

CLIENT ALERT

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Two Constitutional Court Rulings on EIT Law Offer New Hope for Freedom of Expression in the Digital Sphere

In recent years, the rapid advancement of information technology and the widespread use of social media have fundamentally altered communication, transforming these platforms into digital public spheres where citizens increasingly express opinions, including criticism of government, public figures, and institutions. From a sociological perspective, social media's openness, rapid dissemination of information, broad reach, and the relative anonymity and autonomy it offers have made it the preferred medium for voicing criticism unconstrained by traditional formal or institutional mechanisms. Nevertheless, the act of expressing criticism through social media often raises legal concerns.

One of the invoked provisions in this context is Article 27A of Law Number 11 of 2008 on Electronic Information and Transactions, as amended by Law Number 19 of 2016 and Law Number 1 of 2024 (“**EIT Law**”) concerning defamation offence, which prohibits any person from intentionally and unlawfully distributing, transmitting, and/or making accessible electronic information and/or electronic documents containing defamatory or insulting content through an electronic system.

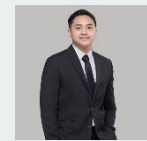
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In addition, Article 28 paragraph (2) of the EIT Law criminalizes hate speech, and is often used as a legal basis in cases involving criticism disseminated via social media, especially when such criticisms are construed as incitement to hatred on the basis of ethnicity, religion, race, or inter-group divisions (commonly referred to as “**SARA**”). Another relevant provision in the EIT Law is Article 28 paragraph (3), which stipulates the offence related to the making of false information that leads to a riot in public.

The primary legal issue arising from the enforcement of the above provisions lies in the broad and subjective interpretation of their constituent elements, which has the potential to criminalize legitimate and constitutionally protected expressions of opinion. Significant legal concerns persist regarding the enforcement of defamation and hate speech provisions, largely due to their subjective interpretation by law enforcement. The broad construction of terms such as “causing a sense of hatred” and “riot” poses a risk of criminalizing lawful and protected criticism, as the absence of clear legal boundaries between constructive critique and malicious defamation fosters legal uncertainty and the potential for prosecuting legitimate expression. This is further compounded by inconsistent application, contributing to perceptions of discriminatory and arbitrary justice administration.

A notable case that drew public attention involved Daniel Frits Maurits Tangkilisan, an environmental activist residing in Karimunjawa, Jepara Regency, Central Java Province. In April 2024, he was sentenced to seven months’ imprisonment after being found guilty of disseminating information deemed to incite hatred or SARA via social media. The incident in question occurred on November 12, 2022, when Daniel uploaded a six-minute video showing environmental degradation on the Karimunjawa coast allegedly caused by illegal shrimp farming operations added with commentary perceived as offensive. Daniel’s post led to a police report filed with the Jepara District Police in February 2023, and he was subsequently charged under Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of the EIT Law. Further, motivated by the case he experienced and the fact that several articles in EIT Law present a substantial risk of misuse to suppress critical expression, Daniel submitted a judicial review to the Constitutional Court of the Republic of Indonesia (“**Constitutional Court**”) as registered under Case Number 105/PUU-XXII/2024.

In Daniel’s petition for judicial review, he contended that Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of the EIT Law should be interpreted more narrowly, for the following reasons:

- a) The formulation fails to address the root causes of hate speech and unjustly criminalizes innocent individuals;
- b) The current articulation of mens rea complicates the effective prosecution of manifest hatred;
- c) The act of “transmitting” prohibited content under Article 28 paragraph (2) diverges from the international standard under Article 20 paragraph (2) of the International Covenant on Civil and Political Rights (ICCPR), which limits criminalization to public incitement of hatred; and
- d) The broad interpretation of what constitutes “information” or “electronic documents” that give rise to hatred allows for disproportionate and arbitrary enforcement against individuals who may not possess culpable intent.

In its Decision Number 105/PUU-XXII/2024, the Constitutional Court stated that freedom of expression on social media allows individuals to openly share ideas and criticisms, which can strengthen democracy and public participation. However, it also carries the risk of spreading hoaxes and triggering social conflict. Therefore, clear regulations are needed to ensure this freedom is exercised wisely, responsibly, and with respect for the rights of others, so it can make a positive contribution to democracy and social justice. The Constitutional Court partially granted Daniel's petition by clarifying that Article 27A, as linked to Article 45 paragraph (5) of the EIT Law, constitutes a complaint-based offence (*delik aduan*), prosecutable only upon a complaint by the victim or the person defamed. In this context, although a legal entity may be a victim of defamation, it cannot file a complaint or report through electronic media. Only the individual victim whose good name has been defamed can report the criminal act to law enforcement, not their representative. To avoid arbitrary application by law enforcement in applying the phrase "other person" in Article 27A of the EIT Law, the Constitutional Court affirmed that the phrase "other person" means an individual or natural person. Moreover, the Constitutional Court clarified regarding the phrase "a matter", which relates to the act of accusing something with the intent that it becomes publicly known, creating potential for multiple interpretations without clear normative limits. Therefore, the Constitutional Court declared Article 27A, as linked to Article 45 paragraph (5) of the EIT Law, is conditionally unconstitutional if not interpreted as 'an act that degrades the honour or good name of a person'. Also, the Constitutional Court considered that Article 28 paragraph (2) is conditionally unconstitutional unless interpreted as "only electronic information and/or electronic documents that substantially contain deliberate and public acts of spreading hatred based on certain identities that pose a real risk of discrimination, hostility, or violence." In this matter, the Constitutional Court considered that the lack of clear limits on the form or content of electronic information in Article 28 paragraph (2) in conjunction with Article 45A paragraph (2) of the EIT Law has risks in criminalizing neutral or unintended expressions of opinion. To ensure proportional enforcement, it should only apply to deliberate public acts that promote identity-based hatred and clearly lead to discrimination, hostility, or violence against protected groups.

Similar nature with Daniel, Jovi Andrea Bachtiar, S.H., a public prosecutor, also submitted a judicial review of some provisions under the EIT Law to the Constitutional Court as registered under Case Number 115/PUU-XXII/2024. As background, Jovi posted on his social media criticizing a colleague for allegedly misusing an official government vehicle, suggesting improper use of state facilities. His colleague felt defamed by Jovi's posts and filed a police report against Jovi for alleged criminal acts under Article 45 paragraph (1) in conjunction with Article 27 paragraph (1), and Article 45 paragraph (4) in conjunction with Article 27A of the EIT Law. Jovi claimed that his act was legitimate criticism in the public interest. Despite this, the law enforcement agency proceeded with the case and named Jovi a suspect. In November 2024, the panel of judges at the Padangsidempuan District Court, North Sumatra, found Jovi guilty of defamation through his social media account and sentenced him to six months in prison, suspended with a one-year probation period.

In Jovi's petition for judicial review, he argued that Article 27 paragraph (3) of the EIT Law and Articles 310 and 311 of the Indonesian Criminal Code (KUHP) are overly broad and subjective, enabling misuse and threatening constitutionally protected freedom of expression. He contended that criminal defamation provisions are frequently used to suppress citizens' digital expressions, including criticism of public officials or policies, leading to legal uncertainty and undermining the rights to opinion and communication as guaranteed by Articles 28E paragraph (2), 28E paragraph (3), and 28F of the 1945 Constitution of the Republic of Indonesia.

In the petition of related decision Number 115/PUU-XXXII/2024, the phrase "false information causing public riot" is discussed. The formulation of Article 28 paragraph (3) of the EIT Law is, in essence, aligned with Article 263 of the Indonesian Penal Code (KUHP). According to expert opinion, the formulation concerning "false information" in EIT Law differs from the one previously contained in Article 14 and 15 of Law Number 1 of 1946 concerning the Regulations on Criminal Law ("**Law 1/1946**"), which has been reviewed and granted by the Constitutional Court through the Decision Number 78/PUU-XXI/2023. This is the effect of Article 28 paragraph (3) in conjunction with Article 45A paragraph (3) of the EIT Law; the phrase "false information" does not stand alone, but is incorporated with the phrase "causing public riot". In other words, the meaning or scope of the criminalized act of spreading false information is limited to false information that causes a public riot. Thus, a false information criminalized under Article 24 paragraph (3) of the EIT Law has a clear parameter. Through such formulation, the Constitutional Court's assessment regarding the vagueness of the term "false news or information" in Articles 14 and 15 of the Law 1/1946 has been addressed by the legislators by establishing a clear standard of the act of disseminating false information, namely information that causes a riot. The Constitutional Court addressed there is indeed an ambiguities in Article 28 paragraph (3) and Article 45A paragraph (3) of the EIT Law, particularly the definition of "riot." The Constitutional Court found a lack of legal certainty in light of the legislative explanation, which states that "riot" refers solely to disturbances in physical public spaces and does not encompass digital or cyber environments. Hence, the space for citizens to actualize their right to convey opinions and thoughts to the state remains protected. This is because the prohibition and criminal sanction concerning the dissemination of false information under Article 28 paragraph (3) of the EIT Law is limited solely to false information that causes a riot in society. The Constitutional Court decided based on the elucidation of Article 28 paragraph (3) of the EIT Law, which stipulates that the term "riot" refers to conditions that disturb public order in the physical realm, not in the digital or cyber realm. Therefore, the elucidation of Article 28 paragraph (3) of the EIT Law has provided a clear limitation that the dissemination of false information must result in physical riots in society, and does not include disturbances or riots occurring in the digital/cyber space. This limitation is in line with the Constitutional Court's Decision Number 78/PUU-XXI/2023, such that law enforcement officials may only proceed with legal action against the dissemination of false information that causes physical riots in society.

These two landmark rulings on EIT Law by the Constitutional Court, rendered in April 2025, represent a pivotal shift in safeguarding freedom of expression within Indonesia's digital landscape, addressing longstanding concerns over vague and overly broad legal provisions that have often been misused to criminalize legitimate public criticism on social media. By clarifying that peaceful expressions made in the public interest, including criticism of government actions or officials, should not attract criminal sanctions, the Constitutional Court reaffirmed the importance of legal certainty, limited the scope of complaint-based offences, and emphasized the state's obligation to uphold human rights principles. These decisions mark a turning point in protecting democratic freedoms in an era increasingly shaped by digital communication and should serve as essential guidance for law enforcement, encouraging a more informed and proportionate application of the law. While these rulings offer much-needed relief and help foster a more inclusive and respectful digital discourse, it remains crucial to balance freedom of expression with the responsibility to prevent incitement to harm, hatred, or misinformation. A measured and human rights-based interpretation of the EIT Law will be key to preserving constitutional democratic values while ensuring legal protection in the evolving digital space.

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We were named '2021 and 2022 Top 100 Indonesian Law Firm's, '2021 and 2022 Rising Star Law Firm', '2021 and 2022 Mid-Size Full-Service Law Firm' and '2022 In-House Counsel Choice – Most Recommended Law Firm' by Hukum Online. These awards recognize our milestones as a recognized mid-size law firm. We were also rewarded the '2023 Project Finance Deal of the Year' and 'the 2023 Firm to Watch' by Asian Legal Business (ALB).

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