls (2005) further explained that 'public reason' also requires that such justification must not be only political decisions but should aim at satisfying the public values and standards (pp. 227–228), or when public accept such a justification as valid (p. 213). In short, a reason cannot be justified or rated as in public interest merely because a majority in society view it as a good reason; hence the majoritarian principle (Zysset, 2019) is unacceptable to justify the restriction on freedom of expression.

Problem statement

A big hue and cry is raised in all democratic countries when there is a restriction³⁸ limitation on right to free speech and freedom of expression. Such a vulnerability of freedom of expression is justified if the state imposes it for protection of law and order or consolidation of state's rights in the interest of the people. However, if such restrictions are unwarranted, and individuals' rights to express their opinions, convictions, and beliefs are curbed and imperiled without any justifications, there is likely to be public outrage and protests. In such a situation, due to the lack of substantial judicial support and inadequate justifications for the restrictions imposed, it is too difficult to control aggression. Such a situation mostly arises when bureaucrats and politicians assault journalists, media bloggers, and other communication platforms, that are involved in investigations and disseminations of information about governmental corruption or irregularities in governance.

Several problematic laws deal with the posing human rights activists as criminals, just for exercising their right to freedom of expression (Amnesty Indonesia, 2020a, 2020b; Amnesty International, 2020). The question arises why these law recognized and allowed criminalizing 'free expressions' as so called 'hate speeches'. Articles 27, 28 and 29 of EIT Law, too, fails to provide any legal redress to such activities who are treated as criminals and are accused for "hate speeches" and exercise their right to free speech. Likewise, Regulation No. 5 of 2020, Ministry of Communication and Information Technology regarding Private Electronic Service Providers, also threatens the right to freedom of expression. This regulation provides government authorities to restrict online content that 'causes public unrest' or 'disturbs public order'. This regulation mandates media platforms and electronic service providers to comply with regulations, failure to which may lead to fines or blocking their websites. The severity of the problem increases when this regulation does not have any provision for the service provider to challenge the restriction imposed on the content. Thus, this regulation gives unlimited power to the state to curb right to free speech or restrict access to any online content, thus contravening the rights to freedom of expression.

There are several instances when the government throttles internet connection or shuts down under the justification of preventing the spread of hoaxes and provocative messages. During this shut down there is a restriction on the access to information, limitations on journalists to report the events, thus another example of infringement of the right to freedom of expression. Amnesty Indonesia (2020a, 2020b); Amnesty International (2020) has noted down several cases of such digital intimidation and throttling of the right to freedom of expression.

In the context of pandemic, such limitations and infringements were considered to be essential in the interest of the public, law and order and social harmony. Individuals and organizations were instructed to avoid criticism of the government's policies in dealing with the COVID-19 outbreak nor should there be any political statements that might highlight state failure to control the pandemic. For instance, in April 2020, a human rights activist, Ravio Patra, publicly criticized the lack of transparency of data about COVID-19 patients. Ravio's WhatsApp account was hacked and he was later secured by the police for spreading provocation through his WhatsApp account. Amnesty International notified at least 66 cases of digital attacks on individual and organizations in 2020 and 14 cases in 2021, that can be termed as violations of the right to freedom of expression. On the logical front, there may be justifications it is unlikely that any individual's interest or right was harmed in imposing such restrictions. All such curbs and restrictions were placed in the public interest and to maintain harmony among the people, since the state deemed it fit to impose such restrictions.

This study questions such acts of limitations and infringements of right to freedom of expression, and demands justifications. The framework of the study was derived from 'fundamental liberal principle' (Gaus, 1996) which stipulated that 'the onus of justification is on those who would use coercion to limit freedom' (Courtland et al., 1996; Feinberg, 1987). In an act of justifying limitations on the freedom of expression, Moller (2014) also opined that it is the adjudicative body to assess which of the two interests—the individual's interest in the freedom of expression or the legitimate interest (public interest) pursued by the state—is weightier. In other words, whether the state ignored the interest of the individual and their rights on grounds of public

interest. It was also pointed out that courts and tribunals often give verdict in the favor of the state and its discretion, hence there is no question of determining which interest is heavier or more preferable. Hence, the question does not arise to talk of competing interests attempting any task of balancing between two interests or seek any precision. The role of the adjudicative body is very crucial in such a situation, whether it could weigh the individual's interest in the freedom of expression against the interests of others in public order and vice versa; or whether the competing interests of the two parties in the freedom of expression really outweighed each other. The adjudicative body should also see whether the state intends to appease a majority community, or showcase its achievements in a positive way, and would not appreciate any criticism in the name of freedom of expression, and hence the restrictions. In such a case, the justifications would be illogical and meaningless.

Results

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A close study of the legal documents in this study revealed that Article 19, paragraph 2 of the ICCPR, and article 10, paragraph 2 of the European Convention on Human Rights (ECHR), explicitly allow states to restrict the freedom of expression on the grounds of collective interests, such as public order and public health. The Indonesian Law even provided criminal provisions for such social activities that might amount to hate speeches, defamation and posting false messages on social media. These social restrictions are postulated under Articles 310 and 311 of the Criminal Code Law and under Article 27(3) the Electronic Information and Transactions (EIT) Law. Unfortunately, Indonesia has failed to justify all such restrictions in accordance with international standards.

During the COVID-19 pandemic, digital attacks, threats, criticism of government policies, and alleging government officials of indulgence into drugs trafficking had dramatically increased. There were digital attacks on independent media groups which promoted minority and women's rights. Their journalists were harassed and their Twitter and Facebook accounts were blocked, thus throttling their freedom of expression. The digital hacking of two Indonesia news sites, Tempo.co and 4 Tirto.id, is another example of victimization, harassment and limitation on the freedom of expression in the name of COVID emergency. Rasio Patra, a political researcher and human rights activist, was subjected to humiliation for allegedly speaking on socio-political issues in social media. The reality later detected was that his WhatsApp account was hacked and the hacker, pretending to be Rasio, sent out provocative messages for civil disobedience and criticism of the government measures to prevent spread of COVID pandemic. All such cases of individuals and media sites participating in peaceful political activities were prosecuted under treason provisions, mainly Articles 106 and 110 of the Criminal Code, which further deteriorated the situation and posed challenge 18 to Amnesty International (Indonesia) and human rights bodies.

All these cases of the violation of the right to freedom of expression were also tried under the Electronic Information and Transaction (EIT) Law. The government did not accept that all such acts were legitimate criticisms of official policies or acts, and should fall under purview of legal right to freedom of expression. The government's plea was that these cases were acts of criticism of the public policies and adversely affected public opinion during the pandemic.

It is not only in Indonesia, but several other nations advocated such restrictions on the freedom of expression and gave similar reason of collective interests or restrictions imposed in the interest of the public. Such an argument, however, suffers from normative or judicial weaknesses. The legal doctrines could be questioned whether normative practices were adhered to imposing such restrictions; second, whether such limitations on the freedom of expression are contemplative of the state discretion or were based on public demand. Such normative priorities or legal prerequisites are consistent with the reports submitted by Bernstorff (2014) and Urbina (2015), who pointed out two risks vested if the limitations on the freedom of expression was based on state discretion alone. First, if the state used its own discretion only to appease majoritarian interests, the minorities and political opponents may outrageously demand justifications and question how the limitations on the freedom of expression preserved national security, public order, public health, and public morals. Second, the state might be alleged for unjustly limiting an individual's freedom of expression, unless there is an explicit reason that the individual was engaged in harmful activities, or his conduct could be classified as manifestation of harmful practices on social and religious grounds. In such cases, the state may also need to justify that the individual was really engaged in violence, and that it was the state's positive obligation towards the citizens to impose such limitations and also to maintain law and order.

The study further revealed that violations of the right to freedom of expression appear in the form of criminal prosecution, threats, digital attacks, and no protection to press and media personnel. The individual targeted were teachers, human rights activities, and independent journalists /media personnel. In all these cases, the state sought to outweigh its positive image by limiting the individual's freedom of expression. The compulsions before the state included appeasing the majoritarian community, which forced the government to take strict actions against unpopular or offensive expressions in public, which allegedly affected the interest of the majoritarian community.

Discussion

With the outbreak of the COVID pandemic, if any government resorts to internet throttling (slowing down internet connection) or internet shutdown, it justifies it as preventing the spread of hoaxes and provocative messages. Such restrictions prevent people to get the rightful access to information as these limitations also restrict the journalists and they are unable to report the ongoing situation. This is a case of infringement of the right to freedom of expression. If such an infringement occurs when the government has no legal authority to cut off internet access or curb other media platforms, it is a direct instance of violation of the right to freedom of expression.

Many governments lack a formal regulation or law to justify such limitations or to prevent such instances from happening again. Talking of justification means an approach that can demonstrate the governments' obligation towards its people, the ability of the government to convince the people that such limitations are in public interest. However, when a state fails to justify such limitations and also no such positive obligations are sighted as the cause of such limitations of the freedom of

expression, it would attract public outrage. In such a scenario, the court or tribunal should be responsible to judge the justification, if any. If the court or tribunal also fails to find any proportionate justification, nor if there exist any competing interests of the society against individual interests, the court or tribunal can seek an alternative justificatory approach and demand an explanation of such limitations of the freedoms of expression (Tsakyrakis, 2009).

Undoubtedly, public interest or public morals are imperative, and in such instances, there is a positive obligation of the state to prevent violent and disruptive behavior, which if needed, it could impose limitations on freedom of expression, provided there exists laws and regulations to do so. In the absence of such laws, the state might resort to measures other than limitations on freedom of expression and refrain individuals from violent and disruptive behavior. The problem occurs when the government adopts an unwarranted, duty-based approach and justifies the limitations on the freedom of expression, which in most cases is to appease the majoritarian interests, and lesser to prove the competing interest of public order outweighing the individual.

In many cases, when an individual exercises his or her freedom of expression and articulates something offensive, and such offence leads to lawlessness, though the individual does not intend to incite lawlessness. In such a scenario, the state is liable to weigh between the individual interest and the public competing interests, prior to out rightly making the offence a reason for the limitation on the freedom of expression. Such an unintentional offense must not be grounded as the individual's violation of the law amounting to the limitation on the freedom of expression. If the state adopts this approach, it would strengthen its legitimacy and its positive obligation towards the public. This would also clarify its stand that it would not form any offence the basis for a limitation on the freedom of expression. In other words, unless any offence in the public domain has valid grounds for limiting the freedom of expression, the state would not propose a restriction. This would be a positive reinforcement of the direct responsibility on the part of the individual.

This is consistent with Gunatilleke (2021) who recognized the state's responsibility towards the realm of public interest, wherein the state should demonstrate a duty of justice by its policies and regulatory practices, reinforcing the individuals also to reciprocate such a conduct. Taking such a stance would also strengthen the state's justificatory burden when there is a need to justify any kind of limitations on the freedom of expression (Sweeney, 2004). The United Nations Human Rights Council (Kaye, 2018) is also in line with this approach which recommends that cases of only disruptive conduct should be considered for imposing limitations on the freedom of expression, provided such limitations are justified in public interest and supported by legal regulations.

Rawls (2005) defines public interest, in the context of the justification of limitations on freedom of expression, as a political decision taken to uphold the values and standards that are publicly acceptable and when such values and standards can be termed 'public' when citizens of that country equally accept them as valid. Any justification to the limitation on freedom of expression cannot fall within the rubric of public reason merely because a majority believe it to as a justification. The majoritarian principle could sometimes be biased, for instance, when the majority

group may consider the minority group as 'inferior', and such a prejudiced reason could not be a valid justification for imposing limitations on a group or discriminating it. Such a perceived inferiority would not be publicly acceptable as it would also be a threat to the very idea of equal citizenship and the democratic principle of equality, fraternity and humanitarian ideals (Rawls, 2005).

Conclusion

This study discussed the issue of imposing limitation on the freedom of expression by a state, categorizing the right to free speech as a vehicle of crime, hence criminalizing all free expressions in media and in the public domain. This kind of criminalizing the free expression was more evident during the COVID-19 pandemic in Indonesia. The NGOs and journalists faced the state hostility and the outrage of the government supporters who committed acts of violence against journalists. Such acts were considered instances of curtailment of the freedom of press and media. The government, however, tried to justify such acts as violation of regional and national regulations, including blasphemy, hate speech, and separatism. During this COVID period, all media personnel and journalists were strictly under surveillance, their movement was restricted and they were not allowed to report or criticize such news items like government policies for safety reasons. It was mandated that if any journalist deviates from the mandate, they would have to face imprisonment and substantial fine. This study surveyed various aspects of the justification of the limitation on the freedom of expression and question why it should be treated as a crime.

The study suggests to adopt a justificatory approach within the normative and juristic regulations. The state should also adopt an approach that requires it to justify every limitation imposed on the freedom of expression. The study also recommends to repeal EIT Law, particularly Article 127, that considers all free expressions as defamation and hate speeches. If needed, such acts should not be criminalized and treated as a civil litigation. Likewise, Articles 106 and 110 of Indonesia's Criminal Code regarding treason, should not be used to criminalize people who express critical opinions or protest peacefully, as peaceful demonstrations, assembly and raising voices of concern cannot be counted as treason. The safety of journalists and media personnel must also be ensured while the police and bureaucrats should be instructed not to infiltrate into the freedom of expression and to provide indemnity to the journalist or whoever is involved in free speech.

The legal wing of the country should ensure that the right to freedom of expression is protected and any acts of infringement or limitations should be investigated by applying the principles of legality, legitimacy, necessity, and proportionality. Such gimmicks like internet throttling or internet shut down must be immediately stopped as these prove to be excessive and disproportionate restriction on the right to freedom of expression. Last, but not the least, freedom of assembly and association, should also be ensured if such demonstrations are consistent with the law and international standards. If the police or any other enforcement agency use excessive force, there must be prompt, impartial, independent, and effective investigations and the perpetrators must be brought to justice through fair trials.

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