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GOVERNMENT THESIS

The Indonesian Ministry of Communication and Informatics (MCI) Content Moderation Regulation Policy Since 2020: Impacts on Good Governance and Freedom of Expression

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Abstract

World community is a common term in the digital world, there is even a term 'netizen', namely the community in the network. This shows that human activities are now heavily dependent on digital technology. However, in Indonesia, which has a large and diverse population, it still takes a lot of time to get established in digital literacy and digital sovereignty. In order to achieve this, the Government of Indonesia through Ministry of Communication and Informatics (MOCI) Regulation No. 5 of 2020 on Electronic System Organizers in the Private Sector, seeks to strengthen digital sovereignty in Indonesia and foster digital literacy. However, the implementation of this policy has the potential to limit the rights and freedom of expression for the Indonesian people. The worst thing was when the Ministry of Communication and Informatics as the agency authorized to regulate communication and information, both conventional and digital, imposed a ban on Electronic System Organizers (ESO), both domestically and internationally, so that it could not be accessed by Indonesian people throughout the country. It happened because the ESO had not re-registered their website with the ministry and causing many people in Indonesia to be affected in their business and income. This certainly has an impact on the implementation of good governance in Indonesia. In this study, it will be further investigated what things limit freedom of expression in these regulations and how good governance rules apply in implementing these policies in Indonesia.

Keyword: Content Moderation, Good Governance, Freedom of Expression

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CHAPTER I
INTRODUCTIONS

We all know that in our daily lives we not only interact in the real world but also in the digital world. Digital activities are widely used to support physical activity in the real world, be it for work, health, or just for sports and recreation. Many aspects of life have relied on this digital technology with its various devices, and not a few require special expertise in its use. From the youngest of age to the eldest, regardless of gender and race or ethnicity, let alone the distance between countries, it seems as if it means nothing to digital technology that infiltrates the foundations of today's modern life. In addition, the Industrial Revolution 4.0 has disrupted various aspects of life, especially with the stronger penetration and use of the Internet of Things (IoT) and the use of digital technology. The government is obliged to build human resources to prepare a society that is increasingly adaptive in the digital space as an extended reality of everyday people's lives (Kemkominfo, 2020). The digital literacy program is a major policy framework in pursuing this readiness aimed at increasing public awareness and knowledge so that they are better prepared for digital transformation (Plate, 2021).

The Institute Management Development released the results of its survey findings regarding the Global World Digital Competitiveness Index in terms of digital literacy in 2020. The survey results placed Indonesia in 53rd position out of 63 countries surveyed. In early 2022, the Indonesian Ministry of Communication and Information (MCI) partnered with Katadata Insight Center (KIC) to release the results of a survey on Indonesia's digital literacy in 2021. The survey involved 10,000 respondents spread across 34 provinces, in 514 districts/cities. Respondents are household members aged 13-70 years who accessed the internet in the last 3 months since October. As a result, Indonesia's digital literacy index was found to have a score of 3.49 with an index score scale of 0-5. Based on this score, Indonesia's literacy index is still in the medium category.

Based on these facts, of course the digital literacy program proclaimed by the Government has a crucial role to continue to improve people's capabilities and adapt in the digital space. Because basically, this digital literacy will directly impact the way people behave in the midst of digital space as extended reality. Digital literacy will become a basic ability for people when faced with technology and digital interactions in everyday life. By preparing the community to become more literate, the community is encouraged to move from passive

consumers of information to active producers, both individually and as part of a community. It is hoped that this digital literacy will create a society with a critical-creative mindset and outlook in the future.

Indonesia's economic transition is built on principles that support the growth of various sectors while opening equal opportunities for all Indonesian people. Indonesia is a nation of extraordinary cultural wealth with a growing value-added economy driven by the manufacturing and service sectors. Indonesia which aspires to become one of the world's five largest economies by 2045 and become a leader on the international stage. Therefore, digital transformation will be a very important catalyst in this journey that will push Indonesia to change from a consumer country to a producer country.

President Joko Widodo has clearly given directions that we must hijack the momentum of the COVID-19 pandemic and make big leaps as a real effort to revive the economy and improve the nation's welfare. This direction is realized by accelerating the national digital transformation agenda through 5 (five) steps, namely accelerating the development of digital infrastructure and providing internet services, preparing a digital transformation roadmap in strategic sectors, accelerating the integration of national data centers, developing human resources and digital talent, and preparing various regulations and financing schemes to support the digital ecosystem. The five steps to accelerate digital transformation proclaimed by President Joko Widodo are the foundation for the development of the Indonesia Digital roadmap (CNN Indonesia, 2021).

Indonesia Digital sets out six strategic directions to realize its vision and establish digital sovereignty. The six directives aim to steer Indonesia towards an innovation-based economy with world-class technological capabilities, skilled Human Resources (HR), and a society that is digitally cultured and ready to face the future. The six strategic directions in question are:

1. Build secure and reliable infrastructure and connectivity with high quality services;
2. Turn Indonesia from a consumer into a technology producer through investment in various platforms that have national strategic importance, including data centers, cloud infrastructure, and national digital identity;
3. Improving digital capabilities in priority sectors to increase geostrategic competitiveness and promote inclusive growth;

4. Build digital government institutions that are open and integrated to improve public services;
5. Building a digital culture and taking advantage of demographic bonuses and empowering the Indonesian people in developing the digital world; and
6. Harmonize regulations and increase funding to advance innovation (Kominfo, 2020).

The concept of sovereignty in the cyber world is translated into various regulatory models by each country. China is one country that uses a regulatory model based on sovereignty with 'control' a priority of the state. Digital sovereignty as developed and applied by China is part of information security which focuses on internet and content control and management (Zeng, et al, 2017). Several countries in Asia, Africa and the Middle East also impose strict restrictions on the internet. This includes the Government of Iran which blocks English-language websites such as the BBC and Voice of America and diverting searches to websites that contain the values of the Iranian revolution (Atmaja, 2014). Meanwhile, another regulatory model followed by the United States and Britain is one where internet regulation is not fully carried out by the state but involves many parties such as non-governmental organizations, academics, and individuals (Eichensehr, 2015).

Some of the stakeholders that will benefit from and be interested in this research are the Indonesian Ministry of Communication and Informatics and also educational institutions. Others who will be interested in the results of the research will be civil servants, law enforcement agencies and the general public.

The recent regulation of public information by the Ministry of Communication and Informatics (MCI) is considered controversial among many in the Indonesian public (Ajisatria, 2021). But more specifically, the MCI Regulation 5/2020 on Electronic System Organizers in the Private Sector. This 2020 legislation and the swift ban imposed on the organization of the electronic system on many international domains has created both rage and bafflement in the public (Rodriguez, 2021). However, there are arguments that raise both the pros and cons to the new regulation. But the question that remains is whether the MCI Regulation 5/2020 is the best approach to meet the Government's aim of Indonesia's digital sovereignty? Alternatively, it raises other questions about the effectiveness of its implementation, which has resulted in

many people feeling disadvantaged and disgruntled by the policy? Then further questions arise as to whether the implementation of these content moderation policy is in accordance with its aims and objectives to not hinder freedom of speech? Furthermore, what are the overall impacts on society of implementing this policy?

CHAPTER II
METHOD OF RESEARCH

As stated in the title of this research, which aimed to study about The Indonesian MCI Content Moderation Regulation Policy since 2020 and its impacts on good governance and freedom of speech. In this study, the researcher used mixed methods research. Mixed methods is a research methodology which integrate the results of qualitative and quantitative research, combine them and get the best benefits and reduce the weaknesses of both methods. (Schoonenboom, 2017).

The type of research in this study is normative juridical, which means that the approach taken to conduct this research is by examining the approaches, concepts, and related theories to review the laws and regulations concerned with this research or the statutory approach. This normative research is research on legal systematics, by conducting research that aims to identify the meaning or basis of existing law. Normative juridical research was carried out on the MCI Regulation 5/2020. The research method is carried out by examining legal norms in laws and regulations (Marzuki, 2011). The primary data used is MCI Regulation 5/2020 and the 1945 Constitution Article 28 paragraph (1). While secondary data are writings related to MCI Regulation 5/2020.

The qualitative research methodology is considered to be suitable when the researcher or the investigator either investigates a new field of study or intends to ascertain and theorized prominent issues. Often qualitative research is especially useful for answering “how” or “what” questions. Qualitative research is suitable for this study, since the study is willing to deeply analyse whether the implementation of these digital broadcasting regulations is in accordance with its aims and objectives so it will not hinder with the freedom of speech and developed better suggestions to be implemented.

While quantitative methods in this research is used as secondary sources and not collected as primary sources by the researcher rather from the internet source commenced by other organization. Therefore, with the data collection element is considered a quantitative research method and analyzed it accordingly to later integrated with the qualitative findings.

In term of methods of data collection and analysis, the role of researcher set a stage of discussion of issues involved in collecting data and analysis. The data collection steps include setting the boundaries for the study, collecting information through documents, and visual materials, as well as establishing the protocol for recording information. However, based on the research questions it is determined that this study will use secondary data to collect the data. Secondary data is the data that has already been collected through primary sources and made readily available for researchers to use for their own research. It is a type of data that has already been collected in the past. A data classified as secondary for a particular research may be said to be primary for another research. This is the case when a data is being reused, making it a primary data for the first research and secondary data for the second research it is being used for.

Document or secondary data is required to support the data collected from interview. As interview will provide in-depth information and knowledge from interviewee, some numerical data or definition could be not generated from the interview, therefore document is used to gather more information of the research questions. However, the existing interview is a summary of the news that is used as a reference. Sources of secondary data includes books, personal sources, journal, newspaper, website, government record and audio document.

The documents that have been analyzed are:

1. Official publications related to good governance and freedom of speech;
2. Books related to digital literacy;
4. Annual report related to the content moderation regulation;
5. Scientific publications such as journal and paper related to digital and electronic policy;
6. News and articles related to digital and electronic policy.

CHAPTER III
LITERATURE REVIEW

III.1 History of the Ministry of Communication and Informatics

In Indonesia, the institution authorized to regulate and supervise activities in the digital world is included in the duties of the MCI. This ministry was originally established in 1945 under the title "Department of Information" until 1999. Subsequently it was changed to "Ministry of State for Communication and Information" during the 2001-2005 period, and the Ministry of Communication and Information during 2005-2009. In accordance with Law Number 39 of 2008 concerning State Ministries, the Ministry of Communication and Informatics is an instrument of the Government of the Republic of Indonesia in charge of affairs whose scope is stated in the 1945 Constitution of the Republic of Indonesia, namely information and communication.

The Ministry of Communication and Informatics has the task of administering government affairs in the field of communication and informatics to assist the President in administering state government. The Ministry of Communication and Informatics is led by a Minister, who since October 23, 2019, has been held by Johnny Gerard Plate.

The MCI, previously named "Department of Information" (1945-1999), "State Ministry of Communication and Information" (2001-2005), and the Department of Communication and Informatics (Depkominfo) (2005-2009).

After the proclamation of independence, an Information Agency was formed which functionally carried out information policies, patterns and guidelines with the aim of (1) defending and maintaining independence, (2) inviting the people to participate in defending and filling in independence and (3) introducing the Republic of Indonesia at and abroad . During the 1959-1965 period, in accordance with the National Development Guidelines as stipulated by the MPRS, the Ministry of Information was formed to provide information through information media including radio, film, toestel and photographs, printing, vehicles, stencil machines and typewriters.

Beginning in 1966, one of the main tasks of the information organization was to direct public opinion in order to form positive social support, control and participation in the implementation of government policies, in addition to information inside and outside the country. At that time internal organization was carried out so that the Ministry of Information would function as the spokesperson for the government. On September 15, 1967 the foreign information authority (Penlugri), which had been in the hands of the Ministry of Foreign Affairs of the Republic of Indonesia since 1959, was transferred back to the Ministry of Information.

In 1971, in order to increase the efficiency and effectiveness of mass media facilities, an integrated communication system was developed through coordination, integration and synergy between elements of government information. Institutions were formed including the Government Public Relations Coordinating Agency (BAKOHUMAS) and the Information Coordinating Agency (BAKOPEN).

At the regional level, provincial information offices, district information offices and lighting officers at the sub-district level were formed. In districts and cities, Community Information Centers (PUSPENMAS) were formed with the main activities of interpersonal information supported by information facilities in the regions such as: radio, television, information films, press publications, exhibitions and people's shows as well as work discussions.

At the beginning of the reform period, the duties and functions of the Ministry of Information did not change much. Information institutions are maintained from the central to the provincial level under the name of regional offices of the information department and provincial public relations bureaus. After the enactment of Law Number 22 of 1999 concerning Regional Government, there was a repositioning of regional apparatus according to regional interests. The information office is under the coordination of the provincial, district and city governments. In accordance with Presidential Decree 153 of 1999, the National Information and Communication Agency (BIKN) was formed at the central level, while at the provincial level; District and city. A year after the dissolution of the Ministry of Information, a National Information Institute (LIN) was formed, which later changed its status to the State Ministry of Communication and Information (Kemeneg Kominfo).

Furthermore, the task of providing public information services is handed over to the Minister of State for Communication and Information. While BIKN changed to become a National Information Institute and is responsible to the Minister of Communication and Information.

Since 2005, there has been a change from the State Ministry of Communication and Information to the Ministry of Communication and Informatics. In accordance with Presidential Regulation Number 9 of 2005, the integration of the State Ministry of Communication and Information was carried out; National Information Institute, and Directorate General of Post and Telecommunications.

One of the important functions of the Ministry of Communications and Informatics related to information is the dissemination of national information by creating open access to information and building and developing telecommunication infrastructure for the benefit of all citizens.

At the end of 2010, the Ministry of Communication and Information adjusted the organizational structure. The new paradigm of communication policy places information as part of people's daily needs. The information function is developed on economic added value, not just 'information', but more strategic communication support to build good national integration.

The dynamics of information technology and the development of the digital economy have made the Ministry of Communication and Informatics focus on accelerating the distribution of digital infrastructure in the form of telecommunication access and internet networks. In addition to the change in nomenclature, at the end of 2006, the Ministry of Communication and Informatics implemented a pattern of financial management for public service agencies based on the Decree of the Minister of Finance Number: 1006/KMK.05/2006 concerning Designation of Rural Telecommunications and Informatics Centers (BTIP).

Along with the rapid developments in the field of Information and Communication Technology (ICT) and demands for the availability of ICT services at all levels of society, then BTIP transformed into the Telecommunications and Informatics Financing Provider and Management Center (BP3TI) on 19 November 2010. Since August 2017, the Minister of Communication and Informatics has announced a new name for BP3TI to become BAKTI.

This institution has the task of carrying out the management of Universal Service Obligation financing and the provision of telecommunications and information technology infrastructure and services.

The main duties and functions of the Ministry of Communication and Informatics are to formulate national policies, implementing policies, and technical policies in the field of communication and informatics which include postal, telecommunication, broadcasting, information and communication technology, multimedia services and information dissemination.

III.2 Digital Sovereignty

Digital sovereignty put forward in "A Declaration of the Independence of Cyberspace" by Barlow states that the digital realm, is a realm that is detached from the influence of government of the industrial world and must be allowed to be sovereign separate from the realm of nations (Barlow, 1996). While Minister Johny G. Plate wants to fence off Indonesia's internet which is controlled by the state (Ajisatria, 2021). Digital sovereignty put forward by Barlow and Minister Johnny G. Plate are two opposing models of digital sovereignty. When talking about digital sovereignty, it is not much different from the term data sovereignty where existing data can be located accurately within the boundaries of certain countries Accurately enough to be located within the boundaries of a particular nation-state (Peterson et al, 2011). This means, to uphold data sovereignty, a country must ensure that all data produced within its territory is stored within that country's territory, so that it can become a legal subject of a country. Therefore, we are also familiar with the term data residency.

Like humans, digital data can be seen as ‘citizens’ of a country's digital space with the, data traffic between countries required to be regulated (Ash et al, 2018). This understanding of data sovereignty is divided into two poles. First, "soft sovereignty", the model adopted by Barlow. This model makes the private sector the prime mover and emphasizes aspects of citizens' digital rights. Second, there is “hard sovereignty”, which is adhered to by the Indonesian Government. This position makes the Government the main engine and emphasizes national security. There are two important events that illustrate these two views. The first event, which illustrates 'soft sovereignty' occurred in 2009, when a former United States intelligence agency consultant, Edward Snowden, leaked classified documents regarding the five eyes conspiracy. This conspiracy was carried out by the intelligence agencies of the United States,

Canada, New Zealand, Britain and Australia with the aim of spying on the governments of various countries and their own citizens. Indonesia was included in the list of victims when Australian intelligence tapped into the telephones of Susilo Bambang Yudhoyono, who was President of Indonesia at the time, along with his wife, senior ministers and other public officials. The second event, 'The Arab Spring', namely when citizen movements in various Middle Eastern countries such as Syria, Egypt, Tunisia, Libya, or Yemen, rose up against authoritarian governments. The internet had a crucial role in mobilizing people's resistance in this event.

These two major events are used to support both soft and hard sovereignty. Snowden's leak was assessed negatively for both parties. Supporters of soft sovereignty consider the leak to show that the internet must be fortified in such a way that it cannot interfere with all kinds of state affairs. For the sovereign, this event helps to illustrate that the internet must be subject to the power of the state so that it does not become a security hole that can be used by opposing parties. The interpretation of the Arab Spring is a little different. Adherents of soft sovereignty assess the event positively, that it shows the potential of the internet in supporting democratization and empowering citizens. Whereas sovereign advocates see it negatively as the internet having the potential to undermine national sovereignty and disrupt public order. Apart from security and politics, these two positions also differ drastically in terms of views on the digital economy. Supporters of soft sovereignty prefer the free market model; they support global business and data exchange free from government interference. Meanwhile, supporters of hard sovereignty tend to apply protectionism; where the state actively restricts imports and intervenes to protect the domestic industry. Some countries are even more inclined towards neomercantilism, namely policies to suppress imports as low as possible and increase exports as much as possible.

These two extreme positions of sovereignty have their own consequences. On the political and security side, both have potential problems in collecting personal data. The only difference is by whom and for what. From an economic perspective, both positions only focus on one of two equally important elements, namely inequality and competition. In soft sovereignty, data collection is carried out by private companies that actively record, process and trade our internet usage data for business purposes. This data can be used to determine our behavior so that digital companies can influence us to do various things on the internet, such as buying products and services, or even making certain political choices, as suspected was

done by Cambridge Analytica in winning Donald Trump in the United States presidential election. in 2016 (The Guardian, 2018). Meanwhile, in hard sovereignty, it is the state that has this power. Under the pretext of law enforcement and national security, the state can monitor data circulation on the internet. Authoritarian countries like China tend to favor this model because they can spy on citizens and stifle criticism (The Atlantic, 2020).

From an economic perspective, we are faced with the classic problem of free market vs protectionism, two variations of capitalism that are contradictory to each other. Supporters of soft sovereignty generally advocate free markets, or competition that is quoted as "equal" in the global market, that with this competition citizens benefit because the cost of finished products is cheaper and of higher quality. Supporters of hard sovereignty tend to choose protectionism, which departs from the assumption of inequality between countries. Indonesian and US industries, for example, do not have equal technological, industrial and business maturity, resulting in unfair competition. The US industry has the potential to dominate the Indonesian digital market because they are far more mature. Protectionism seeks to balance this competition by placing restrictions on international industries wishing to do business in Indonesia, so that Indonesia can compete in a more balanced manner. Protectionism policies themselves also have problems. This system is vulnerable to abuse of power, such as corruption, because of the government's closeness to national entrepreneurs. National industry also has the potential to be slow to develop, or not to provide competitive products, because they are used to the privileges granted by the state and do not have competition that forces continuous quality improvement (Roberts, 2018).

The debate over which sovereignty is better leads to the question: who can be trusted more, the government or multinational corporations. Do we want to be the society described in the novel "1984" by George Orwell, where the state monitors all the movements of citizens, or in the novel "The Brave New World" by Aldous Huxley, where large corporations carry out psychological manipulation to direct our actions? Both of these options are not in line with the model of Indonesian sovereignty as stipulated in the 1945 Constitution, namely people's sovereignty, not state sovereignty or free market. In this perspective, the state or free market is a tool to achieve people's sovereignty. An important concept in the theory of sovereignty is self-determination, the ability to determine one's own destiny (Mann et al, 2018). This means that the state must have enough power and capacity to help every citizen realize their potential as well as possible. Whether they are going to become farmers, photo models, or lawyers, the state as a tool must provide equal opportunities so that every citizen can achieve that wish.

Sovereignty of the people does not ignore the importance of state security or fair business competition, on the contrary, it really needs these two things. Therefore, this concept is quite difficult to translate into applicable policies. The policies that have been issued by Ministry of Communication and Informatics are more inclined towards authoritarian policies that only focus on state security.

III. 3 The Development of Good Governance In Indonesia

Good Governance is a form of organizing an organization to achieve goals based on the principles of good governance. Some of the principles regarding good governance, among others, by the Organization for Economic Co-operation and Development (OECD), namely: Fairness, Transparency, Accountability, and Responsibility. The Forum for Corporate Governance in Indonesia (FCGI, 2001) reveals the principles of good governance to become Fairness, Disclosure, Transparency, Accountability and Responsibility.

Initially, the concept of good governance was not recognized in administrative law, or in constitutional law, or even in political science. The concept of good governance was born from within the United Nations, which was originally from the OECD. Where the Good Governance Component is broken down into the following points:

1. Human rights observance and democracy.
2. Market reforms
3. Bureaucratic reform (corruption and transparancy)
4. Environmental protection and sustainable development.
5. Reduction in military and defence expenditures and non-production of weapons of mass destruction. (Fahmal, 2006:62).

Apart from the Organization for the Economic Cooperation and Development (OECD) there is also the United Nation Development Program (UNDP) which put forward the Good Governance component which includes:

1. Participation.
2. Rule of law
3. Transparency
4. Responsiveness
5. Consensus orientation.

6. Equity
7. Effectiveness and efficiency
8. Accountability
9. Strategic vision. (Ibid,)

This public sector reforms brought from international organization gave birth to a new concept of thinking in good governance as has been widely practiced in developed countries, actually started a long time ago in Indonesia, for example in MPRS Decree No. X/ MPRS/1966. It was in this decision that the head of Government which at that time was de facto in the hands of General Suharto conducted a thorough evaluation of administrative organizations within the Government with two objectives (Furniss, 1982). These were to first determine whether or not the existence of a government organization was important at that time, and secondly, to ascertain whether the formation and continuity of government organizations that existed at that time were in accordance with the applicable constitution. According to Zamroni (2019) this was the beginning of the administrative (government) reform that took place in Indonesia and this triggered other reforms to be carried out at that time in order to realize good governance in Indonesia.

This movement began to strengthen again in Indonesia after the reformation event in 1998 where the multidimensional crisis that occurred after the fall of the New Order government gave rise to a strong push from the public to create a more professional government management system. This push especially emphasized a government system that is free from collusion, corruption, and nepotism - which had become a central issue in every reform movement in Indonesia at that time, until finally the bureaucratic reform movement was born. The 1998 reform was used as a momentum by the Indonesian people and became a milestone for fundamental changes to the system of governance, especially regarding institutional aspects (organization), management (business processes), and human resources (civil servants). Furthermore, through Law 17/2007 concerning the National Long-Term Development Plan (UU RPJPN), bureaucratic reform was included as one of the main agendas to increase the professionalism of the state apparatus and to realize good governance in Indonesia.

The concept of state law according to Asshidiqie (2005) is related to the term nomocracy (nomocratie) which means that the determinant in the exercise of state power is law. The highest law in Indonesia is the 1945 Constitution of the Republic of Indonesia (UUD 1945) as a form of the highest social agreement, the constitution contains the ideals to be

achieved with the formation of the state and the basic principles for achieving these ideals. The 1945 Constitution according to Asshidiqie (2005) as the constitution of the Indonesian nation is a legal document and a political document which contains the ideals, foundations and principles of implementing national life.

Meanwhile, according to the Decree of the Minister of Utilization and State Apparatus (MUSA) Number 63/KEP/MPAN/7/2003 the principles of public service with the principles of good governance are transparency, accountability, conditionality, participation, equality of rights and balance of rights and obligations. Stoker (1998) uses the principles of transparency, accountability, fairness and participation as indicators of good governance.

According to Haque (2001), several important points related to the implementation of the principles of good governance are a guideline for the public bureaucracy in transforming government management. According to Bell and Hindmoor (2009), demands towards good governance are also born due to the low quality of public services. It is further stated that the implementation of good governance is inseparable from the important role of the state and government which is referred to as metagovernance. The six core elements that must be considered are steering, effectiveness, resourcing, democracy, accountability and legitimacy.

In terms of the pattern of implementation, public services in Indonesia still have various weaknesses, including: (1) less responsive, (2) less informative, (3) less accessible, (4) less coordination, (5) bureaucratic, (6) less want to hear complaints/suggestions/aspirations of the community, and (7) inefficiency (Haque, 2001). In terms of human resources, the main weaknesses are related to professionalism, competence, empathy, and ethics. The working pattern used by most of the existing apparatus is still influenced by the classic bureaucratic model, namely a structured/hierarchical, formal legalistic, and closed system way of working (Robichau, 2011). In addition, several opinions consider that the weakness of the human resources of government officials in providing services is caused by a low and inappropriate compensation system (World Bank, 2001).

III. 4 Freedom of Expression in Indonesia

Freedom of expression is part of human rights and is one of the civil and political rights which is the first generation of human rights to be ratified. This right is a negative right that requires no interference from the state on these individual rights and freedoms (Nozick, 1974). The definition of

freedom of expression includes the concept of freedom of press and freedom of speech (Thompson et al, 2014).

Guarantees for freedom of expression have been stated in various international conventions on human rights, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. However, as stipulated in Article 19 of the International Covenant on Civil and Political Rights, freedom of expression is restrictive, meaning that opinions can only be limited by law in order to respect the rights and reputation of others, and in order to protect national security. According to Tourkochoriti, freedom of expression must respect: (i) the rights and freedoms of others (respect for the rights and freedoms of others); (ii) generally accepted moral codes; (iii) public order; (iv) general welfare; (v) public safety; (vi) national security and community security (national and social security); (vii) public health; (viii) avoiding abuse of rights; (ix) democratic principles; and (x) positive law (Tourkochoriti, 2022).

In addition, various international conventions also strictly regulate the forms of freedom of expression that are prohibited, namely child pornography, calls to encourage acts that lead to genocide, advocacy of hatred based on race, religion or nationality which is an invitation to discriminate against, hostility or violence, and invitations to terrorism.

Indonesia recognizes freedom of expression as a basic right of citizens as stipulated in Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia. This right is also expressly regulated in various laws, one of which is in Article 55 of Law Number 39 of 1999 concerning Human Rights. Like international conventions that limit freedom of expression, Indonesia's positive law also limits other forms of freedom of expression, one of which is the crime of insulting another person. This was confirmed by the Constitutional Court in Decisions Number 50/PUU-VI/2008 and Number 2/PUU-VII/2009.

In the implementation of law, disparities that cause inconsistencies cannot be separated from the formulation of the applicable law. This is an indirect source of disparity and inconsistency (Komisi Yudisial RI, 2014: 185). There are four problems in the formulation of Article 27 paragraph (3) jo. Article 45 of the Law on Information and Electronic Transactions (IET) which poses a threat to freedom of expression. First, the norms regulated in Article 27 paragraph (3) jo. Article 45 of IET law is the same as several articles regarding insult in the Criminal Code, and this is a form of overcriminalization. Husak stated that one of the causes

of overcriminalization is the overlapping of criminal acts, namely when a crime has been declared a crime by an existing law, then it is re-criminalized in another law (Husak, 2008: 36). In practice law enforcers often subsitute Article 310 and Article 311 of the Criminal Code with Article 27 paragraph (3) jo. Article 45 Law on Information and Electronic Transactions.

The formulation of the article mixes up the criminal act of defamation with the criminal act of defamation and the criminal act of slander. Therefore, the formulation is contrary to not fulfilling the criteria of high standards, clarity, accessibility, and avoiding the ambiguity of the formulation as referred to in the International Covenant on Civil and Political Rights. The problem in this formulation is a threat to the protection of the right to freedom of expression in Indonesia.

The freedom of judges to play a role in implementing the formulation of Article 27 paragraph (3) jo. Article 45 Law on Information and Electronic Transactions. When the formulation is problematic, it is appropriate for the judge to be more careful in its application by not only being the mouthpiece of the law. Indeed, international conventions do not explicitly place insults as a limitation on freedom of expression, but Indonesian criminal law policies still require the criminalization of insult crimes as one of the limitations on freedom of expression. Freedom of expression is limited by the rights of others. The boundaries used so far are morality and harm or harm resulting from the act of humiliation. However, there is no clear line to separate what is an insult and what is not. This is left entirely up to the panel of judges. In the end, it is the judge who is the last door for the protection of freedom of expression.

The development of technology through social media causes what citizens convey to the public not only regarding opinions or criticism of the government but matters that become daily conversations. In the court decisions studied, most of these cases were related to conveying opinions and emotions on daily events, and not criticism of the government delivered online via social media.

Technological developments make the boundaries between public and private spaces blurry, as well as technological developments that make it easy for internet users to spread their expressions using only their fingers. However, this development has not been accompanied by a change in the perspective of law enforcement officials, especially judges. Consequently Article 27 paragraph (3) jo. Article 45 of the Information and Electronic Transactions Law is

often used to punish internet users for conveying expressions and emotions that actually do not cause significant harm/loss.

CHAPTER IV

FINDINGS AND ANALYSIS

The world community is a common term in the digital world, there is even a term netizen, namely the community in the network. This shows that human activities now depend a lot on digital technology. However, in Indonesia, which has a large and diverse population, it still takes a lot of time to achieve stability in digital literacy and digital sovereignty. In order to realize this, the Government of Indonesia through MCI Regulation 5/2020 on Electronic System Organizer in the Private Sector seeks to strengthen digital sovereignty in Indonesia and foster digital literacy. However, the implementation of this policy has the potential to limit the rights and freedom of opinion for the Indonesian people. The worst was when the Ministry of Communication and Informatics, as the agency authorized to regulate both conventional and digital communications and information, imposed a blockade for electronic system operators, both domestic and international, so that it could not be accessed by Indonesians throughout the country (Reuters, 2022). This certainly has an impact on the implementation of good governance in Indonesia. In this research, we will examine further what are the things that limit freedom of expression in these regulations and how good governance rules apply in implementing these policies in Indonesia.

There is no world government, so no international legislature has the authority to make international law. The only international organization that has almost such a function is the General Assembly of the United Nations but the resolutions issued are non-binding except for those that regulate the international organization itself internally (UN); International conferences within the UN framework for certain issues do not always formulate Law Making Treaties. Bodin (2013) stated that basically sovereignty is the main source for establishing law. Sovereignty is a source of authority that is located at the highest level in a country's legal hierarchy. However, such sovereignty only applies internally, and not externally. Because every sovereign state has sovereignty, their positions are equal. This equality also provides the basis for making an agreement. Each agreement is law for the parties.

Checks and balances have little bearing on the statutory hierarchy. In the implementation of governance, supervision is also carried out to practice good governance as

a guideline for the best service for the people of Indonesia. However, this is not the case in several implementations of regulations by the government which the public considers inappropriate. The government also tends to delegate public complaints through a judicial review mechanism on several occasions as if the Constitutional Court is a bumper in every government legislation issue. In essence, the implementation of a policy requires a clear and orderly legal basis so that it does not overlap and is implemented in harmony with other regulations. The role of oversight in each policy must also be a concern so that maladministration or abuse of authority does not occur. In practice, law enforcement is considered detrimental to society.

The blocking of digital platforms that are not registered in the implementation of the MCI Regulation 5/2020 is currently a trending topic being discussed by the public. The blocking is a mandate from MCI Regulation 5/2020 concerning Private Electronic System Operators. Many regret this policy because it was carried out in a hurry, without massive socialization. In addition, MCI Regulation 5/2020 has the potential to limit freedom of opinion and human rights. Then the question is, is it appropriate for this to be regulated at the ministerial regulation level? First, statutory regulations cannot be separated from every government and state administration. This is a consequence of the concept of a rule of law adopted by Indonesia as emphasized in Article 1 paragraph (3) of the 1945 Constitution, so that every action of the government and the life of the nation and state must be based on law.

After the ban on private ESO, LBH Jakarta managed to collect a number of complaints which emphasized that many people were harmed. In total, there were 213 complaints received by the public during the 7 days the Complaints Post was opened from 30 July 2022. Most complaints came on 31 July 2022 (75 complaints) and 1 August 2022 (62 complaints). The complainants consisted of 211 individuals and 2 companies with various fields of work ranging from freelancers (48%), private employees (14%), developers (12%), students/students (12%) to others such as lecturers, musicians and entrepreneur. Of the 213 incoming complaints, 194 complained about the impact of the policy, while the remaining 18 were in the form of support, policy protests to legal questions. Only 62 Complainants attached proof of loss where the total loss was estimated at IDR 1,556,840,000.-. The most reported problem is related to the impact of Paypal blocking which reached 64% (LBH Jakarta, 2022).

IV.1 MCI Regulation 5/2020 on Freedom of Expression

In general, the right to privacy is guaranteed by article 12 of the Universal Declaration of Human Rights and article 17 of the International Covenant on Civil and Political Rights. Article 12 of the Declaration, states, “No one shall be arbitrarily interfered with his personal affairs, his family, his household or correspondence; also not allowed to violate the honor and good name. Everyone has the right to legal protection against interference or violations like this.” While article 17 of the Covenant, states, (1) No one may arbitrarily or unlawfully interfere in personal, family, home or correspondence matters, or unlawfully attack his honor and reputation. (2) Everyone has the right to legal protection against such interference or attacks.

Meanwhile, the provisions in MCI Regulation 5/2020 contain content that has the potential to conflict with the two articles, especially based on how to place the position of personal data in a private ESO which is so easy to access by the interests of the authorities who have had two basic things, namely: (1) the absence of independent supervision in obtaining access to personal data; (2) In practice, misuse of personal data is often found, especially by bureaucratic law enforcement officers and law enforcement.

The following points become the basic problem,

I. The definition and use of personal data, including specific personal data. Based on Article number 21 of MCI Regulation 5/2020, it states, "Specific Personal Data" is health data and information, biometric data, genetic data, sexual life/orientation, political views, child data, personal financial data, and/or other data in accordance with the provisions of the legislation. This sorting of terms relates to interventions that are possible in opening or processing them for purposes that are truly legitimate, proportional and have clear provisions in law. The problem is the extent to which the interpretation of "necessity" or "level of urgency" is consistent with implementation in the field. In addition, excessive regulation of personal data relating to "health data and information, biometric data, genetic data, sexual life/orientation, political views, child data, personal financial data," is a personal right as a fundamental part of human rights, which is too far interfered by the state and other parties.

II. In addition, based on Article 36 of MCI Regulation 5/2020, there are two paragraphs related to this matter, especially in relation to the possibility of opening access to Communication Content.

- Paragraph (3), “PSE Lingkup Privat memberikan akses terhadap Konten Komunikasi yang diminta oleh Aparat Penegak Hukum dalam hal permintaan tersebut disampaikan secara resmi kepada PSE Lingkup Privat”, [“Private Scope ESO provides access to Communication Content requested by Law Enforcement Officials in the event that the request is officially submitted to Private Scope ESO.”].
- Paragraph (4), “Permintaan akses terhadap Konten Komunikasi sebagaimana dimaksud pada ayat (3) harus melampirkan: 1. Dasar kewenangan Aparat Penegak hukum; 2. Maksud dan tujuan serta kepentingan permintaan; 3.deskripsi secara spesifik jenis Data Elektronik yang diminta; 4. Tindak pidana yang sedang disidik, dituntut, atau disidangkan; surat penetapan dari ketua pengadilan negeri dalam wilayah mana Institusi Penegak Hukum tersebut memiliki kewenangan.”, [“Requests for access to the Communication Content as referred to in paragraph (3) must attach: a. basis of authority of Law Enforcement Apparatus; b. the intent and purpose and importance of the request; c. a specific description of the type of Electronic Data requested; d. a criminal act that is being investigated, prosecuted, or tried; e. a letter of determination from the head of the district court in the territory where the Law Enforcement Institution has the authority.”].
- Paragraph (5), “PSE Lingkup Privat memberikan akses terhadap Data Pribadi Spesifik yang diminta oleh Aparat Penegak Hukum dalam hal permintaan tersebut disampaikan berdasarkan ketentuan sebagaimana dimaksud pada ayat (4).”, [“Private Scope ESO provides access to Specific Personal Data requested by Law Enforcement Officials in the event that the request is submitted based on the provisions as referred to in paragraph (4).”].

The basic problem with the provision of article 36 is that it clearly contradicts the right to "illegally interfere with personal, family, home or correspondence matters, and every citizen has the right to legal protection against interference", and is vulnerable to abuse, given the practice of law enforcement so far. the level of public distrust on the issue of rights restrictions, the mechanisms that are complied with, including a public mechanism for complaints on abuse of authority over Private ESO. The three-part test has also not been strictly regulated in the legal mechanism in MCI Regulation 5/2020, so practically, this arrangement opens up space for violations of human rights, especially the right to privacy.

III. As stated earlier, the potential or concerns of MCI Regulation No. 5/2020 will be misused to silence groups that criticize the government, it is wide open, this is due to the institutional architecture, indeed there is no independent institution or body that has been formed, involved, or balanced with the perspective of the obligation to protect human rights.

IV. If independent institutions are not yet available, including procedural mechanisms, it is clear that it is possible not to use a strict three-part test as a framework for limiting human rights, including access to personal data.

V. Basically, MCI Regulation is a derivative legal product of Government Regulation 71/2019, and it is known that MCI Regulation 5/2020 is intended to carry out the 'orders' of the Government Regulation into ministry-level operational rules. The problem is whether in product or legal form the regulation at the Ministerial level can be justified for the regulation of these restrictions, as stipulated in MCI Regulation 5/2020 which found 65 keywords 'Termination of Access', both interpreted as access blocking and take down. The simplest example of this problem is the question of the power of interpretation "to disturb the public". What is the size or standard, the authority in determining it, and the mechanism if the public feels that it is not part of what is "disturbing the community".

VI. The orientation of such regulation in MCI Regulation 5/2020 is how to organize legislation and regulations if the basic and basic provisions are not yet sufficiently single and complete to regulate, as related to the plan for the Personal Data Protection Bill. The current regulations are still widespread, and the scope of responsibilities is not very clearly understood.

The impact that is very likely to occur is about the potential for limiting major rights or freedoms, coupled with the possibility of disturbing the interests of the organizers of the electronic system in the private sphere, especially if it is not for legitimate and disproportionate reasons. Meanwhile, contrary to the situation, it is known that the standard restrictions, especially the termination of access, are actually limited in providing guarantees for the protection of rights, including the absence of an adequate mechanism for complaints (grievance mechanisms) for example on public services.

MCI Regulation 5/2020 allows forcing all private ESO from various social media platforms, providing online or online-based services, to submit and accept domestic or local

jurisdictions, both over content and use of content in daily practice. In this context, it is clear that the direction of policies and regulations through MCI Regulation 5/2020 actually makes Indonesia a region that requires private ESO registration and submits itself to the domestic/national legal system. Such mandatory legal framework actually weakens the protective position of all social media platforms, applications and other online service providers, especially to accept domestic/national jurisdiction over content and user data policies and practices. Such a legal framework becomes a repressive instrument that will contradict or even violate human rights.

It is realized that in its development, ESO's responsibility is not only borne by the state, but also the responsibility of various types of companies in the digital access industry, which actually play an important role in protecting, but on the contrary, they fail to protect the freedom of expression of internet access users. Internet service providers and telecommunications providers face legal pressure and intimidation by governments to comply with censorship and surveillance. Meanwhile, in the context of private ESO, this does not mean that this responsibility is also removed, but also that it has an important role in protecting freedom of opinion and expression, including recognizing and encouraging the responsibility to take action that ensures respect for human rights.

Therefore, taking into account that MCI Regulation 5/2020, in the midst of regulations that are so loose and will be very easy or vulnerable to misuse, it is necessary to criticize the large and dominant role or authority of the ministry, specifically related to the public interest. Even though he is authorized to normalize, as a process of restoring rights or access to electronic systems that have been closed, closing or blocking access, closing accounts and/or deleting content, is a form of action that has the potential to eliminate human rights and freedoms themselves.

The most important stage in making a change, including the change towards good governance, is implementation. Implementation is a real step in realizing a change, because at this stage, the policy is no longer realized as a formality on paper or mere rules (juridical) but has been realized with more concrete actions and the progress of its implementation or success can be measured. In addition, MCI Regulation 5/2020 relating to access to user privacy is contrary to Article 30 paragraph (1) of Law no. 11/2008 concerning ITE which prohibits: "everyone intentionally and without rights or unlawfully accessing another person's computer and/or electronic system in any way." MCI Regulation 5/2020 can be said to have exceeded its

content material which is actually an implementing regulation and may not conflict with the regulations above it.

On Wednesday, 22 June 2022, the Ministry of Communication and Informatics of the Republic of Indonesia announced through a press conference that the deadline for Private ESO register would end on 20 July 2022. This is based on Government Regulation Number 71 of 2019 and Regulations Minister of Communication and Informatics Number 10 of 2021 concerning Amendments to the MCI Regulation 5/2020 concerning Private Electronic System Operators.

The regulation states that Private Scope ESO regulated in this Ministerial Regulation are required to register no later than 6 (six) months after the implementation of Risk-Based Business Permits through the OSS system becomes effective. If after that date Private ESO, MCI will give a start from a warning to the heaviest sanction, namely termination of access.

The conception of Private ESO is too broad, includes non-commercial ESO matters, and can be affected by regulations. SAFEnet records at least 65 key words of termination of access (as access blocking or take down) in MCI Regulation No. 5/2020 which may threaten Private ESO. MCI Regulation No 5/2020 does not specify the extent of the interpretation of "necessity" or "level of urgency" in relation to the real conditions on the ground. Excessive regulation actually interferes with personal rights. Provisions for termination of access to electronic systems (limitation of rights by means of termination of access should be regulated in law). It has the potential to confuse cyber media freedom if it is considered to be troubling to the public. Respect the protection of personal data privacy rights and freedom of expression in accordance with laws and regulations. Where does the power of interpretation "disturbing the community" come from? How about the size or standard, the authority to determine it, and the mechanism if the community feels that it is not part of something that "disturbs the community". Because the principles in Siracusa Principle are not found in this MCI Regulation 5/2020.

Article number 21 MCI Regulation No 5/2020, states, "Specific Personal Data" is Health data and information, biometric data, genetic data, life/sexual orientation, political views, child data, personal financial data, and/or other data in accordance with the provisions of the legislation. The problem is how far from the interpretation of "necessity" or "level of urgency" is consistent with implementation in the field. In addition, excessive regulation of

personal data relating to "health data and information, biometric data, genetic data, life/sexual orientation, political views, child data, personal financial data," is a personal right as a fundamental part of human rights. which is too much interfered with by the state and other parties.

From the implementation of MCI Regulation No 5/2020 it has two main objectives. First, to create an equal level playing field. Different from global platforms, Indonesian platforms must comply with Indonesian rules, which makes the competition unequal. They have to obey the law, pay taxes, and so on. It is understood that these provisions are intended to create economic justice. So, the global platform can be asked to have an office in Indonesia and employ Indonesians. They also have the potential to become a tax subject by the state, so that if there are profits not only for the country of origin but also some of it will go into state revenue and become capital for building the nation. As Neilmadrin Noor said “Each data will be processed into potential taxation, both compliance potential and revenue potential” (cnnindonesia.com, 2022). Of course this intention is a good thing because many other countries are implementing similar policies. We as a sovereign country certainly have the right to force industry to obey our own rules. The problem is that this regulation requires all ESOs on the platform engaged in six categories of business activities to register through MCI, namely:

1. Offering or trading goods/services
2. Providing financial transaction services
3. Providing paid digital material services
4. Providing communication services
5. Providing search engine services
6. Performing personal data processing for electronic transactions

When examined more deeply in point number 5 it is explained in article 2 paragraph 2 (b) point 5 which reads: “layanan mesin pencari, layanan penyediaan Informasi Elektronik yang berbentuk tulisan, suara, gambar, animasi, music, video, film, dan permainan atau kombinasi dari sebagian dan/atau seluruhnya”, [“search engine services, services for providing Electronic Information in the form of writing, sound, images, animation, music, videos, films, and games or a combination of some and/or all of them”], is required to register. For a platform in Indonesia with a national scope it might still make sense, but if it's on a global scale, it's almost impossible. You can imagine when someone is looking for news or scientific studies in

English, it will be difficult to access some of the search results because they may not have registered with MCI.

In the European Union, the Digital Market Act has just emerged which aims to create healthy digital competition. What is regulated is not a platform but rather a 'gatekeeper', or a large online platform capable of hindering the creation of a competitive digital market. This rule makes much more sense because it operates within the scope of business competition and targets large and multinational employers rather than smaller enterprises.

The second goal targets the issue of protecting the public from digital crime which is very important. There are many cases of data leaks, pyramid scheme fraud and other things. With ESO registration, in essence, the government will have the authority to access platform data as part of its investigative efforts. In global practice it is possible for governments or law enforcement to access user data. However, the process cannot be arbitrary, they must obtain a letter from the court to ensure that the request is indeed needed in the enforcement of a clear legal case. However, in MCI Regulation No. 5/2020 allows officials to cut the line as a shortcut to request user data from ESO under the pretext of surveillance without court approval.

In Article 15 paragraph 8, the Government can also force ESO to take down their content in conditions deemed urgent. Urgent provisions are explained in Article 14 paragraph 3 which reads: "The application referred to in paragraph (1) is urgent in terms of: a. terrorism; b. child pornography; or c. content that disturbs the public and disturbs public order.”. This issue of "unrest in the community and disturbing public order" is called the "rubber article" due to multiple interpretations because translation depends on the government's perspective which is definitely different from translation by the public (Shidarta, 2021). And this rubber article is very likely to be misused to silence criticism as is the case with other legal products which also fall within the realm of the Ministry of Communication and Information, namely Law No. 11/2008 concerning Information and Electronic Transactions which also experienced similar problems. Made with the intent and purpose of protecting the digital realm, but it is more used by officials and businessmen to stifle criticism. According to SAFEnet, in 2008-2020 there were 768 cases related to problematic articles in the ITE Law with similar cases involving ordinary citizens, activists and journalists. Meanwhile, most of the reporters came from officials, professionals and entrepreneurs. Whereas the law should protect ordinary citizens from the arbitrariness of those in power.

In 2021, SAFEnet said that Indonesia is experiencing the rise of digital authoritarianism, and indeed that is what is happening (SAFEnet, 2021). Protection of personal data is still weak, the police seem to have given up on handling cases reported by the public because there are too many cases and too few members", corruption is still rampant. In the midst of these conditions, criticism is not heard and is instead criminalized.

IV.2 MCI Regulation 5/2020 on Good Governance

Referring to the 'spirit' embodied in the concept of digital sovereignty above, the efforts of the MCI by encouraging and forcing Private ESO to register their digital business activities is a strategic step to uphold Indonesian norms and rules of the game. The Ministry of Communication and Informatics likens the registration to 'guests who must take off their shoes before entering the house', establishing the sovereignty of the host over the guest. However, the problem is the approach and instruments used by the MCI in upholding digital sovereignty. In the practice of good governance that is common in internet governance, blocking must be the last resort supported by clear rationale, taking into account the principles of necessity and proportionality, and most importantly: being accountable before the law (Audrine et al, 2021). This also needs to be supported with sensitivity to the conditions that are felt by residents as the subject most affected. By blocking Paypal, a digital financial service platform that is widely used by freelancers in the digital sector, actually has a big negative impact (Roth, 2022). They cannot withdraw and transfer digital money even though these users are no less intelligent in 'getting around' blocking by using technology as well. The temporary opening of the Paypal block is also more or less the fruit of the demands and tweets of digital workers that flood various media channels (ibid).

In the context of public policy, viral-based policy making as evident in the case of the temporary lifting of the Paypal blocking on the one hand illustrates how influential public pressure is in the formulation and determination of our public policies. But on the other hand, this illustrates the most fundamental weakness in formulating public policy: the lack of agility in hearing public voices at the formulation stage, so that someone has to express his anxiety in the public space so that it becomes viral and reaches the ears of public policy makers.

Provisions regarding laws and regulations in Indonesia are regulated in Law Number 12 of 2011 concerning the Formation of Legislation. In Article 7 paragraph (1) it is explained

that the types and hierarchies of laws and regulations consist of: the 1945 Constitution of the Republic of Indonesia, Decrees of the People's Consultative Assembly, Laws/Government Regulations in Lieu of Laws (Perppu), Government Regulations , Presidential Regulations, Provincial Regulations and Regency/City Regional Regulations.

In terms of type and hierarchy, ministerial regulations are not included in the provisions of Article 7 paragraph (1) of Law 12/2011. Ministerial Regulations are still recognized for their type as Article 8 paragraph (1) of Law 12/2011 which reads: "Jenis peraturan Perundang-undangan selain sebagaimana dimaksud dalam pasal 7 ayat (1) mencakup peraturan yang ditetapkan oleh Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, Mahkamah Agung, Mahkamah Konstitusi, Badan Pemeriksa Keuangan, Komisi Yudisial, Bank Indonesia, Menteri, badan, Lembaga, atau komisi yang setingkat yang dibentuk dengan Undang-Undang atau Pemerintah atas perintah Undang-Undang, Dewan Perwakilan Rakyat Daerah Provinsi, Gubernur, Dewan Perwakilan Rakyat Daerah Kabupaten/Kota, Bupati/Walikota, Kepala Desa atau yang setingkat." ["Types of Legislation other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council , Supreme Court, Constitutional Court, Supreme Audit Board, Judicial Commission, Bank Indonesia, Ministers, agencies, institutions, or commissions of the same level established by law or the government by order of law, Provincial People's Legislative Assembly, Governor, Council Regency/City Regional People's Representative, Regent/Mayor, Village Head or equivalent."].

Although this provision does not explicitly mention the type of legislation in the form of "Ministerial Regulation", the phrase "...a regulation established by... the Minister...", indicates the existence of a ministerial regulation as one of the recognized types of legislation. In theory, the formation of ministerial regulations is formed from the authority of the delegation. This means that a ministerial regulation can only be formed if the delegation of authority to form laws and regulations is obtained from a higher level of legislation (Khalid et al, 2022). In this way, ministerial regulations can be formed if orders are obtained from laws, government regulations or presidential regulations.

The legal system in Indonesia still has a variety of problems, namely not all types of laws and regulations are clearly located in the hierarchy of laws and regulations, and the content material is too broad and the content material is similar between laws and regulations. This problem can also be seen in MCI Regulation 5/2020, which in general requires ESO companies, both domestic and foreign ESO, to register with the Indonesian government. MCI Regulation

5/2020 gives broad, even excessive authority to the government to regulate ESO activities, moderate information, access user data or also private conversations, up to terminating access. The impact of these regulations can threaten freedom of expression and opinion, freedom of the press and the right to privacy of users.

Adhering to the principle of Forming good Legislation as Article 5 of Law no. 12 of 2011, namely clarity of purpose and compatibility between types, hierarchies and content material, and clarity of formulation, there are several formulations of articles in MCI Regulation 5/2020 which is still vague and has not explained the reasons, certainty and purpose of the regulation. We can see the ambiguity of objectives in Article 21 paragraphs (1) and (2) which regulates the obligation of ESO in the private sector to provide access to Electronic Systems and/or Electronic Data to Ministries or Agencies and law enforcement officials in the context of monitoring and law enforcement in accordance with statutory regulations.

Articles that open access to the content of this communication have the potential to be misused, while on the other hand ESO must uphold the privacy of user data. The ambiguity of the formulation is contained in Article 9 paragraphs (3) and (4) which require that platform owners not include “prohibited” information, nor facilitate the exchange of “prohibited” data. What is meant by data that is "prohibited" is data that is classified as violating the provisions of laws and regulations and disturbing the public and disturbing public order. The definitions of "disturbing the community" and "disturbing public order" have a broad meaning so they are prone to misinterpretation, who has the authority to judge them? As a fairly technical implementing regulation, MCI Regulation 5/2020 provides definite clarity.

Finally, what is important to note regarding Article 36 of MCI Regulation 5/2020 which authorizes law enforcement officials to request private ESOs to provide access to communication content and personal data. Even though legal procedures have been included regarding requests for information needed by law enforcement officials, in practice law enforcement needs to be monitored so as not to silence those who come into contact with sensitive issues such as human rights and corruption. In addition, MCI Regulation 5/2020 does not provide a choice for private ESO to appeal incoming access requests, and the rights of data subjects, especially regarding the right to notification when their data is requested to be accessed by the government or law enforcement officials. This appeal or objection mechanism should be regulated.

Seeing from the public's reaction to the blocking of several ESOs and content materials that have the potential to violate human rights, it seems necessary to review MCI Regulation 5/2020 with public participation. In addition, MCI Regulation 5/2020 relating to access to user privacy is contrary to Article 30 paragraph (1) of Law no. 11 of 2008 concerning ITE which prohibits: “Setiap orang dengan sengaja dan tanpa hak atau melawan hukum mengakses komputer dan/atau system elektronik milik orang lain dengan cara apapun.” ["Everyone intentionally and without rights or against the law accesses another person's computer and/or electronic system in any way."].

MCI Regulation 5/2020 can be said to have exceeded the content material which is actually an implementing regulation and may not conflict with the regulations above it. Regulations regarding human rights, restrictions, and sanctions should be at the higher level of law, namely the law level. So it is necessary to consider revising Law No. 11 of 2008 which has been updated with Law no. 19 of 2016 concerning Information and Electronic Transactions, only then revised MCI Regulation 5/2020 in order to adapt to the needs of society. The state should not issue regulations that threaten platform users with various kinds of prohibitions that can reduce creativity. Moreover, the government's target is to make Indonesia the Digital Center for Southeast Asia in 2024. To make this happen, the government must provide a good climate for digital platforms so that they are free to innovate and be creative according to the characteristics of their fields.

CHAPTER V

Conclusion

From the discussion above, all Private ESO and platforms operating in Indonesia require and agree to register with the MCI and can be accessed in Indonesia so that social media and other platforms can handle content and market sharing. Regulates all private "electronic system operators", search engines, financial services, data processing services, and communications services that provide news, video calls, and games. This regulation affects regional and even national digital services and platforms, as well as multinational companies such as Google, Twitter, Facebook, Instagram and TikTok. Access to regulated systems and data. Second, these companies need to "guarantee" that their platforms do not contain "prohibited content" or promote submissions. This means that you have an obligation to monitor existing content. Otherwise, the entire platform may be blocked. Regulatory requirements that require businesses to actively monitor or screen content that violates their privacy rights and may constitute censorship prior to publication.

The government's definition of prohibited social media content has a very broad meaning, allowing content that is said to "cause public disturbance or obstruction of the public" or access, and content that violates laws that have been enacted in Indonesia that restrict freedom of opinion and expression. Information on how to do this is available. Provide direct access to prohibited material. The latter includes virtual private networks (VPNs) which can provide users or the general public with easy access to blocked content, but are routinely used by businesses and individuals to ensure the privacy of legitimate activity (Wicaksana et al, 2020). For "urgent" requests, regulations require companies to remove content within 4 hours. Other prohibited content must be carried out within 24 hours after the issuance of a warning/notification from the relevant Ministry. If it fails, the regulator has the right to block services or impose heavy fines on platform service providers that activate user-generated content.

The presence of MCI Regulation 05/2020 which is owned by the Indonesian government with the aim of protecting personal data in the private sphere, it turns out that it still causes several problems in its application to personal data or content on social media.

Governments can request that ESOs, including social media platforms provide access to systems and users' personal data to governments for "surveillance" purposes. In addition, governments may require ESO to remove any type of content it deems inappropriate. This regulation is also considered inconsistent with the Covenant on Civil and Political Rights and Article 28 A-J of the 1945 Constitution regarding the principle of freedom of opinion and expression. With the existence of several articles that still limit freedom of opinion and expression, including Article 9 Paragraph (4) to (6) of MCI Regulation 5/2020 which basically regulates the classification of documents that are prohibited from being disseminated on social media, and if does not remove related content that is prohibited by the government will be subject to sanctions. However, with this regulation, the Government has its own thoughts regarding ESOs which is considered to make it easy for the public to disseminate prohibited information. Even though in this regulation the government cannot explain what can be used as an indicator or basis that information or content disseminated through social media can be considered "disturbing" to disturb public order. And the government has not given a mandate to who has the authority to determine various information violations on social media.

Article 14 of the MCI Regulation 05/2020 stipulates that the Ministry of Communication and Information and other state agencies, law enforcement officials, judicial authorities and the general public can request information that "disturbs public order and decency". Also, content must be removed within 24 hours, and if the situation is "urgent", it must be removed within 4 hours. If ESO is unable to comply with the request. Warnings, fines and bans by Indonesia itself. And Point 3C itself has not explained in detail what information is classified as offensive to public order and decency.

Therefore, the freedom inherent in every individual is freedom of speech and opinion. The path of national democracy is formed by respecting, protecting, and fulfilling the government's responsibilities and obligations towards human rights, which of course requires the role and participation of the community. Freedom of speech and expression depends on responsible government policies. Especially in the issue of state guarantees for individual freedom of opinion and freedom of speech without interference. Freedom of speech as stated in the UDHR is a negative human right. This means that these rights must be fulfilled, respected and upheld, especially in the life of a democratic society that guarantees the presence of human rights.

"Everyone has the right to freedom of opinion and expression; this right includes freedom to

hold opinion without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers." (Article 19)

The Covenant on Civil and Political Rights also prohibits war propaganda and any behavior that promotes hate speech based on race, ethnicity, religion and even nationality which constitutes incitement to violence, hostility, or discrimination. The American Convention on Human Rights, which deals with free speech, also sets limits, but clearly states that the right to free speech may not be pre-censored. This provision is a means of communication under the same legal conditions to those who are victims of inappropriate or uncomfortable expressions or ideas that have been disseminated to the public through legally regulated means of communication.

One of the common threads that we can draw from this is that the context in which freedom of expression exists also contributes to the implementation of freedom of expression itself. For good governance to be realized, local laws are the spirit of the national constitution, and positive laws is the to be the safe net. Morality and soul are the spirit of defending freedom of expression and living and prospering well among those who express it. Public order and morals are closely related to norms, ethics, and various other common problems in the life of a democratic society. In fact, it is not easy to create an ideal media democratization state. The new media, which is expected to be able to update the atmosphere of freedom of opinion, is mired in a separate dilemma due to the ambiguity of the laws and regulations that regulate its existence. Initially aiming to provide a clear legal umbrella, several laws related to new media, especially Indonesian social media, have instead become ghost articles or "*pasal hantu*" that are terrible in the life of media democracy in Indonesia because it is entrusted by a handful of people and not in the public interest (Ediwarman, 2012).

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