

CYBER LAW AND CYBER ETHICS

The Limitation on Freedom
of Expression in Cyberspace





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Introduction

The rapid growth of information technology has numerous impacts on social life. For example, it changes direct interaction into indirect interaction due to social media. However, it has both positive and negative consequences. On the good side, it makes it easier for people worldwide to communicate without regard to cultural and geographic boundaries. In addition, it also allows everyone to participate in democracy. However, on the contrary, this situation also brings up some offenses in the digital space, such as hate speech, online defamation, and cyberbullying (Amedie, 2015).

There are at least two reasons that cause those digital offenses. First, the law is always falling years behind social progress, especially in technology. It is described by a classic Dutch postulate which says *het recht hink achter de feiten aan*—the law will always lag behind the times. While technology develops rapidly, the law always lags, thus often creating a legal vacuum. Although there is the law, the jurisdictional problem often inhibits law enforcement in the digital space. Second, anonymity allows everyone to express themselves without limitation. Anonymity in the digital space allows someone to commit a crime without fear of taking responsibility (Chang, 2020).



The arising of those offenses shows that freedom can be expressed without limitation in digital space. However, each person carries out duties and responsibilities in expressing their freedom, including duties and responsibilities in freedom of expression as mentioned in Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) within certain limitations. Those limitations must be provided by law and necessary for respect of the rights and reputations of others, for the protection of national security, public order, or public health or morals. In the digital space, cyber law and cyber ethics are two instruments that limit freedom of expression.

This paper will analyze to what extent the limitation on freedom of expression can be applied by taking into account international legal instruments and legal doctrines. Then, it will discuss cyber law and cyber ethics as two instruments that limit freedom of expression in the digital space and its problems. Last but not least, this paper will explore the application of cyber law and cyber ethics in terms of positive law in Indonesia and the solution to the existing problems.

Freedom of Expression and Its Limitations


Freedom of expression is one of the most fundamental human rights. It is shown by the Universal Declaration of Human Rights—one of the preeminent international human rights documents—which mentions freedom of expression in Article 19. It is later affirmed in the International Covenant on Civil and Political Rights (ICCPR). Article 19(2) ICCPR states that everyone shall have the right to freedom of expression either orally, in writing or in print, in the form of art, or through any other media of his choice. In the next paragraph, it is mentioned that the right to freedom of expression carries with it special duties and responsibilities, which also become its limitations. Those limitations solely aim to respect the rights and reputations of others and to protect national security, public order, public health, or morals.

The limitation on freedom of expression is then explained strictly in the Siracusa Principles. Siracusa Principles provides guidance on the limitation on freedom of expression that rests on four principles, i.e., legality, legitimate aim, necessity, and proportionality. Legality means the limitation shall be prescribed by law, and there are effective remedies against the illegal or abusive limitation. Legitimate aim implies the purpose of the limitation shall be legitimate and limited solely to protect certain things as mentioned in Article 19(3) of the ICCPR. Necessity means the limitation shall be exercised if only needed and it is the only way to attain the purpose of the limitation. Lastly, proportionality means the limitation shall be adequate to the rights protected (Andelkovic, 2017).

Although those limitations are still debatable, almost every country in the world has regulations that limit freedom of expression. Indonesia, for example, regulates those limitations in Article 28J of the 1945 Constitution. Freedom of expression is mentioned in Articles 28 and 28E(3) and its limitations are mentioned in Article 28J in the constitution. The limitations stipulated in the Indonesian constitution are similar to those in Article 19(3) of the ICCPR. However, religious values are also added as one of the considerations in the limitations. The constitution also ensures the legality principle by stating that those limitations must be provided by law.

Besides being regulated by international law, some legal doctrines also justify the limitation on freedom of expression. One of the legal doctrines that justifies the limitation on freedom of expression is Harm Principle by John Stuart Mill. John Stuart Mill was an influential English philosopher with his ideas on liberal politics. He became one of the prominent thinkers in the 19th century whose works are still used today (Cohen-Almagor, 2017). One of his works, *On Liberty* (1859), discusses a well-known legal doctrine on freedom and its limitations, namely *the harm principle*. This doctrine states that limitation on freedom only can be exercised if it aims to prevent harm to others (Bell, 2021).



An illustration at the top of the page shows three documents. Two are white with grey horizontal lines representing text, and one is yellow with a gear icon at the bottom right. They are positioned under two blue spotlights that cast a yellow glow. There are also several white starburst icons scattered around the documents.

Unfortunately, Mill did not clearly explain what he meant by 'harm' in this context. It creates various interpretations, particularly regarding limitations on freedom of expression related to others' rights. In this context, harm can be described as the damaging effect on someone due to another's expression. Therefore, cyberbullying, online defamation, and libel can be considered limitations respecting the rights and freedoms of others. Though, in fact, those three things are still debatable in society. Nevertheless, at least those three things harm others' rights.

It differs from the critique that cannot be used as a limitation on freedom of expression. Critiques cannot be classified as offenses like defamation because they are different. The intention can distinguish it; critique aims to evaluate, while defamation intends to harm others. On top of that, this exclusion is affirmed by Siracusa Principles, which states that the limitation on human rights regarding others' reputations shall not be used to protect the state and its officials from public opinion or criticism.

Based on legal reasoning, the limitation on freedom of expression to respect others' rights is valid. It is because, in essence, everyone has the right to dignity and reputation, as mentioned in Articles 1 and 12 of the Universal Declaration of Human Rights (UDHR). Moreover, everyone has the right to the protection of their reputation, as mentioned in Article 12 of the UDHR. It shows that there are two rights here, i.e., the right to freedom of expression and the right to reputation and dignity.

Cyber Law and Cyber Ethics and Its Problems

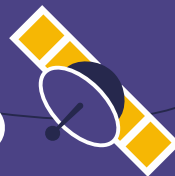
The growth of information technology has created a new dimension in human life: digital space. Digital space allows people to interact with others, just like direct interaction with the real life. Someone can express himself freely in the digital space freely, particularly in social media. The limitation on freedom of expression, should be applicable even in the digital space.

There are two instruments that can be used to limit freedom of expression in the digital space, namely cyber law and cyber ethics. Cyberlaw regulates the use of the internet and activities performed over the internet and other networks (Rackeviciene dan Mockiene, 2020). It is a fact that the internet has become a means for the arising of new crimes called cybercrimes. Some are crimes related to expressions, such as cyberbullying, hate speech, and online defamation. Hence, cyber law is significant to regulate those things to ensure legal certainty and the protection of people.

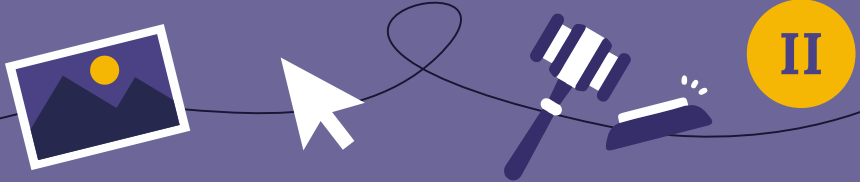


On the other hand, cyber ethics is a set of norms concerned with the decision-making of computer users and how those decisions affect other individuals and society. Cyber ethics tries to apply and modify fundamental values and virtues to new problems and situations arising from cyber technologies and society (Duggal, 2018). In brief, cyber ethics is the application of morality in the digital world. Unlike cyber law, which is established in a written form and is legally binding, cyber ethics comes from individual morality and is influenced by culture and living norms in society. Consequently, the application of cyber ethics so varies from one community to another. One recognized cyber ethics is the Ten Commandments of Computer Ethics, published by the Computer Ethics Institute. One of them said, ' *Thou shalt not use a computer to harm other people*', which becomes the central guidance in digital interaction (Duggal, 2018). Therefore, it is clear that cyberbullying, hate speech, and online defamation are violations of cyber ethics. One cannot perform cyberbullying and online defamation on the grounds of freedom of expression or free speech.

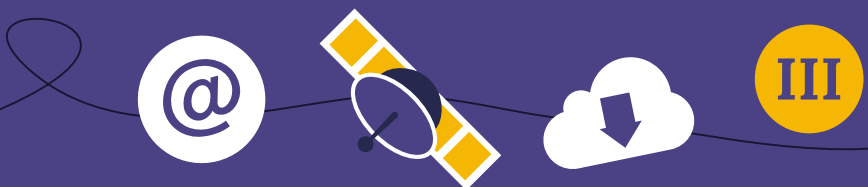
In the reality of digital society, the application of cyber law and cyber ethics face numerous problems. The first problem comes from the development of cyber law, which is not in line with the growth of the internet. Since its creation in the 1990s, digital space has evolved continuously, and cybercrime has flourished on a parallel track with internet growth (Schjolber, 2017). One of its developments is represented by the virtual reality called Metaverse. However, if we examine the development of law in Indonesia, there is no regulation that specifically and strictly regulates it. Another fact that confirms the argument above is that Personal Data Protection Act (PDP Act) was just recently passed last September. Meanwhile, the need for a law that regulates the protection of personal data has been needed for years ago. Both facts above show that law indeed lags behind social progress.



The second problem is regarding law enforcement when it comes to state jurisdiction. In international law, a state can only exercise its authority to enforce the law in its territory (Shaw, 2017). Otherwise, cyberspace creates a borderless world because everyone around the world is connected without meeting each other. This also makes law enforcement in the digital space hard because jurisdiction restricts states from dealing with cybercrimes. A state can indeed enforce its national law outside its territory. However, it only applies to certain crimes categorized as serious crimes, such as crimes against national security and terrorism. This principle does not apply to online defamation and hates speech committed by someone outside the state's territory.



The third problem is anonymity in cyberspace. The internet allows someone to use an anonymous identity in interacting with others. Anonymity on the internet lets a criminal commit a crime without being afraid to take responsibility for his action. Because of anonymous identity, someone cannot be punished for his/her action unless it can be traced to his/her true identity. The fact that content on the internet is permanent and causes a prolonged effect on the victim worsens it. For example, someone performs cyberbullying on the internet using an anonymous identity. It will be difficult to trace the perpetrator while the victim experiences a prolonged effect from that cyberbullying (Jhonson, *et al.*, 2019).





The three problems above show that the implementation of law in cyberspace has several drawbacks. If so, cyber ethics should be the alternative to protect others' dignity and reputation from reckless expression. Nonetheless, cyber ethics also has its problems. As explained before, cyber ethics depends on individual morality, so it is not legally binding just like cyber law, which has legal sanctions. Therefore, the application of cyber ethics is ineffective since it is so dependent on each individual to exercise it.

One of the solutions that can be done is to introduce cyber ethics education into the education system. Cyber ethics education concerns responsible and moral behavior and the use of computers and digital technology, critical moral thinking, decision-making with cyber and digital technology, technical skills, leadership, and management strategies (Petrie-Wyman, Rodi, dan McConnell, 2021). Cyber ethics education intends to teach about good and bad and the limitation of expressing freedom in the digital space. For instance, cyber ethics teaches that someone shall not insult or perform cyberbullying on others on social media. Cyber ethics education also focuses on developing social responsibility that every action performed by someone will affect another person.

Cyber ethics education is not only teachers' duty in formal education. Parents have the most significant role in teaching their children cyber ethics education. Hence, there must be a collaboration between the teachers, the parents, and the whole society to educate the children about ethics and morality in using the internet in the digital space (Kaluarachchi, Warren, dan Jiang, 2019). An appropriate cyber ethics education will create a secure digital environment, mainly social media.

Cyber Law and Cyber Ethics in Indonesia

As a democratic country, Indonesia recognizes and protects human rights in its constitution. The regulation of human rights is mentioned in Article 28A to Article 28J of the 1945 Constitution. Article 28E(3) mentions the freedom of expression. It states that everyone shall be entitled to the freedom to associate, assemble, and of expression (Fuady, *et al.*, 2020). However, freedom of expression in Indonesia also has certain limitations, as mentioned in the Siracusa Principles. The limitation is mentioned in Article 28J(2) of the 1945 Constitution, which states that:

"In the exercise of his/her rights and freedom, every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations for morality, religious values, security, and public order in a democratic society."

In essence, the limitation on freedom of expression in Indonesia is in accordance with the provisions of the Siracusa Principles. The difference is that the Indonesian constitution added *religious values* as one of the limitations on freedom of expression. Thus, in Indonesian law, blasphemy becomes one of its limitations.



The limitation on freedom of expression in Indonesia regarding the respect of rights and freedom of others is regulated in Chapter XVI on Defamation starting from Articles 310 to 321 of the Indonesian Criminal Code. Those articles are the limitation on freedom of expression in the real world. Meanwhile, the limitation on freedom of expression in the digital world is mentioned in Law No. 11/2008 on Electronic Information and Transactions (EIT Law), particularly in Article 27(3). The article mainly regulates the prohibition of online defamation. The elucidation of the article also explained that the definition of defamation in Article 27(3) of EIT Law is referred to the provisions of the Indonesian Criminal Code. It means that the entire article in Chapter XVI of the Indonesian Criminal Code does apply to Article 27(3) of EIT Law if it is conducted online.

Though it intends to protect others' rights and freedom, the defamation provision—both mentioned in the Indonesian Criminal Code and EIT Law—has many problems in its application. First, this provision is often used to criminalize a critical statement. One example is the Saiful Mahdi case, an engineering professor at Universitas Syah Kuala who was imprisoned due to the statement about the Probationary Civil Servant (CPNS) test result that he shared with a WhatsApp group. The judges deemed his statement as defamation against Taufiq Saidi, the Dean of the Faculty of Engineering Universitas Syah Kuala. In fact, Saiful Mahdi's statement did not even mention anyone (Putra, 2022). Such a case does not only happen to Saiful Mahdi; there are many victims criminalized by EIT Law misapplication due to their statements, like the Baiq Nuril case.

Second, the defamation provision is often used by public officials to protect themselves from public opinion or criticism. A report from SAFENet shows that most defamation cases come from public officials (Putra, 2022). It shows that this provision is used to restrict freedom of expression inappropriately. As discussed in the previous section, a critique is not supposed to be considered defamation. Moreover, Syracuse Principles also emphasizes that the limitation on freedom of expression shall not be used to protect the state and its officials from public opinion or criticism.

Following the problems above, the Minister of Information and Communications, the Attorney General, and the National Police Chief issued EIT Law Joint Decree in 2021. The Joint Decree provides guidelines on the implementation of EIT Law, especially Article 27, which regulates prohibited acts such as contents against propriety, contents of gambling, contents of defamation, and contents of extortion and/or threats. Particularly in the defamation provision, the Joint Decree gives a strict limitation on it. What is meant by defamation in Article 27(3) EIT Law is only referred to Articles 310 and 311 of the Indonesian Criminal Code. Simple defamation, as defined by Article 315 of the Indonesian Criminal Code, does not count as defamation in Article 27(3) of EIT Law. This Joint Decree also emphasizes that an assessment, opinion, evaluation, and fact do not belong to this provision. Furthermore, the Joint Decree limits the plaintiff to individuals with a specific identity, not a particular institution, corporate, profession, or position. Lattermost, the Joint Decree also limits the phrase “intends to give publicity thereof” (in the context to distribute, and/or transmit, and/or causes to be accessible) only to social media or online groups that are accessible to the public, not a limited online group such as family, institution, and so forth.

The EIT Law Joint Decree issue significantly impacts interpreting Article 27(3) of EIT Law so that the definition of defamation in this provision becomes clearer and more strict. Nevertheless, it does not guarantee that the defamation provision in EIT Law will not be misused. In many cases, the problem does not arise from the legal norm but from the application of the norm by the officers. Hence, the officers must also acknowledge which can be considered defamation and which cannot. Only then will the misuse of defamation provisions toward critique statements not happen in the future.

Regarding cyberbullying, Indonesia has no specific regulation which governs bullying in cyberspace. Cyberbullying can not be classified as a prohibited act in Article 27(3) of EIT Law because both have a fundamental distinction. However, cyberbullying should not be left unregulated since it harms others. Numerous research shows that cyberbullying harms mental health. In many cases, cyberbullying triggers sleep disorders, depression, and even suicide (Donoghue dan Meltzer, 2018; Reed *et al.*, 2015; Rodelli *et al.*, 2018). Thus, cyberbullying should be specifically regulated to protect others' rights and freedom from reckless expression. The regulation of cyberbullying shall be made restrictively to prevent misuse, like the EIT Law.

Furthermore, cyber ethics education, as discussed in the previous section, should be strengthened. It can be implemented by introducing cyber ethics in the school curricula starting from elementary school. Cyber ethics education will teach children what is good and bad in the digital world and make them wiser in using social media.




Conclusion

As one of the fundamental human rights, freedom of expression must be respected. However, the exercise of freedom of expression needs to be limited in certain circumstances, especially with respect for the rights and freedom of others. Therefore, cyber law and cyber ethics have a significant role in ensuring that freedom of expression does not violate the rights and freedoms of others. Cyber law and cyber ethics are still unideal because they have many problems in their implementation. Specific actions need to be taken to make them effective, for example, by strengthening cyber law and implementing cyber ethics in the school curricula. Those actions are needed to create a secure digital environment for all.




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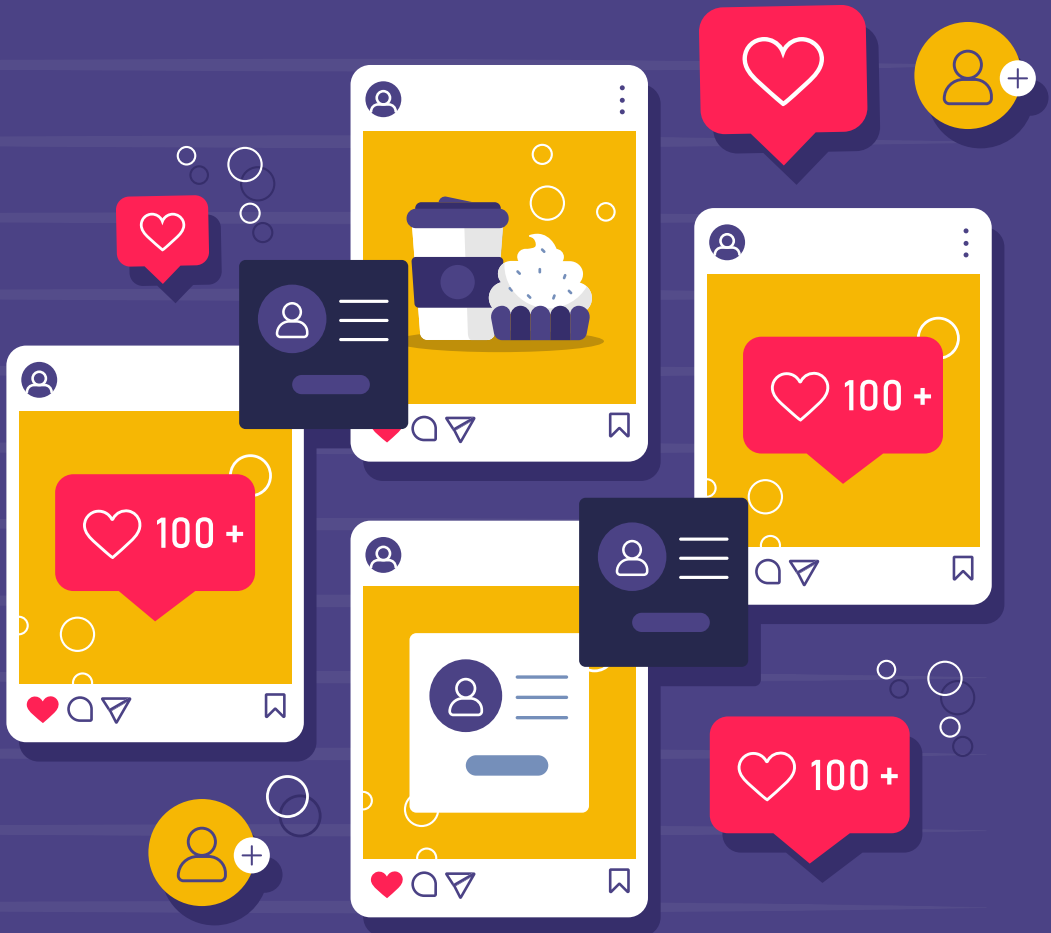


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