

Freedom of Expression on Social Media in Indonesia: Why are the limitations imposed?

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Abstract

As part of the fundamental human rights, the right to freedom of expression is neither absolute nor unlimited; there are limitations on exercising this right in the context of the democratic rule of law. Presently, the exercise of the right to freedom of expression in social media has been misused by the emergence of fake news or information (hoaxes). The limitations to exercising the right, as stipulated under the Indonesian national laws such as the 1945 Constitution of the Republic of Indonesia, Law No. 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights, Law No. 39 of 1999 concerning Human Rights, and Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Information and Electronic Transactions, are aimed at respecting and protecting the dignity of individuals or other people and protecting the public interest and national security. This article aims to discuss the impact of entities outside Indonesian sovereignty on implementing legal norms limiting the exercise of the right to freedom of expression in social media and the implementation of the norms under Indonesian national law. The method used is normative legal research using a statutory, case, and fact approach. The analysis shows that limitations on exercising the right to freedom of expression on social media under Indonesia's national sovereignty have not been efficient due to the entities of social media platforms outside the territory of Indonesia, which may not be entirely located or subject to the scope of national jurisdiction.

1. INTRODUCTION

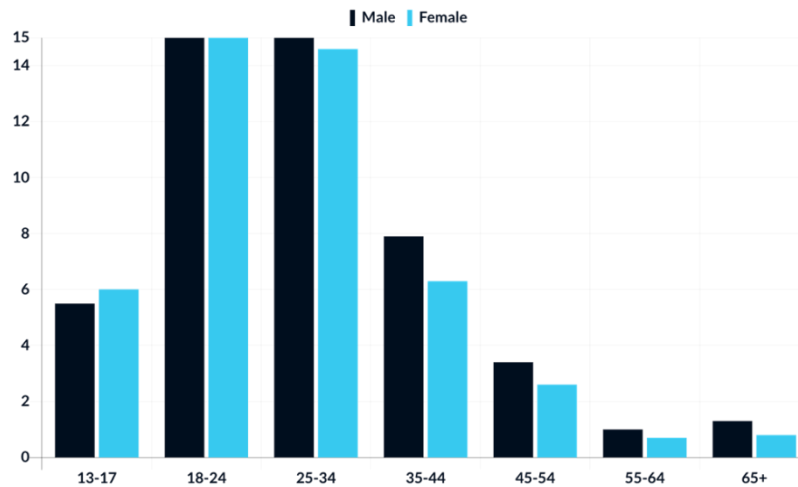
The rapid growth of information and communication technology in today's digital era¹ has brought significant advancements that intertwined

¹ Information and communication technology encompasses various technologies used to access and exchange information through communication. In the past, human activities primarily relied on physical facilities. However, with the advent of information technology, human activities have become more diverse and are now dominated by equipment based on information and communication technology. These technologies have been utilized systematically to enhance various aspects of human life. See Rev. Sr. Ogochukwu Honorata Nwosu. *Information and Communication Technology and the Management of Schools in Nigeria* (Bloomington: WestBow Press, 2021), 18.

with vast internet coverage and rapid social media usage.² Social media itself refers to online communication platforms³ that allow its users to interact with other users and express themselves by sharing information, updating status, photos, etc. Moreover, Minister of Trade of the Republic of Indonesia under the Minister of Trade Regulation No. 31 of 2023 concerning Business Licensing, Advertising, Development and Supervision of Business Actors in Trading via Electronic Systems (hereinafter, MoT Regulation 31/2023) defined ‘social media’ as pages or applications that allow users to create and share content or engage in social networks.⁴

In 2023, data shown by the Indonesian Internet Service Provider Association⁵ verified that 215,626,156 people are actively using the internet, which is equivalent to 78,19 percent of the total population in Indonesia. This data shows that internet users in Indonesia have increased by 1,17 percent compared to the percentage in the previous year.

Graphic 1. Social Media User Demographics, 2022⁶



² Doris Febriyanti et al, “Information Communication Technology (ICT) on Palembang City Government, Indonesia: Performance Measurement for Great Digital Governance,” *Cogent Social Science* 9, no. 2 (2023): 2.

³ Sahnaz Kartika and Nurhayati, “Ujaran Kebencian (*Hate Speech*) di Media Sosial dalam Konteks Hukum dan Perubahan Sosial (Studi Kasus pada Masyarakat Kota Medan),” *Jurnal Mercatoria* 16, no. 1 (2023): 100.

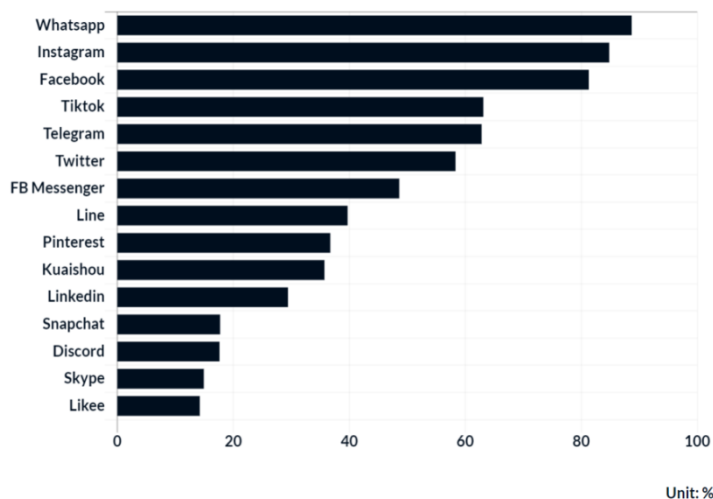
⁴ The MoT Regulation 31/2023, Art.1 (18).

⁵ Indonesian Internet Service Provider Association, “Survei APJII Pengguna Internet di Indonesia Tembus 215 Juta Orang,” <https://apji.or.id/berita/d/%20survei-apji-%20pengguna-internet-di-%20indonesia-tembus-%20215-juta-orang#:~:text=Survei%20APJII%20Pengguna%20Internet%20di,yang%20sebesar%20275.773.901%20jiwa>.

⁶ OOSGA, “Social Media in Indonesia – 2023 Stats & Platform Trends,” <https://oosga.com/social-media/idn/#:~:text=Social%20Media's%20User%20Demographics%20in,of%20users%20has%20grown%2012.6%20%25;DataReportal,“Digital2022:Indonesia,”https://datareportal.com/reports/digital-2022-indonesia?rq=digital%20indonesia%202022>.

Additionally, a survey given by OOSGA⁷ shows that there are approximately 188,6 million active social media users in Indonesia as of 2022. This indicates 68,9% of the addressable demographics log in at least once a month, resulting in an increase of 12,6% in the number of users from 2021 to 2022.⁸ Furthermore, digital report by DataReportal⁹ in 2023 revealed that social media use in Indonesia reached 167 million users, equating to 60,7 percent of the total population.¹⁰

Graphic 2. Most Used Platforms, 2022¹¹



According to Graphic 2, WhatsApp is the most widely used social media platform in Indonesia, with almost 90% of internet users using it. Followed by Instagram and Facebook as the second and third most-used platforms, respectively. With the tremendous growth of TikTok over the past four years, it follows with 63,1% of users in Indonesia. In comparison to the number of uses of social media in 2022, the latest report by DigitalReport has been shown to increase, i.e., WhatsApp with an increase of 3,4%, Instagram with 1,7%, and Facebook with 2,5%, respectively.¹²

⁷ OOSGA is a consulting firm that helps businesses build new ventures and conduct market research for entry and operation. See OOSGA, “About Us,” <https://oosga.com/about-us/>.

⁸ OOSGA, “Social Media in Indonesia – 2023 Stats & Platform Trends,” *loc.cit.*

⁹ DataReportal is an online reference library designed to provide free reports with data, insights, and trends to help users make more informed decisions. See DataReportal, “About,” <https://datareportal.com/about>.

¹⁰ DataReportal, “Digital 2023: Indonesia,” <https://datareportal.com/reports/digital-2023-indonesia#:~:text=Indonesia%20was%20home%20to%20167.0,percent%20of%20the%20total%20population>; Indonesia is one of the ten countries with the highest durations of social media use in the world, 3 hours and 14 minutes per day. See We Are Social, “Social Media Use Reaches New Milestone,” <https://wearesocial.com/id/blog/2023/07/social-media-use-reaches-new-milestone/>.

¹¹ See DataReportal, “Digital 2022: Indonesia,” *loc.cit.*; and OOSGA, “Social Media in Indonesia – 2023 Stats & Platform Trends,” *loc.cit.*

¹² DataReportal, “Digital 2023: Indonesia,” *loc.cit.*

Given the immense growth of these platforms, the use of social media in this digital era has certainly had various positive impacts on society;¹³ social media has made it easier and faster for everyone to interact and share information online without having to spend so much money.¹⁴ Moreover, it has also become a public space for people to express themselves and their opinions of all sorts.

The right to freedom of expression itself is enshrined in a number of international human rights laws, i.e., under Article 19 of the International Covenant on Civil and Political Rights (hereinafter, “ICCPR”), in the same broad terms as Article 19 of the Universal Declaration of Human Rights (hereinafter, “UDHR”). Moreover, it is also protected under Article 15(3) of the International Convention on Economic, Social and Cultural Rights (hereinafter, “ICESCR”), under Articles 12 and 13 of the Convention on the Rights of the Child (hereinafter, “CRC”), under Article 5 (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter, “ICERD”), and under Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter, “CEDAW”). As the right to freedom of expression is guaranteed under the core international human rights instruments,¹⁵ hence, states are legally obliged to respect, protect, and fulfill the human rights of all individuals.¹⁶

In addition to that, it is important to note that the Indonesian national law also stipulates the right to freedom of expression under Articles 28, 28E (3), and 28F of the 1945 Constitution of the Republic of Indonesia (hereinafter, “The Indonesian Constitution”). This right is also recognized under Law No. 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights (hereinafter, “Law 12/2005”), Article 23 (2) and Article 25 of Law No. 39 of 1999 concerning Human Rights (hereinafter, “Human Rights Law”), and Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Electronic Information and Transaction (hereinafter, “EIT Law”).

However, the unlimited or crosses national borders (borderless) and uncensored exercise of the right to freedom of expression on social media

¹³ Ministry of Finance of the Republic of Indonesia, “Pengaruh Positif dan Negatif Media Sosial terhadap Masyarakat,” <https://www.djkn.kemenkeu.go.id/kpknl-semarang/baca-artikel/14366/Pengaruh-Positif-dan-Negatif-Media-Sosial-Terhadap-Masyarakat.html>.

¹⁴ Iwan Satriawan, Tareq Muhammad Aziz Elven, and Tanto Lailam, “Internet Shutdown in Indonesia: An Appropriate Response or a Threat to Human Rights?,” *Sriwijaya Law Review* 7, no. 1 (2023): 22.

¹⁵ Office of the High Commissioner for Human Rights, “The Core International Human Rights Instruments and Their Monitoring Bodies,” <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies>.

¹⁶ See Todd Landmand. *Human Rights and Democracy, The Precarious Triumph of Ideals* (London: Bloomsbury Publishing Plc, 2013), 31-32.

has negatively impacted Indonesia. One of the most significant issues is the surge of false news and hate speech. Disseminating false information and news through social media platforms with the intention to deceive and incite readers to believe and spread hatred toward the target of the news is a form of cybercrime.¹⁷ Such action may distort the public's understanding and pose a threat to the country's security and stability, in particular, the nation's politics, ideology, and religion.¹⁸

Besides that, it has also resulted in the abuse of the right to freedom of expression by society, such as firstly, the massive spread of fake or false information (hoaxes) and hate speech on social media. This has injured and degraded the human rights of individuals and groups. Secondly, social media has increasingly become a medium to commit bullying – cyberbullying.¹⁹ This phenomenon involves the use of social media as a means of causing harm and harassment to others, often with little or no accountability, and the anonymity afforded by social media platforms enables perpetrators to engage in such behavior without fear of repercussions. Following that, the facts show that numerous friendships have been disrupted due to the consumption of false information on social media. Both parties involved remain steadfast in their respective positions, feeling self-righteous and unwilling to consider a more objective perspective. Consequently, the trend of unfriending²⁰ has become more prevalent, especially among younger generations.

Furthermore, the lack of knowledge and understanding of communication ethics in social media has also resulted in the abuse of these rights. Communication ethics issues in cyberspace are caused by some people who are unaware of the legal implications that arise from using social media to write harmful comments about others, such as spreading slander, distorting facts, promoting false news, inciting hatred, provoking others, blaspheming, cursing, and other similar things, often escalate into serious problems and continue to the court. These actions contradict the purpose of freedom of expression to express thoughts and opinions freely on

¹⁷ Robert Smith and Mark Perry, "Fake News and the Convention on Cybercrime," *Athens Journal of Law* 7, no. 3 (2021): 336; 'Cybercrime' is defined as the intended act of violating the law through the use of information and communication technology as either a tool or target. See Rian Dwi Hapsari and Kuncoro Galih Pambayun, "Ancaman Cybercrime di Indonesia: Sebuah Tinjauan Pustaka Sistematis," *Jurnal Konstituen* 5, no. 1 (2023): 7.

¹⁸ Cynthia Shafira Hartati and Ali Muhammad, "Combating Cybercrime and Cyberterrorism in Indonesia," *Jurnal Hubungan Internasional* 11, no. 2 (2023): 45.

¹⁹ Cyberbullying is an act of bullying using technology with the aim of scaring, angering, or shaming the target. See Unicef, "Cyberbullying: What is it and how to stop it," <https://www.unicef.org/end-violence/how-to-stop-cyberbullying#:~:text=If%20the%20bullying%20is%20happening,and%20reporting%20it%20is%20key.>

²⁰ Unfriend is the act of removing someone from one's friends list on a social networking site. See Collins Dictionary, "Unfriend," <https://www.collinsdictionary.com/dictionary/english/unfriend.>

social media in the context of Indonesia as a democratic, rule-of-law country. Last but certainly not least, the widespread use of social media has created a new battleground in cyberspace. Parties or groups with hidden agendas, such as political and economic goals, are using this platform to divide society directly or indirectly.

Since the spread of hoaxes in Indonesia has massively spread and resulted in a “news crisis”,²¹ it is crucial to take this issue seriously and work towards preventing the spread of such misinformation on social media. Moreover, data provided by the Ministry of Communication and Information of the Republic of Indonesia (Hereinafter, “MoCI”) shows that there were 800.000 sites spread hoaxes in Indonesia.²² The spread of hoaxes often appears together with hate speech and is used as a justification for freedom of expression and opinion. However, in fact, the spread of both hoaxes and hate speech might pose a threat to national security, directly and indirectly.²³

There is no legal definition for hate speech; however, it can be defined based on four factors: harm, content, intrinsic properties, i.e., the type of words used, and dignity.²⁴ The United Nations Strategy and Plan of Action on Hate Speech²⁵ defines hate speech as an act of communication in speech towards a person or group with the intention to attack or use pejorative or prejudiced language based on their identity factor, e.g. religion, ethnicity, race, or gender.

Social media as communication platforms are likely to be a medium for promoting hate speech²⁶ and inciting discrimination against people or groups, which becomes uncontrollable and might lead to conflict and threaten the unity of national security defense.²⁷ Thus, it is important to

²¹ Muhammad Tisna Nugraha, “Hoax di Media Social Facebook: Antara Edukasi dan Propaganda Kepentingan,” *JSW: Jurnal Sosiologi Walisongo* 3, no. 1 (2019): 97.

²² Ministry of Communication and Information Technology of the Republic of Indonesia, “Ada 800.000 Situs Penyebar Hoax di Indonesia,” https://www.kominfo.go.id/content/detail/2115/kominfo-jamin-kebebasan-berpendapat-di-dunia-maya/0/sorotan_media.

²³ National Resilience Institute of the Republic of Indonesia, “Dampak Media Sosial terhadap Ketahanan Nasional,” <https://www.lemhannas.go.id/index.php/berita/berita-utama/521-dampak-media-sosial-terhadap-ketahanan-nasional>.

²⁴ Stanford Encyclopedia of Philosophy, “Hate Speech,” <https://plato.stanford.edu/entries/hate-speech/#Aca>.

²⁵ United Nations, 2020, “United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences,” https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech_Guidance%20on%20Addressing%20in%20field.pdf, 8.

²⁶ Devita Kartika Putri, “Hate Speech and the Harm in Indonesian Judicial Decisions,” *Cogent Social Science* 9, no. 2 (2023): 2.

²⁷ See Security Council Report, “Arria-Formula Meeting on Hate Speech and Social Media,” <https://www.securitycouncilreport.org/whatsinblue/2021/10/arria-formula-meeting-on-hate-speech-and-social-media.php>; and Bambang Mudjiyanto, “Kebebasan Berekspresi dan Hoaks,” *PROMEDIA (Public Relation dan Media Komunikasi)* 5, no. 1 (2019): 1.

impose limitations on the exercise of the right to freedom of expression, particularly on social media, to ensure respect for the rights and freedoms of every person by taking into account moral, religious, and cultural matters, also focusing on the equity of the law.²⁸

Several previous studies have also discussed similar issues. Gunatilleke (2021),²⁹ in his study, discusses a proportionality test used to limit freedom of expression and highlights some normative and political weaknesses associated with the test. Collins et al (2022)³⁰ examine the different kinds of fake news that have been spreading and increasing by the use of social bots on social media. Putri (2023)³¹ discusses how the Indonesian judicial system determines the verdict in cases related to hate speech.

However, by contrast, this article aims to analyze the impact of non-Indonesian entities on freedom of expression on social media within Indonesian sovereignty and determine the implementation of Indonesian laws in regulating the limitations of freedom of expression on social media. This article reflects normative legal research in the field of human rights law and relies on statutory, case, and factual approaches. The analysis refers to various sources and materials, including international and national legal instruments, textbooks, journal articles, news, and studies.

2. RESULT AND ANALYSIS

2.1. External Entities of Indonesian Sovereignty and Their Impact on Freedom of Expression on Social Media

An entity is defined as a tangible unity,³² something that exists on its independent existence.³³ The term "external entity,"³⁴ moreover, refers to any legal or natural person, including but not limited to partnerships, corporations, sole proprietorships, associations, holding companies, joint stock companies, trusts, governmental agencies, and subdivisions. This definition encompasses entities that operate for profit, nonprofit organizations, and those with charitable objectives. For the purpose of this article, entities are any company providing social media services online, e.g. Meta Platforms, X Corps, and TikTok.

²⁸ Fatimatuz Zahrah and Siti Maizul Habibah, "Freedom of Speech and Human Rights: What can Civic Education Do?," *Jurnal HAM* 13, no. 3 (2022): 504-505.

²⁹ Gehan Gunatilleke, "Justifying Limitations on the Freedom of Expression," *Human Rights* 22, no. 1 (2021): 91.

³⁰ Botambu Collins et al, "Trends in Combating Fake News on Social Media – A Survey," *Journal of Information and Telecommunication* 5, no. 2 (2021): 249-250.

³¹ Putri, *op.cit.*, 4.

³² The Great Indonesian Dictionary, "Entitas," <https://www.kbbi.web.id/entitas>.

³³ Cambridge Dictionary, "Entity," <https://dictionary.cambridge.org/dictionary/english/entity>.

³⁴ Law Insider, "External Entity," <https://www.lawinsider.com/dictionary/external-entity>.

Meta Platforms is the parent company to social media platforms, i.e. Facebook, Instagram, WhatsApp, and Threads. The name “Meta” emphasizes the metaverse, where users can interact in a virtual reality environment.³⁵ X Corps, formerly known as Twitter, Inc., is a company to social networking platform, X. Furthermore, a social media platform called TikTok facilitates the creation, editing, and sharing of videos between 15 seconds and three minutes in length. These platforms have become pathways for creating and sharing news and information,³⁶ enabling social interaction and self-expression, and also have brought about a paradigm shift in the way people consume and share information.

As social media platforms continue attracting billions of users,³⁷ they also have become an essential component in businesses’ marketing strategies by offering a unique opportunity for companies to optimize their internal operations and build connections with suppliers, other businesses, and particularly customers in meaningful ways.³⁸ It is worth noting that social media encompasses a wide range of applications and functions, which can vary significantly between different types of platforms. In addition, social media has its characteristics, i.e., network, information, archive, interactivity, simulation of society, and user-generated content.³⁹

To protect the right to freedom of expression and opinion in cyberspace, particularly, the instruments of international law under Article 19 UDHR as well as Article 19 (1) and (2) of the ICCPR firmly stipulated that everyone has the right to hold opinions and to seek, receive, and impart information through any media without interference. Hence, it is crucial to uphold this right, as it enables people to engage in open discourse and freely express their thoughts and opinions. It has also played a pivotal role in creating a democratic society in Indonesia, particularly. Moreover, to promote and protect the freedom of opinion and expression of every individual, in accordance with international human rights law and standards, the Human Rights Council; *ergo*, appointed a Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.⁴⁰

³⁵ Britannica, “Meta,” <https://www.britannica.com/topic/Meta-Platforms>.

³⁶ Gaurav Kumar Bisen et al, “A Systematic Review of Implications of Social Media Misinformation Upon Marketing and Consumers,” *Journal of Namibian Studies: History Politics Culture* 36, no. 2 (2023): 662.

³⁷ DataReportal, “Digital 2023 October Global Statshot Report,” <https://datareportal.com/reports/digital-2023-october-global-statshot>.

³⁸ Thomas Aichner et al, “Twenty-Five Years of Social Media: A Review of Social Media Applications and Definitions from 1994 to 2019,” *Cyberpsychology, Behavior, and Social Networking* 24, no. 4 (2021): 216-217.

³⁹ Neng Dewi Kurnia et al, “Hubungan Pemanfaatan Media Sosial Instagram dengan Kemampuan Literasi Media di UPT Perpustakaan Itenas,” *EduLib: Journal of Library and Information Science* 8, no. 1 (2018): 4.

⁴⁰ See United Nation, Human Rights Council (“UNHRC”), “Resolution Adopted by the Human Rights Council on 3 April 2023,” 14 April 2023, A/HRC/RES/25/9 <https://undocs.org/A/HRC/RES/25/9>; and UN Commission on Human Rights “Question

Nonetheless, the rise of social media has eradicated many barriers that used to prevent the spread of fake news in democratic countries.⁴¹ This has caused tendencies to produce and distribute false information or news containing incitement, hatred, threats, and hate speech towards individuals or groups based on their race, ethnicity, and religion, particularly by the one who excels in information and communication technology or social networks.⁴² Moreover, social media has also emerged as a significant platform for the amplification of economic, political, and cultural grievances of individuals and groups. The impact of these platforms is not limited to their ability to amplify existing sentiments; they also have an independent effect on the politics of both established democracies and autocratic regimes.⁴³

Since 2018,⁴⁴ MoCI has verified and taken down a total of 3,640 cases of online hate speech. These cases were primarily based on the discrimination of ethnicity, religion, race, and intergroups. Furthermore, in 2021,⁴⁵ the Centre for Strategic and International Studies⁴⁶ recorded a surge in the number of the phenomenon of hate speech in Indonesia. Following that, in 2022,⁴⁷ Amnesty International⁴⁸ documented numerous cases of violations against freedom of expression on social media in Indonesia, in which at least 91 incidents occurred and led to 148 victims from 2019 to 2022. This surge of hate speech cases in Indonesia may pose a significant threat to Indonesia's sovereignty and cause social and national disunity.

All in all, it can be said that content produced and shared by these entities, which encompasses user-generated content,⁴⁹ broadcasts or shows

of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment," 4 March 1993, E/CN.4/1993/L.48 <https://undocs.org/E/CN.4/1993/L.48>.

⁴¹ Gabriela Belova and Gergana Georgieva, "Fake News as A Threat to National Security," *International Conference Knowledge-Based Organization* 24, no. 1 (2018): 19.

⁴² See Hartati and Muhammad, *op. cit.*, 52-53; Bisen et al, *loc. cit.*; Security Council Report, *loc.cit.*; and The Daily Star, "Disinformation is A Threat to Democracy," <https://www.thedailystar.net/opinion/views/news/disinformation-threat-democracy-3310766>.

⁴³ Ekaterina Zhuravskaya, Maria Petrova, and Ruben Enikolopov, "Political Effect of the Internet and Social Media," *Annual Review of Economics* 12 (2020): 416.

⁴⁴ Center for Digital Society, "Regulating Harmful Content in Indonesia: Legal Frameworks, Trends, and Concerns," <https://digitalsociety.id/wp-content/uploads/2023/04/Final-Report-Unesco-Rev-18062022-1.pdf>, 3.

⁴⁵ CSIS, "CSIS National Hate Speech Dashboard," <https://hatespeech.csis.or.id/>.

⁴⁶ Centre for Strategic and International Studies (CSIS) is a non-profit policy research organization. See CSIS, "About Centre for Strategic and International Studies," <https://www.csis.or.id/about-us/>.

⁴⁷ Amnesty International Indonesia. *Silencing Voices, Suppressing Criticism: The Decline in Indonesia's Civil Liberties* (Jakarta: Amnesty International Indonesia, 2022), 7.

⁴⁸ Amnesty International is an international non-governmental organization working for the protection of human rights of every individual and group across the world. See Amnesty International, "About Us," <https://www.amnesty.org/en/about-us/>.

⁴⁹ Media content created by non-professionals on a platform. See Oxford Reference, "User-Generated Content," <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803114939679>.

that contain provocative, blasphemous, threatening, hate speech, or hoaxes with religion, ethnicity, race, or gender content, could undermine the integrity of the Republic of Indonesia. Moreover, since social media platform companies possess significant capital and advanced technology that enables them to have an extensive network globally, it is reported that these entities are purportedly allowing perpetrators to disseminate false information to profit from such activities.⁵⁰ The non-state actors wield immense power that can challenge the sovereignty of a country and, in some cases, even interfere with it.

The fact that social media platforms operate fully outside the sovereignty and possess no obligations to the government⁵¹ has resulted in the limitation and inability of the Republic of Indonesia, particularly, to take control of the dissemination of fake news and hate speech. This lack of control derives from the fact that these platforms fall beyond the scope of Indonesian jurisdiction. As per the current scenario, the Indonesian government faces limitations in regulating social media platforms. This, in turn, limits Indonesia's ability to exercise significant control over social media activities.

2.2. Implementation on the Limitations of the Right to Freedom of Expression on Social Media under Indonesian National Law

In accordance with Indonesian Constitution,⁵² every individual has the right to express, receive, and share information and opinions in any form and by any means.⁵³ Freedom of expression is a fundamental right that holds both personal and social aspects,⁵⁴ which are considered “indispensable conditions for the full development of the person”, “essential for any society”, and constitute the “foundation stone for every free and democratic society”.⁵⁵ It also plays a crucial role in the development and reinforcement of democratic systems since it is closely connected to other fundamental rights, such as freedom of association, assembly, thought,

⁵⁰ UNHRC, “Disinformation and Freedom of Opinion and Expression – Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression,” 13 April 2021, A/HRC/47/25 <https://undocs.org/A/HRC/47/25>, paras. 16-17.

⁵¹ United Nations General Assembly, “Report on Online Hate Speech,” 9 October 2019, A/74/486 <https://undocs.org/A/74/486>, para. 41. (“A/74/486”)

⁵² The Indonesian Constitution, Article 28E (3) and 28F.

⁵³ Amnesty International, “Kebebasan Berekspresi,” <https://www.amnesty.id/kebebasan-berekspresi/>.

⁵⁴ Zico Junius Fernando, et al, “The Freedom of Expression in Indonesia,” *Cogent Social Sciences* 8, no. 1 (2022): 1.

⁵⁵ See United Nations, Human Rights Committee, “General Comment No. 34: Article 19 (Freedom of Opinion and Expression),” 12 September 2011, CCPR/C/GC/34, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>; and Emily Howie, “Protecting the Human Right to Freedom of Expression in International Law,” *International Journal of Speech-Language Pathology* 20, no.1 (2018): 12-13.

conscience, religion, and participation in public affairs.⁵⁶ In other words, the right to freedom of expression is an essential instrument for promoting and protecting other human rights, such as the right to freedom of thought, conscience, and religion. It also plays a significant role in personal development and is an anchor for free and democratic societies.

As previously mentioned in Section 2.1., individuals are using social media as a main place for them to express opinions and themselves. However, in fact, the use of social media as a means of freedom of expression has become imbalanced and filled with various negative content due to a lack of digital literacy skills by some individuals.⁵⁷ This situation may also lead to the degradation of the dignity of other individuals and pose a threat to national security and defense unity. Hence, despite the fact that the right to freedom of expression is a fundamental right⁵⁸ and relates to non-interference by the states,⁵⁹ it is not an absolute right and comes with particular responsibilities that may be restricted on certain grounds. Such limitations are regulated under Article 9 (3) of the ICCPR, under the same broad term as Article 29 (2) of the UDHR, which emphasizes that in exercising the right to freedom of expression, individuals may only be subject to limitations set by the law to protect the recognition and respect the rights and freedom of others and to meet morality, public order and general welfare in a democratic society. In other words, the limitation on freedom of expression comes with certain responsibilities and shall meet three conditions, i.e., legality, legitimacy, as well as necessity and proportionality.⁶⁰

Similar to the limitation on the right to freedom of expression stipulated under Article 9 (3) of the ICCPR, Indonesian national law under Article 28J (2) of the Indonesian Constitution also stipulates limitations on freedom of expression, however, it must be defined in accordance with the law and

⁵⁶ United Nations General Assembly, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Frank La Rue," 20 April 2010. A/HRC/14/23. <https://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.pdf>, 6.

⁵⁷ See Latipah Nasution, "Hak Kebebasan Berpendapat dan Berekspresi dalam Ruang Publik di Era Digital," *ADALAH: Buletin Hukum & Keadilan* 4, no. 3 (2020): 37; and Muhammad Okky Ibrohim and Indra Budi, "Hate Speech and Abusive Language Detection in Indonesia Social Media: Progress and Challenges," *Heliyon* 9, no. 8 (2023): 13.

⁵⁸ Universal Declaration of Human Rights, Article 19.

⁵⁹ House of Lords Communications and Digital Committee, "1st Report of Session 2021-22: Free for all? Freedom of Expression in the Digital Age," <https://committees.parliament.uk/publications/6878/documents/72529/default/#page=10>, 8.

⁶⁰ Legality means the restrictions shall be precise, public, and transparent; authorities should avoid giving unbounded discretion, and appropriate notice must be given. Legitimacy means the restriction should be justified to protect and respect the rights or reputations of others or to protect national security, public order, public health or morals. Necessity and proportionality mean the States must demonstrate that the restriction is necessary and least restrictive to protect a legitimate interest. See A/74/486, para. 6.

shall not be discriminatory. The limitations set under these provisions aim to ensure legal certainty and guarantee regarding the steps and actions taken by the State Party.⁶¹ Additionally, Article 70 of Human Rights Law specifies that freedom of expression shall be subject to limitations regulated by the law.⁶²

In the context of social media, the limitation on the right to freedom of expression is regulated under Article 27, Article 28, and Article 29 of the EIT Law. The provisions under Article 27 of EIT Law construe that any act violating decency, including gambling, insults and/or defamation, as well as extortion and/or threats, is prohibited. Besides, disseminating fake news and information that may incite hatred towards individuals or groups is prohibited under Article 28 of the EIT Law. Further, Article 29 of the EIT Law prohibits the transmission of information and/or electronic documents containing threats of violence or intimidation.

It emphasizes the importance of being mindful of the information shared or disseminated on social media platforms while respecting and protecting other people's human rights, as well as maintaining public order and protecting national security. The existence of this law should give Indonesians the confidence to use technology, knowing that measures are in place to protect their interests and promote responsible online behavior. These laws aim to maintain order and control the flow of information while still upholding the fundamental right to freedom of expression. Hence, the Indonesian government has taken a proactive approach to protect its citizens from the potential harms of information technology by implementing the EIT Law.⁶³

In addition, under Article 2 (2)(b)(4) of the MoCI Regulation No. 5 of 2020 concerning Private Scope Electronic System Operators (hereinafter, "MoCI Regulation No. 5/2020") and Article 1 (18) of the MoT Regulation 31/2023 have also been put in place to regulate the scope of and the use of social media. Furthermore, Law No. 9 of 1998 concerning the Freedom to Express Opinion in Public (hereinafter, "Law 9/1998"), Law No. 40 of 1999 concerning the Press (hereinafter, "Law 40/1999"), and Government Regulation No. 71 of 2019 concerning Electronic System and Transaction Implementation (hereinafter, "Government Regulation 71/2019") have

⁶¹ Afrizal Razqi and Hananto Widodo, "Pembatasan Kebebasan Berekspresi dan Berpendapat Menurut Undang-Undang Nomor 12 Tahun 2005 tentang Pengesahan International Covenant on Civil and Political Rights," *Novum: Jurnal Hukum* 11, no. 7 (2022): 61.

⁶² Since citizens have the right to take part in the policy-making process, the freedom of every person may only be restricted by the law. See Bahder Johan Nasution. *Negara Hukum dan Hak Asasi Manusia* (Bandung: Mandar Maju, 2018), 228.

⁶³ Fadilah Raskasih, "Batasan Kebebasan Berpendapat melalui Media Elektronik dalam Perspektif HAM dikaitkan dengan Tindakan Pidana menurut UU ITE," *Journal Equitable* 5, no. 2 (2020): 147.

entered into force to regulate the vast dissemination of information and hate speech in cyberspace.

Despite being put in place, these laws and regulations have come under criticism from civil organizations, activists, and academic. In particular, a number of vague provisions under the EIT Law and MoCI Regulation No. 5/2020 are likely to pose a serious threat and exacerbate the repression of the right to freedom of expression on social media. These controversial provisions encompass Articles 27 and 28 of the EIT Law, and Article 14 (3)(c) of the MoCI Regulation No. 5/2020.

Provisions under EIT Law are originally aimed to strike a balance between freedom of expression and accountability, and to ensure that the fundamental rights to seek, obtain, possess, store, and convey information are not subtracted, to guarantee freedom from threats to the dignity of the individual or their family, and also to prevent degradation of human dignity.⁶⁴ However, the second amended EIT Law still contains overly broad provisions and is used to criminalize and repress the right to freedom of expression.⁶⁵ Moreover, provisions under Article 14 (3)(c) of the MoCI Regulation No. 5/2020 prohibits the distribution of content that disturbs public order. Yet, this provision falls short of providing a clear definition of 'restricted content,' leaving it open to misinterpretation and misuse. As a result, it can be subject to misinterpretation and misuse, leading to potential confusion and legal issues.

It is undeniable that these laws are meant to govern the limitation on the right to freedom of expression and opinion on social media, to respect the rights of others, and to establish regulations based on the current dynamics of society. However, despite the fact that social media platforms operate outside the Republic of Indonesia's jurisdiction and the government is often struggling to keep up in predicting the spread and negative consequences of fake news and information on social media,⁶⁶ the implementation of limitation on the right to freedom of expression on social media under Indonesian law has found to criminalized and repressed individual's right to freedom of expression on social media. Therefore, the provision on the limitation of this right needs to be repealed or revised.

⁶⁴ Herlambang P. Wiratraman and Sébastien Lafrance, "Protecting Freedom of Expression in Multicultural Societies: Comparing Constitutionalism in Indonesia and Canada", *Yuridika* 36, no. 1 (2021): 88; and Decision of the Constitutional Court of the Republic of Indonesia No. 36/PUU-XX/2022, 52.

⁶⁵ Amnesty Internasional Indonesia, *op.cit.*, 18-19.

⁶⁶ See Hartati and Muhammad, *op. cit.*, 54; and The Diplomat, "As Cyber Threats Grow, Indonesia's Data Protection Efforts are Falling Short," <https://thediplomat.com/2022/06/as-cyber-threats-grow-indonesias-data-protection-efforts-are-falling-short/>.

3. CONCLUSION

The presence of international social media platforms has positively impacted Indonesia's democratic life by providing a space for the free expression of ideas, thoughts, and opinions. Nevertheless, the implementation of the right to freedom of expression, particularly in social media, has led to the widespread dissemination of false information or hoaxes and caused negative impacts. To respect and protect the human rights of others, the right to freedom of expression is subject to limitations based on religious values, morality, and national security. However, the fact that social media platforms are operating outside of Indonesian sovereignty ensures that their compliance with the country's laws is challenging. The external entities influencing Indonesian sovereignty and their impact on freedom of expression on social media have also presented a complex and multifaceted challenge. Thus, the limitation set on the right to freedom of expression under Indonesian National Law has been found to criminalize and repress the right to freedom of expression and requires amendments. It is crucial to reconsider and revise the existing legal framework governing freedom of expression.

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