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"Criminal Defamation is an Unconstitutional Restriction on Freedom of Speech"

Amicus Curiae (Written Commentary) proposed by:
ELSAM, ICJR, IMDLN, PBHI dan YLBHI

District Court of Tangerang
Case No: 1269/PID.B/2009/PN.TNG
Case : "Prita Mulyasari Vs. the Republic of Indonesia"

ELSAM ICJR IMDLN PBHI YLBHI

Jakarta, February 2010

"Criminal Defamation is an Unconstitutional Restriction on Freedom of Speech"

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All ELSAM publications is dedicated to victims of human rights violation, as part of the effort of human rights promotion and protection in Indonesia.

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Foreword

The freedom of expression, freedom of speech in particular, has some reasons to be one of important rights and the most important indicator in determining the condition of democracy in a country. Prita Mulyasari, Kho Seng Seng, Risang Bima Wijaya, and Bersihar Lubis are perfect examples of how criminal provisions are used as tool to imprison freedom of speech. This offense will not only affect journalists and activists, but also may be imposed on ordinary citizens.

Many efforts have been conducted to test the constitutionality of contempt offense, as stipulated within the Penal Code and Electronic Transaction Information (hereinafter referred to "ITE") Act, as the offense is considered limiting the freedom of expression. Such fruitless efforts, as all fall short in the judgment of the Constitutional Court. The Court failed to determine the balance of rights in reading the complexity of the offense, also known as offense to reputation. Consequently, there are increasing trend of exploiting this criminal provision against corruption allegations or against people criticizing the performance of the government, corporation or institution providing public services.

In one of the well-known case of reputation offense of Prita Mulyasari vs The State of the Republic of Indonesia in 2009, she was charged for defamation offense as stipulated within Article 27 (3) ITE Act. ELSAM together with YLBHI, PBHI, ICJR and IMDLN have submitted *amicus curiae* for Prita Mulyasari to District Court of Tangerang where the trial took place.

Indeed, the term *amicus curiae*, translated as friend of court, is not familiar within the Indonesian legal system, neither used in trial by legal scholars or legal practitioners. In the USA and in the international dispute settlement, *amicus curiae* plays very important role in a number of landmark cases. Therefore, the publication of this *Amicus Curiae* is expected to contribute in promoting and disseminating the importance of alternative strategy in the protection of rights, particularly through judicial mechanism. Hopefully, in future Amicus Curiae may earn more respect from scholars, practitioners and general public.

Jakarta, February 2010

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Content

I. Declaration of Interest

1. **The Institute for Criminal Justice Reform (ICJR),** established in Jakarta in August 2007, is a non-governmental organization mandated to undertake independent studies focusing on the reform of the criminal justice system, the reform of criminal law, and the reform of laws in general. ICJR strives to take initiatives that support the building up of respect for legal principles and, together with others, develop a culture of human rights in the criminal court system and the reform of criminal law.

2. **Perhimpunan dan Bantuan Hukum dan HAM Indonesia (The Indonesian Legal Aid and Human Rights Association) or PBHI** is a non-profitable association composed of individual members who are dedicated to the promotion and defense of human rights without discrimination based on tribe, religion, skin color, ethnicity, gender, status and social class, career and profession, including political orientation and ideology. PBHI was founded on 5 November 1966 in Jakarta through a Congress participated in by 54 founding members as an umbrella organization for every person concerned about human rights, stressing importance on diversity. PBHI declares its commitment to a three-fold mission, namely…
   (1) To promote human rights values.
   (2) To defend victims of human rights violations.
   (3) To train its members and candidates for membership to become human rights defenders.

3. **Lembaga Studi dan Advokasi Masyarakat (Institute for Policy Research and Advocacy) or ELSAM** for short, is an organization for policy advocacy that has existed since August 1993 in Jakarta. Initially it was a foundation, then it developed into an association on 8 July 2002. ELSAM aims to give shape to a society that holds on to human rights values, justice and democracy, whether in the formulation of law as well as in its implementation. ELSAM undertakes such endeavors as…
   (1) Assessing policies and/or laws, their implementation and application, as well as their impact on social and economic life, and on cult ure/
   (2) Developing ideas and concepts or alternative policies on laws that respond to the needs of society and protect human rights.
   (3) Carrying out advocacy in various forms for the fulfillment of rights, freedoms, and the requirements of a just society.
   (4) Disseminating information connected with the insights, concepts, and policies or laws with a vision about human rights, democracy, and justice in the midst of the wider community.

4. **Yayasan Lembaga Bantuan Hukum Indonesia (Indonesian Legal Aid Foundation)** or **YLBHI** is a legal aid organization founded in Jakarta on 28 October 1970. In carrying out its work and programs, YLBHI bases itself on the core values of the organization, the vision and mission of the institute that have been formulated and agreed on by all the legal aid institutions in Indonesia. YLBHI, together with other components of society and

the Indonesian nation, strongly desires and will work hard to achieve its goals in the future.

(1) The realization of a just, humane and democratic socio-legal system.
(2) The realization of a fair and transparent institutionalized legal-administrative system.
(3) The realization of an open political-economic system with a culture that fully respects human rights.

5. **Indonesian Media Defense Litigation Network (IMDLN)** is a network formed in Jakarta on 18 August 2009 by a group of advocates who have worked in the defense of human rights in Indonesia. This network was organized in response to the ratification of Law No. 11 Year 2008 on Electronic Information and Transactions as part of a group advocacy aimed at maintaining freedom of expression in general and freedom of speech in particular in Indonesia, and at providing for the defense of the interests of users of the "new media" in Indonesia.

6. **ICJR, PBHI, ELSAM, YLBHI, and IMDLN** submit this Written Commentary to the District Court of Tangerang to express their view and give support to the Judges of the District Court of Tangerang who investigated Case No. 1269/PEN.PID.B/2009/PN.TNG to evaluate whether in this case which is being examined, the Republic of Indonesia has violated the stipulations for Freedom of Expression and Speech as guaranteed in Article 28 F of the 1945 Constitutions *jo* Article 19 in the International Covenant for Civil and Political Rights (See Law No 12 Year 2005).

II. Amicus Curiae in Passing

7. "*Amicus Curiae*" is a technical term from Latin that is perhaps rarely heard in Indonesian courts. *Amicus curiae* is a legal concept from the Roman legal tradition that later developed and was practiced in the tradition of common law which allows the court to invite a third person to provide information or legal facts relevant to unfamiliar issues.

8. *Amicus curiae* in the English language is called "*friend of the court*", meaning, "*someone who is not a party to the litigation, but who believes that the court's decision may affect its interest*". A*micus curiae* can be freely translated as *friends of the court* or in Indonesian 'Sahabat Pengadilan', wherein an interested party in a case gives a legal opinion to the court. The *Miriam Webster Dictionary* defines *amicus curiae* as "*one (a professional person or organization) that is not a party to a particular litigation but who is permitted by the court to advise it in respect to some matter of law that directly affects the case in question*".

9. Hence, *amicus curiae* is submitted by a person interested in influencing the result of an action, but is not involved in the lawsuit; an adviser of the court on some legal matters, who is not a party in a case, usually a person who wants to influence the result of a case that involves the wider community.

10. In the tradition of *common law*, the mechanism of *amicus curiae* was introduced for the first time in the 14th century.

Then in the 17th and 18th centuries, broad participation in *amicus curiae* was noted in the *All England Report*. From this report we learn of several descriptions connected with *amicus curiae*:

a. The first function of *amicus curiae* is to clarify factual issues, explain legal issues and represent certain groups;
b. *amicus curiae*, in connection with facts and legal issues, does not have to be done by a lawyer;
c. *amicus curiae* is not related to the plaintiff or the defendant; however, they have an interest in a specific case;
d. permission [is needed] to participate as *amicus curiae*

11. In the United States of America, before the Green v. Biddle case at the start of the 19th century, the court did not allow the participation of *amicus curiae* for a long time during court proceedings. However, since the start of the 20th century, *amicus curiae* has played an important role in landmark cases in the history of law in the United States, such as, in civil rights and abortion cases. In fact, in a study done in 1998, *amicus curiae*, was used in more than 90% of the cases handled by the Supreme Court.

12. The latest development in the practice of *amicus curiae* is the application of *amicus curiae* in resolving international disputes, used by both state institutions and international organizations.

13. In Indonesia, though, *amicus curiae* is not yet well-known or used, either by academicians or practitioners. Up to the

present day, only two *amicus curiae* have been submitted in an Indonesian Court - *amicus curiae* that was submitted by activist groups for press freedom who proposed *amicus curiae* to the Supreme Court connected with the review of the case of Time magazine versus Soeharto, and *amicus curiae* in the case of "Upi Asmaradana" in the District Court of Makasar, wherein *amicus curiae* was presented as additional information to the judge who investigated the case.

14. *Amicus curiae* is not yet known in the legal system of Indonesia.Nevertheless, Article 28 section (1) Law No.4 Year 2004 on Judicial Powers states: *The judge is obliged to dig into, follow, and understand legal values and the sense of justice that is alive among the people*" This can be held on to as the legal basis for filing for *amicus curiae*. Therefore it is not excessive to use this mechanism as a strategy in clarifying legal and constitutional principles, particularly in cases that involve controversial laws or articles.

III. Summary of the Legal Facts

15. Prita Mulyasari, a housewife with two children, was made a prisoner by the State Prosecutor and detained on 13 Mei 2009 at the LP Wanita Tangerang (Tangerang Prison for Women) as a defendant in a case of defamation against RS Omni International situated in Alam Sutera, Serpong Tangerang, on the basis of Article 27 section (3) Law on EIT.

16. This case began when Prita Mulyasari had a health check-up at the Omni International Hospital on 7 August 2008 and complained about the service given by Omni International as well as by the doctors who treated her, namely, Dr. Hengky Gosal, SpPD, and Dr. Grace Herza Yarlen Nela. Her request for the medical records and her complaint was not well received and "forced" Prita to write about her experience by e-mail using her mailing list.

17. Prita Mulyasari was sued by Omni International Hospital on defamation charges by mailing list. This case began with an e-mail written by Prita that described her experience when she was treated at the Emergency Unit of Omni International on 7 August 2008. This email contained her complaint about the service given by Omni International Hospital and also by the doctors who treated her, namely, Dr. Hengky Gosal, SpPD, and Dr. Grace Herza Yarlen Nela. At that time she had a headache and felt nauseous. At the emergency unit she was treated by the doctor on duty, Indah. From the laboratory tests, this resident of Villa Melati Mas Tangerang was said to have 27.000 blood platelets, way below normal, around 200.000. Prita was asked to check in and choose the specialist who would attend to her. Upon the suggestion of Indah, she chose Dr. Hengky. The doctor diagnosed her as having dengue fever. According to Prita, she was then injected and given an infusion without any explanation or the permission of her family. Later on, she was surprised when Hengky informed her of the revised laboratory results on the number of her blood platelets.

What was first believed to be 27.000 blood palettes had now become 181.000. The doctor also told her that she had an airborne virus. Because she was dissatisfied with her treatment at this hospital, Prita decided to transfer to another hospital.

18. From here another problem arose. When she asked for her complete medical records, including the results of her blood tests, the hospital said that they could not print the said data. Prita then went to the Service Manager of Omni Hospital, Grace. She got the same results. On 15 August 2008, she sent an e-mail to some of her friends. It appears that this email reached the management of Omni International. Omni moved quickly. Besides putting out an advertisement to "teach her a lesson" they reported her to the police.

19. Omni International Hospital then not only sued Prita Mulyasari civilly on the charge of defamation by mailing list, but also published the half-page advertisement on 8 September 2009 entitled "Announcement and Rebuttal" in the daily newspaper Kompas. Essentially, it was a rebuttal from Omni of Prita's e-mail entitled "Fraud at Omni International Hospital in Alam Sutera, Tangerang." This e-mail made Omni bristle. According to the lawyer of Omni International, Heribertus, the contents of the e-mail besmirched the good name of the hospital together with the reputation of their doctors Hengky Gosal and Grace Hilza Yarlen Nela.

20. On 11 Mei 2009, the District Court of Tangerang pronounced that Omni International Hospital had won its civil suit against Prita Mulyasari and Prita was ordered to pay material damages worth Rp.161 million and immaterial damages worth Rp. 100 million.

21. In brief, after losing in the civil case, on 13 Mei 2009 Prita was put in prison by the State Prosecutor of Tangerang. Based on Article 43 section (6) of Law No 11 Year 2008 on Information and Electronic Transactions it was mentioned that "*In matters of arrest and detention, the investigating officer through the state prosecutor is obliged to ask for the decision of the chairman of the local court within twenty four hours.*"

22. Due to increasing pressure from the community since 28 May 2009, the day before Prita faced criminal trial, her place of detention was changed to the city jail on 3 June 2009

23. On 4 June 2009, the trial on behalf of the defendant Prita Mulyasari was held. Prita was accused with an alternative accusation, that is, violation of Article 27 section (3) of the Law on EIT, Article 310 WvS and Article 311 WvS.

24. On 25 June 2009, the Tangerang District Court gave the verdict that the accusation of the Prosecutor was null and void on the grounds that the new law on EIT would take effect two years after it is ratified. This decision immediately became controversial, because the imprisonment of Prita Mulyasari was caused by

the accusation that she violated Article 27 section (3) jo Article 45 section (1) Law on EIT, which clearly required the decision of the Chief Justice of the Tangerang District Court.

IV. Freedom of Expression and Human Rights

25. Freedom of expression is an important element in a democracy. In fact, in the first assembly of the UN in 1946, before the ratification of the Universal Declaration on Human Rights or the treaties adopted, the UN General Assembly through Resolution No. 59 (I) dated 14 December 1946 stated that "the right to information is a fundamental human right and the standard of all freedoms proclaimed as "holy" by the UN".

26. Freedom of expression is an important condition that makes possible the continuation of democracy and public participation in decision-making. Citizens cannot exercise their rights effectively in elections or participate in public decision-making if they do not have the freedom to obtain information and voice their opinions, or are not able to express their views freely. Such freedom of expression is important not only for the dignity of the individual, but also for participation, accountability, and democracy. Violations of freedom of expression often go together with the violation of other rights, especially the right to the freedom to associate and organize.

27. Freedom of speech is a very strategic human right in the ways and workings of democracy. It is difficult to imagine how a democratic system can work without the freedom to state one's opinion and attitude, and to express oneself.

28. In this context then, in order that a democratic system would work in a state based on law, freedom of speech in International Law is guaranteed and regulated in both Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. These place on the shoulders of the State or what is better known as state responsibility, the obligation to protect freedom of speech.

29. In the context of international law, the implementation of Article 19 of the International Covenant on Civil and Political Rights can be referred to the General Comment 10 on Freedom of Expression (Article 19): 29/06/83 where, based on General Comment No 10 (4) on Article 19 of the International Covenant on Civil and Political Rights which essentially emphasizes that the exercise of the right to freedom of expression carries with it specific duties and responsibilities, and on account of this, particular limits on this right are allowed as long as they are connected with the interests of other persons or the interests of society as a whole. Nevertheless there is a provision that is more than a mere restriction, because the General Comment 10 (4) also stresses that the application of these limits to the freedom of expression shall not endanger the essence of this right in itself.

30. Freedom of Expression is first of all freedom of speech, and there are several reasons why it is an important right and has become the most important indicator in assessing the extent to which the democratic climate in a country is safeguarded. According to Toby Mendel, "There are many reasons why freedom of expression is the most important right; first, it is the basis of democracy; second, freedom of expression plays a role in curbing corruption; third, freedom of expression promotes accountability; and fourth, freedom of expression in society is believed to be the best way to discover the truth."

31. The Universal Declaration of Human Rights (UDHR) was ratified by the UN General Assembly on 10 December 1948. The UDHR regulates standards for human rights accepted by all member states of the UN.

32. The UDHR also brought back the normative basis to guide the formulation of standards for freedom of expression. Article 19 of the UDHR states that "each person has the right to the freedom to have opinions and to state them, and to self-expression; this matter includes the freedom to follow an opinion without interference; and to seek, receive and submit clarifications and opinions in whatever way and without considering boundaries." Furthermore, Article 20 of the UDHR states that each person has the right to freedom of association and assembly without coercion, and no one can be forced to join an association.

33. However, the terms in Article 19 and Article 20 of the UDHR are limited by the provision in Article 29 of the UDHR, which allows restrictions "specified by laws aimed at allowing restrictions solely to guarantee the acknowledgment and appropriate respect for the rights and freedoms of other persons, and to fulfill just conditions on matters pertaining to morality, public order and general welfare in a democratic society." These rights and freedoms in whatever way and at all times cannot be exercised in contradiction to the objectives and principles of the United Nations.

34. The existence of the UDHR has had a big impact on the development of human rights laws both national and international. Basically all tracts on human rights adopted by UN agencies since 1948, that is, with the elaboration of a series in the UDHR. As a result, at present the UDHR is widely accepted as the Magna Carta that should be obeyed by each actor in the whole world. What was initially considered as a common aspiration is now welcomed as the "authoritative interpretation" of human rights and has become international common law, taking the form of a "global bill of rights".

35. The International Covenant on Civil and Political Rights (ICCPR) has been in effect since 1976. Provisions in this Covenant further spell out the principles found in the UDHR and are legally binding on the States that ratified it. Article 19 of the ICCPR states:
    1. Individuals will have the right to their opinion without coercion.

2. Individuals will have the right to state their opinion; this right includes the freedom to seek, receive and give information and all forms of ideas without considering limits, whether it is oral, written or printed, in the form of art, or through other means of their choice.
3. The exercise of these rights given in section 2 of this article is accompanied by specific duties and responsibilities. Thus specific restrictions are imposed; but in these cases they can only be set by laws and only in so far as they are needed in order to:
   (a) Respect the rights or the good name of other persons.
   (b) Maintain national security or public order or health or public morality.

36. In order to describe respect for the rights or the good name of others, the United Nations Economic and Social Council issued the resolution known as Siracusas' Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights which stresses that "When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to rights not subject to limitations in the Covenant."

37. When connected with the provisions in Article 19 of the UDHR, the contents of Article 19 of the Covenant

have several important elements, such as, there is a difference between freedom of thought (Article 18) and freedom of opinion. Although in reality there is no clear boundary between "thought" and "opinion", both are characterized as internal. "Thought" refers to a process, while "opinion" is the result of such a process. These rights and freedoms exist without limitations. The right to freedom of speech and expression can be exercised not only in just one country, but also internationally. These rights have become international rights.

38. Given the implications in the Universal Declaration of Human Rights, the freedom to have one's opinion without coercion is absolute, while freedom of expression may be subject to certain restrictions. This freedom of expression includes the freedom to seek, receive and put forward information and ideas.

39. The existence of this important right, including the right to information as part of fundamental human rights, is widely acknowledged. The African Commission on Human and Peoples' Rights noted the following, in relation to Article 9 of the African Convention: "*This Article reflects the fact that freedom of expression is a basic human right, vital to individuals personal development, their political consciousness, and participation in the conduct of the public affairs of their country*."

40. The European Court of Human Rights (ECHR) has also acknowledged the role of freedom of expression as follows: "*Freedom of expression constitutes one of the*

essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every person ... it is applicable not only to "information" or "ideas" that are favorably received ... but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society"."

41. The importance of freedom of expression has also been acknowledged in various court decisions in several countries including Indonesia. In various decisions the Supreme Court of the Republic of Indonesia and the Constitutional Court of the Republic of Indonesia also have acknowledged the role of Freedom of Expression, Freedom of Speech, and Freedom of the Press in safeguarding the sovereignty of the people.

The Supreme Court is of the opinion that
" press freedom is a condition sine qua non for the realization of democracy and a State based on law because without press freedom, the freedom to state one's thought and opinions becomes useless. Hence, legal action taken against a deviant press shall not endanger the principles of democracy and a State based on law."

Likewise, the Constitutional Court in its decision was of the opinion
"One essence of democracy is the freedom to communicate and obtain information through all available channels. The freedom to communicate and to obtain information is the

life blood of democracy. Patrick Wilson reminded us that "democracy is communication". Citizens in a democracy live in the conviction that through the open exchange of information, opinions and ideas, the truth will finally become evident and falsehood will eventually be defeated."

Furthermore the Constitutional Court also emphasized that

"Taking off from the above thoughts, the freedom to communicate and to obtain information, to hold one's views, to express ideas and concepts, to correspond with the press is to communicate through mass media. Discussions about the press in a democratic political system takes a central position, given that freedom of the press is a gauge of democracy and not a political system. Press freedom in a democratic political system is related to other important freedoms, like the freedom of expression and exchange of information. In a democratic political system, press freedom is needed as a means of information for society and democracy will only be effective if the citizens have good access to information. Press freedom which encompasses the print media, electronic media, and other media is one means to express thoughts in oral and written form. Because of this, press freedom should be oriented to the interests of society and not to the interests of a particular person or group."

The Constitutional Court also submitted

"That in the context of democratic ideas, freedom of the press must give color and meaning as a means to open a space for differences in opinion and become a place to

proffer criticism and information. This space for differences in opinion exists only when freedom of the press is there and not curtailed, although certainly still subject to the law and the code of ethics for journalists."

Through its decision the Constitutional Court again explained

"That the freedom to express oneself, to talk, and to convey opinions and ideas through all available means is at the heart of democracy. Freedom to talk and to have one's own opinions constitute the lifeblood of democracy…. Therefore the freedom to express oneself, to talk, and to convey opinions and ideas through all available channels also belong to the blogger, the facebook community, mailing lists and the like who carry out interaction, correspondence, and blogging activities on the web. In this position, web blog or blog, facebook, mailing list and the like can function as a "loudspeaker" of the people. The freedom to express and exchange information of the blogging community, facebook, mailing list and the like are important as sources of information, because democracy will function effectively only when the citizens are well-informed. In connection with this, information is used as material for consideration for the citizens to take steps, including political action, both in the framework of participating in decision-making processes, as well as to reject Government policies that are considered harmful to social life."

V. Limitations to Freedom of Expression in International Law

42. Freedom of expression, even though it falls in the category of fundamental rights, is not a right that cannot be limited. Each human rights system, whether international or national, acknowledges that freedom of expression can be restricted within very narrow limits and should be done carefully, according to the provision of Article 19 section (3) of the International Covenant on Civil and Political Rights (see Law No 12 Year 2005).

43. Nevertheless, it cannot be forgotten that the said principle of limitation is not meant to endanger the essence of rights that has been guaranteed in International law. As one of the States parties that ratified the International Covenant on Civil and Political Rights, Indonesia has the international obligation to harmonize the said terms of limitation with International human rights standards.

44. Limitations permitted by international law should be examined using the method called the three part test, namely…
    (1) The limitation should be done only through legislation.
    (2) The limitation should only be allowed for legitimate ends as stated in Article 19 section (3) ICCPR.
    (3) The limitation is truly needed to guarantee and protect such legitimate ends.

V.1. Restriction I

45. International law and in general the constitutions of modern states in the world only allow limitations to the freedom of expression by law. The implication of this provision is that it is done not only by law but that the laws connected with this limitation must have high standards of clarity and accessibility, or in other words, must avoid "unclear definition".

46. The *Siracusa Principles* likewise explains that limitations should be formulated strictly and in the interests of the right being protected, consistent with the objective of the provisions in ICCPR; the limitation cannot be arbitrary and without a legitimate reason. The limitation should be formulated clearly and should be accessible to every individual, and provide security and indemnity in regard to the impact and the application of an illegal limitation and its tendency to be abused.

47. Clarity of definition is known in Indonesia as the principles of Lex Certa and Lex Stricta. These two principles are acknowledged as important principles in a State based on law. Indonesia, through Law No 10 Year 2004, also acknowledged that a law should be made with the principle of clarity in formulation, that is, each regulation should fulfill technical requirements for the codification of regulations, be systematic, and use a choice of words or terminology, as well as legal language, in a clear and easy to understand manner, such that it will not give rise to several interpretations in its implementation.

48. Such unclear definition will only invite broad interpretations from authorized agencies and even from persons who are objects of the regulation of a law and as a result such unclear definition will have the potential of inviting misuse and the authorized agency will look for ways to use the said provision in a situation wherein one cannot find a relationship with the intent of the expert maker of the law or the real objective that the law was meant to achieve. Such unclear definition will fail to provide sufficient notice in a situation if a certain action is allowed or forbidden, and then will result in a climate of fear with regards to freedom of expression with every citizen keeping to a comfort zone to prevent the application of the unclear definition of the provision.

49. Courts in many jurisdictions have stressed that unclear definition and a broad understanding of a law have the potential of creating a widening climate of fear among the people. The Federal Supreme Court of the United States of America has likewise clarified that "*The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within "narrowly limited classes of speech." ... [Statutes] must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible to application to protected expression. Because First Amendment freedoms need breathing space to survive, the government may regulate in the area only with narrow specificity.*"

50. Besides this provision on legal restrictions, laws that give very broad discretional powers to limit freedom of

expression are likewise forbidden. In the case of Ontario Film and Video Appreciation Society v. Ontario Board of Censors, the High Court of Ontario explained that: "*It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.*"

V.2. Restriction II

51. In assessing a legitimate purpose, the said restriction must have as its direct objective a legitimate interest or purpose, as declared by the Supreme Court of India which stated that "*So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.*"

52. The Supreme Court of Canada gave an interpretation on the aforementioned legitimate purpose by noting that "*Justification under s.1 requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing and substantial as to be capable of overriding the Charters' guarantees.*"

53. Moreover, the Supreme Court of Canada noted that in order to assess if a restriction to freedom of expression is truly made for a legitimate purpose, the assessment should be made on both its purpose for which the law was made, and on the application of the law. The moment

the purpose for which the law was made deviates from a legitimate purpose, as stated in Article 19 section (3) ICCPR, then the said restriction cannot be justified. Furthermore, the Supreme Court of Canada marked that to evaluate whether a restriction to freedom of expression is truly made for a legitimate end, such evaluation should be done on both the purpose for which the regulation was framed as well as its application. When the purpose for which the law was made deviates for a legitimate purpose as mentioned in Article 19 section (3) ICCPR, the restriction in question is unjustifiable. "*Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.*"

V.3. Restriction III

54. A truly necessary restricting phrase can generally only be had in some countries with democratic societies. This third restriction requires the existence of high standards of application so that a country can legitimize a policy restriction it has taken. When a country needs a restriction, such a restriction should have as a basis:
    (1) A provision in the ICCPR allowing such a restriction.
    (2) A need in the community.
    (3) A legitimate purpose to be safeguarded.
    (4) A restriction proportionate to its purpose.

55. Hence, when a state needs a certain restriction, the restriction should be based on:
    (1) A provision of the ICCPR that permits the presence of the restriction.

(2) The restriction is proportional to the achievement of its purpose.

56. The European Court of Human Rights has several times clarified this third standard with the note: "*Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted, and the necessity for any restrictions must be convincingly established.*"

57. The European Court of Human Rights likewise underscored that these restrictions need to be analyzed particularly by noting that "*[There is a] "pressing social need" [whether] the inference at issue was "proportionate to the legitimate aim pursued" and whether the reasons adduced...to justify it…t are "relevant and sufficient.*"

58. The Supreme Court of Canada also specially noted requirements needed in analyzing this limitation. "*The party invoking [the limitation] must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, on p.352.... "There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, on p.352. Third,*

there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'''

59. The Federal Supreme Court of the United States also noted how important it is that the restriction not be broadened by observing that "*Even though the Government's purpose may be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved.*"

60. Finally, we want to underscore that the effect of the restriction must be proportionate in the sense that the restriction that protects one's reputation or good name, which seriously impairs freedom of expression, can never pass this three-part test. A democratic society can be achieved only when the flow and traffic of information and ideas are freely available and the effect of the restriction cannot harm the interests of the wider public.

VI. The Basic Problem in the Offense of Defamation in International Law

61. Even though the legal provisions that regulate defamation in several matters do not prohibit restrictions that are allowed according to the provision in Article 19 section (3) ICCPR (see Law No 12 Year 2005) which are there to

protect a person's reputation/good name. Nevertheless, in reality, the provisions on defamation in general are problematic because these provisions can very easily be interpreted broadly.

62. Susi Dwi Harjanti, an expert in constitutional law of Padjadjaran Univeristy, clarified that the protection of human rights should not always be done by applying provisions from criminal law. They should, however, be protected in another legal area… basically, the interests that are protected by this Article are in the domain of the interests of the individual. Because of this, in the context of legal science in general, the regulation of interests among individuals is more emphasized in civil rather than criminal law.

    Several problems that arise in the regulation of defamation especially in criminal law are:

VI.1. It stops discussion or debate in public institutions.

63. In general the provision on defamation in criminal law is clearly aimed at stopping, or spreading fear in undertakings, debates or discussions regarding institutions or government officials by giving a broad definition which at once prohibits criticism of the head of state or a state institution, or a public official, by adding criminal punishment on the crime of defamation directed at the said objects. In many cases, this hazy formulation of norms in criminal law on defamation can be used effectively by public officials and public figures to stop criticism towards them and to stop debate and

discussion on matters that attract the attention of the public. It is precisely provisions such as this that can effectively foster self-censorship by the media and members of society.

VI.2. It protects feelings rather than reputation.

64. Another significant point is that the use of norms for punishment of degradation/defamation has the high potential of being misused to protect feelings rather than reputation. The main thing about protecting feelings is that it is very subjective and cannot be measured by external factors; a strong proof for this matter is the statement of a person "considered insulting" measured with the feelings of a person "considered insulted". These penal provisions that protect feelings can effectively place victims witnessing for themselves in a strong position, because what is needed by victim-witnesses is explanation to the court that the defamatory statement constituted an attack, and the practical impossibility for the accused to provide evidence that can support their position. Honor is used in much juridical terminology in criminal law. Honor in itself is an ambiguous technical term because it can be connected with one or two of these factors, namely, it is connected with the personal feelings of a person and/or it is connected with society's view of that person.

VI.3. It protects public order rather than reputation.

65. In reality, in many countries, provisions about criminal defamation are often misused for the purpose of

protecting public order rather than protecting a reputation. The root cause of this confusion can be found in the offense of defamation in previous times. In the past, defamation could actually give rise to public order disturbances such as duels or even war. The problems in this offense are

(1) The high potential to cause confusion in its application such as the emergence of duplication with another provision, which will cause confusion regarding which legal standards are applicable.
(2) It can lead courts to apply the offense of defamation (on cases) without the aspect of public order which can result in a verdict that is proportionate in the context of public order, yet be very excessive in the case of defamation.
(3) The relationship between the offense of defamation and public order can cause the court to ask for individual responsibility for the reaction/response of other parties rather than to evaluate it in the context from which the statement concerned arose.

VI.4. The lack of sufficient defense/justification

66. In general the provision for criminal defamation does not provide sufficient justification, like the dispute about whether a certain statement is an opinion or a fact that is incorrect or whether there is justification for publishing the said statement. In fact in general, the provision on defamation allows the court to argue that the said statement is an attack on reputation rather than to prove whether the said fact can be proven.

VII. The Problematic of the Offense of Defamation in Indonesian Law

67. Even though Indonesia formally acknowledges and guarantees freedom of speech in its constitution, in the practice of legislation, freedom of speech can still meet challenges especially when there is a cross-conflict between the right to one's reputation and the right to freedom of speech. In many cases, the court favors the right to reputation compared to clearly weighing and considering these two rights which are equally acknowledged.

68. The history of the offense to reputation itself, based on the opinion of Nono Anwar Makarim, can be traced back to 1275 when the Statute of Westminster introduced what was called Scandalum Magnatum which stated that *" . . . .from now on it will no longer be allowed that a person directly express or publish false news or stories that can cause conflict or the possibility of conflict or slander between the king and his people or great persons in this country."* Scandalum Magnatum itself was meant to create a process of peace-keeping in a situation that can be a threat to public order rather than to protect reputation and to vindicate one's good name.

69. There have been too many armed brawls and killings that have occurred due to a reaction of an insulted person to what was perceived as an insult from another person. In fact revenge has taken a more important position compared to mere protection of reputation. In bygone times, information was rarely obtained and was difficult

to confirm. Rumors easily led to fencing or pistol duels in public. In fact fights of this sort spread until they took the form of a rebellion. According to the Supreme Court of Canada, the purpose of the said law was to prevent false rumors from circulating. In a society dominated by landlords with such great powers, the wrath of the local high ranking official could in fact threaten a country's peace.

70. The offense against reputation in Indonesia can be found in Chapter XVI WvS on Defamation. There are three main problems in looking at the offense against reputation in WvS, namely:

VII.1. The deliberate intention to defame

71. Although in general the offense against reputation in WvS requires the element of "deliberate intention to defame", evidently the Supreme Court since its Decision No 37 K/Kr/1957 dated 21 December 1957 has consistently stated that "the existence of animus injuriandi (the deliberate intention to defame) is not required." What is interesting is that this element of deliberate intention to defame can be interpreted in such a way that the action of sending a letter to an official institution that attacks the good name and honor of another person is already accepted as proof that there is this element of intention to defame.

VII.2. Separation of opinion and fact

72. The offense against reputation in WvS clearly does not make a strong distinction between opinion and fact,

and this lack of strong distinction can result in opinion makers being convicted based on the regulations in effect; in this matter see the case of Bersihar Lubis (2007) who was found guilty based on Article 207 WvS.

VII.3. Claim to truthfulness

73. The offense against reputation, particularly in Article 310 WvS, according to Juswito Satrio (2005), does not require the truth of a statement that is perceived as defamatory. Put simply, a prostitute has the right to feel defamed if shouts "Prostitute." However, if the perpetrator of an offense against reputation is given the chance by the Judge to prove the truth of his accusation but is not able to prove it, then the perpetrator is sentenced as intended in Article 311 WvS. Because of this there is a close connection between Article310 and Article 311 WvS.

74. Besides this, Article 310 WvS also does not explain how this defamation itself is understood except to say "to deliberately attack the honor or good name of a person by an accusation clearly meant for publicity." As explained above, on deliberate intent to defame, again and again criminal law fails to look at the gauge of how a person is qualified to have committed defamation. Thus, according to Dr. Mudzakkir, SH, MH, government expert on the Examination of Articles 310, 311, 316, and 207 WvS, the measure used in criminal law is subjective but objectified. "Subjective" here refers to the feeling of the defamed person, while "objectified" means that it is measured objectively, generally in the place where

it took place, as to whether the deed belongs in the category of defamation or not, or, according to the view of the community where the action was done, whether it is seen as an action that is reprehensible or defamatory. This standard also contains a basic weakness, given that the application of the offense of defamation is generally always within a situation where there is an imbalance between the Defamer and the Defamed. The Defamed is always in a strong position economically, politically, and even legally, while the Defamer is always in a weak or weakened position economically, economically, politically and even legally.

75. Aside from this, it is difficult to see whether a certain statement is a criticism or a form of defamation; hence Dr. Mudzakkir, LLB, LLM, again and again describes quite well how susceptibly a criticism can in a second change into an action seen as criminal defamation. He illustrates thus: "Criticism of a person (including criticism of the president) must be differentiated from defamation, because the two have different meanings. To criticize is not the same as to defame. To defame is a criminal act, because defamation is an intention to attack the honor or good name of a person that begins with an evil intent or a criminal intent that another person's honor or good name be attacked. When this takes place, what is punished according to criminal law is not the act of criticizing that which preceded, accompanied or followed the defamatory act, but the defamatory act itself.".

76. On account of this, there is a basic problem in looking at the offense of defamation, that is, there is a systemic relationship between the vague formulation of norms and the application of these norms, which will eventually make the judges consistently apply them in a way that are prejudicial to the constitutional rights of the citizens. This problem lies in the formulation of norms that are "elastic", in that they do not fulfill the principle of lex certa in the formulation of a criminal offense.

VIII. Imprisonment for the Offense of Defamation is an Excessive Punishment.

77. In international human rights laws, the country indeed is obliged to create instruments and/or mechanisms to protect the right to reputation. In general, countries in the world protect the right to reputation through two legal instruments; namely, criminal law and civil law.

78. However, protection of the honor and reputation of the individual should also be seen relative to other rights, namely, the right to freedom of speech, freedom of expression, and freedom of the press. The protection of the right to reputation should not reach the extent of becoming a powerful weapon to silence independent speech as happened during the New Order.

79. Honor and reputation – as parts of the rights of privacy – should indeed be protected, but without lessening or

threatening free speech. In connection with this matter, it is relevant to present the decision on Bonnard v. Perryman in an English court, which stated: "*The right of free speech is one in which it is for the public interest that individuals should possess and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue there is no wrong commited...*"

80. Both have to be guaranteed and protected by the State. In the context of this responsibility, the State can commit "*derogation*" in the form of attenuation or restriction of these two rights, because both are categorized as "*non-derogable rights*". However, this license does not mean that the State can act arbitrarily, thereby endangering the essence of the right.

81. Because of this, the provision for such *derogation* is hedged with this provision: *"Not a single provision of this Covenant can be interpreted as giving the right to a State, group or individual to carry out an activity that is meant to destroy the rights and freedoms acknowledged in this Covenant, or to restrict them more than what is already stipulated in this Covenant.*"

82. Furthermore, the General Comment to the Covenant on Civil and Political Rights also underscores that: "*States Parties should restrain themselves from violating the rights that are acknowledged in the Covenant, and any restriction on any one or more of these rights must have a rationale that is proportionate to the provisions in the Covenant. When such a restriction is made, the States must indicate why they are*

needed and only take steps that are proportional to achieve the objectives according to the law in order to guarantee the continuous and effective protection of the rights that are acknowledged in the Covenant. Restrictions cannot be applied or made in a way that weakens the essence of a right that is acknowledged by the Covenant."

83. Because of this, the use of criminal law as an precise instrument can restrict the essence of this right in itself, so that it is not surprising if each year the Special Reporter for the UN on Freedom of Expression always calls on the States that ratified the International Covenant on Civil and Political Rights to take out the provision on defamation in criminal law. The calls for such elimination have become so loud that the UN General Assembly, at the start of 2009, likewise called on the member states of the UN to abolish the provision on defamation in their criminal law.

84. In the same way as freedom of expression, the right to reputation is protected by international law particularly in Article 12 of the Universal Declaration of Human Rights, as well as Article 17 of the International Covenant on Civil and Political Rights. The Indonesian Constitution likewise guarantees the protection of the right to reputation based on Article 28 G.. However, the fundamental question is, is it right that the basic assumption used is that criminal law is regarded as the only way for the state to protect the right to reputation?

85. The effort to keep a balance between these two rights can be seen from various decisions by human rights

courts. It is also interesting to note some opinions from the European Human Rights Court in the case Lingens vs. Austria which claims that criminal law, in the case of offense against reputation, can put pressure on freedom of expression. The Inter-American Commission on Human Rights also noted in the conclusion of its "Report on the Compatibility of "Desacato" Laws With the American Convention on Human Rights" which mainly said that " (criminal penalties) will have a fearsome effect on freedom of expression". Besides this is the opinion of the Supreme Court of the United States in 1964 that "*Even in Livingston's day [circa 1830s], however, preference for the civil remedy, which enabled the frustrated victim to trade chivalrous satisfaction for damages, had substantially eroded the breach of the peace justification for criminal libel laws*." Furthermore, the Supreme Court of the United States of America also stated that "*. . . under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation*".

86. Besides this the Human Rights Commission of the UN, in its resolution on freedom of expression would, every year, always declare its concern over the continuation of what the UN Commission on Human Rights called "*abuse of legal provisions on defamation and criminal libel*". Three international commissions established with the mandate to promote freedom of expression, namely, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, in December 2002 also

published the declaration that "*Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws*."

87. Based on the data from *Article 19*, an international non-governmental organization, it can be said that several countries like East Timor (2000), Ghana (2001), Ukraine (2001) and Sri Lanka (2002), have taken out offense against reputation in their respective WvS. And these countries did not experience a significant increase, neither quantitative nor qualitative, in statements that attacked honor since they had taken out offense against reputation from their Criminal Law.

88. Indonesian criminal law also provides kinds of criminal punishment consisting of (1) principal penalty and (2) additional penalty. The provision on Defamation in Chapter XVI WvS in general does not oblige the court to hand down a verdict for principal penalty, namely, imprisonment; however, the court is given the freedom to specify the kind of principal penalty to hand down, in this case imprisonment or a fine. The court can still hand down an additional penalty as found in Article 311 section (2) WvS, Article 317 section (2) WvS, and Article 318 WvS.

89. The penalty of imprisonment can basically cause the emergence of a deep climate of fear that can threaten freedom of expression. The provision for criminal defamation can lead to the verdict of a heavy penalty like imprisonment. Even though the threat of imprisonment

is considered low, it still can create a profound impact like the possibility of arrest by relevant authorities, detention before and as long as the court hearings last, and can result in the people's viewing the accused/the person convicted of defamation while in prison in the same status as an ordinary criminal in other criminal cases. So when a criminal trial is dropped, even though the convict is free for the time being, the possibility of being imprisoned at any time is very high if he should, for example, violate other criminal laws including traffic violations.

90. This provision for criminal defamation is worsened by the reality that basically powerful social actors like public officials, high-ranking administrative officials, popular business people in general use and misuse the provision for criminal defamation to protect themselves from criticism or from the disclosure of embarrassing facts even though there is evidence to support these facts.

IX. The Formulation of Norms for the Penalty for the Offense of Defamation is without any philosophical basis

91. The formulation of norms for penalties for the offense of defamation in Indonesia do not have a good philosophical basis. This can be proven from the table below:

Type of Regulation	Provision	Threat of Penalty
WvS		
Article 142	Defamation of the head of a friendly State	Imprisonment for 5 years and a fine of RP4500
Article 142 a	Insulting the flag of a friendly State	Imprisonment for 5 years and a fine of RP4500
Article 143	Defamation of the head of a foreign country	Imprisonment for 5 years and a fine of RP4500
Article 144	Defamation of the head of a friendly State and a representative of a foreign country in a form other than spoken	Imprisonment for 9 months and a fine of RP4500
Article 154 a	Insulting the flag of Indonesia	Imprisonment for 4 years and a fine of RP3000
Article 207	Insulting the government or a public agency	Imprisonment for 1 year and 6 months and a fine of RP4500
Article 208	Insulting the government or a public agency in a form other than spoken	Imprisonment for 4 months and a fine of RP4500
Article 310	Insult	Imprisonment for 9 months and a fine of RP4500; if in a form other than oral, imprisonment for 1 year and 4 months and a fine of RP4500
Article 311	Defamation	Imprisonment for 4 years
Article 315	Slight defamation	Imprisonment for 4 months and 2 weeks and a fine of RP4500

Article 316	Insulting a person on official duty	Additional weigh of 1/3 of the original offense
Article 317	Accusation of defamation	Imprisonment for 4 years
Article 318	False presupposition	Imprisonment for 4 years
Article 320	Defamation of a dead person	Imprisonment for 4 months and 2 weeks and a fine of RP4500
Article 321	Defamation of a dead person in a form other than verbal	Imprisonment for 1 month and 2 weeks and a fine of RP4500
Law No 32 Year 2002 on Broadcasting		
Article 36 section (5) letter a jo Article 57	Defamation	Imprisonment for 5 years or a fine of RP10.000.000.000
Law No 10 Year 2008 on General Elections for Members of the DPR, DPD, and DPRD		
Article 84 section (1) letter c jo Article 270	Defamation of a candidate and/or a participant in the general elections	Imprisonment for a minimum of 6 months and a maximum of 24 months and a minimum fine of RP6.000.000 and maximum fine of RP24.000.000
Law No 42 Year 2008 on Elections for President and Vice President		
Article 41 section(1) letter c jo Article 214	Defamation of a candidate and/or the pair of candidates for President/Vice President	Imprisonment for a minimum of 6 months and a maximum of 24 months and a fine of a minimum of RP6.000.000 and a maximum of RP24.000.000
Law No 32 Year 2004 on Local Government		

Article 78 letter b jo A 116	Defamation of a candidate for regional head or vice regional head	Imprisonment for a minimum of 3 months and a maximum of 1 year 6 months, and a minimum fine of RP600.000 and a maximum fine of RP6.000.000
Law No 11 Year 2008 on Electronic Information and Transactions		
Article 27 section (3) jo Article 36 jo Article 45 section (1)	Insult and/or defamation	Imprisonment for 6 years and a fine of RP1.000.000.000.

X. The Controversy over Law No. 11 Year 2008 on Electronic Information and Transactions (Law on Electronic Information and Transactions (Law on EIT)

92. Various peculiarities in the formulation of the norms for a criminal act in the Law on EIT are so easily put forward. Along with the formulation of the norms of deliberateness and unfairness that are extremely controversial, there are various peculiarities that can be presented, such as the following:

X.1. The high threat of penalty for defamation

93. The high threat of penalty for defamation clearly has the

effect of creating fear beyond the ordinary for internet users. There is no reason whatsoever why the threat of penalty for criminal defamation must be so costly. Besides this, the makers of the law on EIT have also forgotten the principle for the imposition of penalty for the crime of defamation like in WvS. WvS at least accommodated various types of penalty that can be imposed even though in practice their use has never been considered, namely,

(1) The right to hold a position in general or a position in particular
(2) The right to join the Armed Forces
(3) The right to vote and be voted for
(4) The right to be lawyer or an administrator, a high civil servant, a co-supervisor, guardian, a co- guardian
(5) The right to exercise power as father, trustee, or guardian.
(6) The right to run a particular business. The penalty for this is 9 years [imprisonment] and a fine of RP 1.300.000.000,00 if Article 27 section (3) of the Law on EIT is joined with Article 316 of WvS.

X.2. The penalty for gambling has actually fallen drastically

94. Although the penalty for defamation has become harsher, the penalty for gambling is the complete opposite. If in Article 303 of WvS the penalty of imprisonment for gambling is 10 years, imprisonment "maka ancaman pidana penjara" in Article 27 section (2) jo Article 45 section (1) of the Law on EIT has become only 6 years. Here too, no satisfactory explanation from the framers of the Law on EIT can be obtained on why this could happen.

X.3. Duplication of the crime of intimidation

95. The crime of intimidation in the Law on EIT is formulated in two Articles, namely, Article 27 section (4) and Article 29. This duplication could boomerang because it may create legal uncertainty in the enforcement of the law.

X.4. All types of information can be penalized.

96. The use of only the element of "false news" in Article 28 section (1) can also lead to ambiguity because the information or false news can likewise be given through the print media; the only destination mentioned for the transaction is through electronic transaction. Article 28 section (2) only uses the element "spread information", indicating carelessness and lack of precision on the part of the framers of the Law on EIT because a satisfactory explanation cannot be obtained why they did not use the phrase electronic information and/or electronic document.

97. Besides this, an interesting relationship can also be seen between the offense of intimidation and spreading hostility. In all the states based on law in the world, the penalty for spreading hostility is always a grave one because this is a type of penalty meant to be a deterrent against genocide. However, the Law on EIT says otherwise.

No	Law	Type of Crime	Threat of Punishment
1		Intimidation(368)	9 months
2		Spreading Hostility (156)	4 years and a fine of Rp 4500
3		Spreading Hostility (157)	2 years 6 months and a fine of RP 4500
4		Intimidation (27 section 4)	Imprisonment for 6 years and a fine of RP1 billion
5		Intimidation (29)	12 years and a fine of RP1 billion
6		Spreading Hostility (28 section 2)	6 years and a fine of RP1 billion

XI. The Controversial Article 27 section (3) of the Law on EIT

98. In the Law on EIT, defamation is not always differentiated based on its object and type, nonetheless it is as one with a criminal act grouped under Article 27 section 3 that says: "A person who willfully and unrightfully distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that contains insult and/or defamation."

99. In this formulation, there are three elements that should be examined, namely:
    1. The element of deliberateness and without right
    2. The element of distributing, transmitting and

making accessible Electronic Information and/or Electronic Documents

3. The element of containing degradation and/or defamation

100. It has become public knowledge that, since its birth, the Republic of Indonesia was never meant to be an authoritarian state; rather it was emphatically proclaimed that Indonesia is ruled by law. As declared by Frans Magnis Suseno, a state ruled by law is based on a desire that state power be used on the basis of good and just laws. Laws are the bases for all acts of the state, and these laws themselves must be good and fair – good because they are in accord with what is expected by society of the law, and fair because the basic intent of all laws is justice. There are four fundamental reasons for demanding that the duties of the state are held and run based on law:
(1) The rule of law,
(2) The demand for equal treatment
(3) Democratic legitimacy,
(4) Judiciousness.

101. In a state based on law, rules of statutory regulations that are created must contain the values of justice for all persons. As quoted by Wolfgang Friedman Jimly in his book 'Law in a Changing Society' "Organized public power (the rule of law in the formal sense) is differentiated from the rule of just law (the rule of law in the material sense). A state based on law in the formal (classic) sense involves the understanding of law in a narrow sense,

that is in the meaning of the written regulations and does not necessarily guarantee substantive justice. A state based on law in the material (modern) sense of the rule of just law is an embodiment of a state based on law involving within it a broad understanding of justice which becomes its essence rather than a mere functioning of regulations in a narrow sense. Rule of law can also be interpreted as a "*legal system in which rules are clear, well- understood, and fairly enforced*". Because of this, one characteristic of a state based on law is the existence of the rule of law with the principles of legality, predictability, and transparency."

102. Because one important characteristic of a state based on law is the rule of law, the mastery of legal language/ regulations is absolutely necessary for the officials who frame regulations (especially legislators), because the law is closely connected with the type of language that should be used in the form of norms that are systematic and logical such that they do not invite multiple interpretations.

103. Considering the view of Prof H.A.S Natabaya, LLB, LLM, the special characteristic of the uses of language in regulations is connected with its function in giving substantive ideas that are normative in the sense that they contain legal norms for outlining behavior in social life. The language of legislation demands greater accuracy and precision in the use of language – a demand that is not separate from the characteristics of law itself. Law as the totality of the regulations on behavior aimed at achieving order in society necessitates

assertiveness, precision and clarity even in the composition of sentences. Along with this, consistency is also demanded. All of these are meant to prevent the formulation of legal norms that have multiple meanings and are vague, thereby guaranteeing the rule of law.

104. There are several key issues in the vagueness of the formulation in Article 27 section (3) of the Law on EIT, namely:

XI.1. The element of willfulness and without rights

105. According to the explanation of the Minister for Communications and Information and the Minister for Law and Human Rights at the session of the Constitutional Court on 12 February 2009 the element **willfully** means that "the actor should will the distribution and/or transmission and/or make accessible Electronic Information and/or Electronic Documents and know that the Information and/or Electronic Document contains slander and/or defamation". While the **element without rights** in the same opportunity is interpreted as "unlawful formulation that can be interpreted as (1) contrary to law, and (2) in conflict with rights or without authority or without right".

106. The element by the of willfulness and without right was also defined differently Constitutional Court in its decision. Interesting facts can be obtained on how the CC gave a differing definition on "willfully" and "unrightfully" in its Decision No 50/PUU-VI/2008 and Decision No 2/PUU-VII/2009.

XI.2. The element of 'distribute'

107. The Law on EIT does not explain the definition of 'distribute.' Because of this, the official definition has to be taken from the Large Dictionary of the Indonesian Language that defines it as to channel (share, send) to several persons or to several places (such as the market, store).

In Decision No 50/PUU-VI/2008, the Petition to Examine Article 27 section (3) jo Article 45 section (1) of the Law on EIT, the CC declared (in bold):
"The elements of willfulness and without rights constitute a unit that, on the level of law enforcement, should be proven by the law enforcer. The elements "wilfully" and "without right" mean that the actor "wished" and "knew" consciously that his action was done without rights. In other words, the actor consciously wished and knew that the action of "distributing" and/or "transmitting" and/or "making accessible electronic information and/or documents" that contain libel and/or defamation. Now, the element without rights constitutes an element of being contrary to law. The inclusion of the element without rights is meant to prevent persons from doing the action of distributing and/or transmitting and/or making accessible electronic information and/or electronic documents that contain libel and/or defamation."
However, in the Decision on Case No 2/PUU-VII/2009, Petition to Examine Article 27 section(3) of the Law on EIT, the CC instead declared (in bold):

"That the element of wilfullness means that the actor wished and knew that the act of distributing and/or transmitting and/or making accessible electronic information and/or electronic documents and knew that the said information and/or electronic document contained libel and/or defamation, while the element without rights constitute it as unlawful. The element without right is intended to prevent a person doing the act of distributing and/or transmitting and/or making accessible electronic information and/or electronic documents and knowing that the information and/or electronic document contained libel and defamation from being convicted under the law.

XI.3. The element of 'transmit'

108. The Law on EIT likewise does not explain the definition of 'transmit.' Because of this, the official definition has to be taken from the Large Dictionary of the Indonesian Language which defines it as to send or to forward a message from a person (thing) to another person (another thing).

XI.4. The element of 'make accessible'

109. The Law on EIT likewise does not at all explain the definition of 'to make accessible' except only to give a definition of access, that is, an activity that brings about interaction with an Electronic System that stands on its own or within a network.

110. The totality of the element 'to distribute' or 'to transmit' in the world of IT fundamentally differs from the concepts in standard Indonesian. In the world of IT the phrase 'to distribute' is interpreted as to distribute copies that can be sent through the web, mailing list, peer to peer, broadcast, and through other servers; while to transmit is a part of the activity of distribution. The distribution of information is almost always by transmission, that is, a combination of several fragments/pieces of transmissions because of the necessary existence of an intermediary machine. The phrase 'to make accessible' will involve stakeholders (like the producer, the publisher, intermediaries: the host, isp/telephone company, internet shop/office, readers, and computers). And it is just possible that what is presented is not the actual content, but only a link address (hyperlink).

111. Besides this, if we refer to the opinion of Ronny M.Kom, M.H.; he explains it as follows:
"*The multi-interpretation that arises from the technical term "distribute" in Article 27 section (3) in the Law on EIT can result in unjust enforcement of the law viewed from the issuance of the sanction of imprisonment and/or a fine. For example, the difference in interpretation of "Does the word distribute in Article 27 section (3) in the Law on EIT concern offline or offline & online?"*

Sample case:

A person circulated a video in a compact disk containing defamation of an official. This video was

duplicated using a computer and distributed (change hands) to some people.

Interpretation 1: The word "distribute" in Article 27 section (3) Law on EIT includes distribution of electronic information offline (manual) & online; therefore this case makes use of the Law on EIT. If proven to fulfill Article 27 section (3) then criminal sanctions are applied in accordance with the LAW on EIT (more severe than the maximum criminal sanction).

Interpretation 2: The word "distribute" in Article 27 section (3) Law on EIT includes the distribution of electronic information online; therefore the case cannot make use of the Law on EIT, meaning it makes use of WvS. If proven to fulfill the elements of the articles on defamation, then criminal sanctions are applied according to WvS (lighter than the maximum criminal sanction).

Besides this multi-interpretation, the next is about the phrase "make accessible" in Article 27 section (3) in the Law on EIT which is contradictory to the understanding of "access" in Article number 15 in the Law on EIT. This contradiction gives rise to ambiguity which leads to legal uncertainty. In Article 27 section (3) of the Law on EIT, the phrase "make accessible" refers to accessing electronic information. On the other hand, "access" in Article 1 number 15 of the Law on EIT refers to having access to an electronic system. In the body of knowledge of Information Technology, the correct

understanding of "access" as stated in Article 1 number 15 of the Law on EIT is to have access to an electronic system. Thus, the phrase "make accessible" in Article 27 section (3) in the Law on EIT is clearly wrong.

The phrase "make accessible" carries the meaning "to give the ability to interact with an electronic system". To use an example: in an electronic system in the form of a website, the phrase "make accessible" means to spread, to refer to electronic information on the location/address/name of a domain of a website. Basically to make a link from one website to another website is an act that makes accessible a linked website. Unfortunately, with Article 27 section (3) of the Law on EIT, an innocent person can be imprisoned or fined because he or she is not able to prove inadvertence in making accessible a website containing defamatory information. The following explanations are given…

(1) That the information given in a website is dynamic, meaning it can be changed any time by the owner of the website as the controller, not the person who makes the link to the website.
(2) Linking to a website is a custom (tradition) in the dissemination of information in cyberspace. It is also this activity that helps the spread of knowledge quickly and widely. Unfortunately, the person making the link to a certain website is not the controller of the website he is linked to. Its control lies in the owner of the website whose identity is sometimes unclear, or who uses a fictitious identity.

112. Besides this, Prof. Soetandyo Wignyosoebroto also clarified his opinion in connection with Article 27 section (3). He explained that:

"*Those with objections to the enactment of Article 27 section (3) of this Law on EIT are none other than users of electronic media who will benefit from these means to distribute and/or transmit and/or make accessible electronic information and/or electronic documents that contain degradation and/or defamation, although these non-users cannot be charged as producers of electronic information/documents containing such degradation or defamation. Because users of electronic media are not makers of the electronic information/document that contain degradation and/or defamation, should they be charged as perpetrators (dader) or as "only" followers (mededader) or "merely" helpers of the perpetrators (medepleger)?*

Hence it is not fair if, amidst developments in the utilization of electronic information in these times, the users of electronic media with the aim of disseminating information must face the far greater risk of being regarded as perpetrators by colleagues who perform the same tasks with more conventional means, and even face far greater risks than the producers of information containing derogatory information/defamation themselves.

In fact, not only is it easy to use Article 27 section (3) of this Law on EIT to threaten those whose profession is to be distributors and/or transmitters of electronic information/documents, but also it is very threatening to those who "make accessible" the referred to electronic information/documents. Suddenly all of those who failed to filter information containing degradation and defamation (with norms that are often very subjective),

will soon be burdened with the responsibility for producing it as the agent (dader).

Being Burdened with the responsibility as participant (mededader)or as accessory to a criminal case (medepleger) is an imposition of liability that cannot be said to be fair.. How can they be considered participants or accessories to a crime if the principal agent (hoofddader) must still be sought in ways and procedures that are more complicated and difficult, and not be necessarily immediately asked for accountability? Experts who disseminate electronic information and/or documents note bene do not necessarily know that they contain derogation and/or defamation.

In fact for every regulation, especially those sanctioned with penalties, it should always be clear whose interests are going to be protected. When such protection also strives to be based on public law, casu quo in this case criminal law, certainly the subject whose rights are going to be protected by this law will suffer from the infringement of these rights which can harm not only private interests but also the interests of the public."
Sesungguhnya setiap peraturan perundang-undangan, khususnya yang bersanksi pidana itu, selalu mesti jelas kepentingan siapa (saja) yang akan dilindungi. Manakala perlindlungan itu juga diupayakan berdasarkan hukum publik, casu quo hukum pidana, tentulah subjek yang hak-haknya akan dilindungi oleh sebuah aturan hukum undang-undang itu mestilah hak-hak yang pelanggarannya tak hanya akan merugikan kepentingan privat melainkan juga kepentingan publik"

Furthermore, he also stated: *"However, threatening with a penalty that is equally heavy "The action of each person (who) willfully and unrightfully distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents containing degradation and/or defamation", (that is not necessarily known by him or her), is not acceptable. Treating each person who distributes and/or transmits and/or makes accessible electronic information and documents as part of their daily professional activities (de echte dader) in the same way as a defamer is also actually difficult to accept. Treating these distributors and transmitters as mendader or medepleger is not at all fair."*

113. Because of this, we argue that in general the inclusion, use and application of Article 27 section 3 of the Law on EIT is clearly problematic from the point of view of language and carry ambiguities because there is a high level of legal uncertainty that may result in innocent persons becoming victims in the enforcement of Article 27 section (3) of the Law on EIT.

XII. The threat of penalty in Article 27 section (3) jo Article 45 section (1) of the Law on EIT Kills Civil and Political Rights

114. Each individual who fulfills the elements regulated in Article 27 section (3) jo Article 45 section (1) of the Law on EIT, bears the implication of being penalized with

imprisonment of at most 6 (six) years and/or a fine of at most Rp1.000.000.000,00 (one billion rupiah).

115. Article 27 section (3) jo Article 45 section (1) of the Law on EIT with the threat of imprisonment of at most six years can be used to hinder the democratic process, particularly access to public offices that require that a person should never have been punished for a criminal act carrying the threat of imprisonment for five years or more.

116. The imposition of the threat of imprisonment of at most 6 (six) years can make Indonesian citizens lose their chance to sit in public office; the same thing will happen to an Indonesian citizen who becomes a part of the public service system and/or a government employee whose criticism conveyed by way of electronic media is perceived as defamatory towards his superiors or even his office: he would certainly be laid off as a government employee.

117. Just committing a criminal act as meant in Article 27 section (3) could make Indonesian citizens permanently lose their right to occupy public offices, merely because the framers of a law *a quo* failed to see and clarify whether a criminal act as meant in Article 27 section (3) of the Law on EIT includes crimes that can never be forgiven.

118. Because of this, the outcome for a defamer is not only imprisonment and an extraordinarily big fine, but also the absolute loss of the chance to be involved in

government administration or even to be a member of the legal profession.

119. To illustrate this, several laws connected with the enactment of Article 27 section (3) jo Article 45 section (1) LAW *a quo* can be quoted as a good explanation on this argument.

Article 58 letter f of Law No 12 Year 2008 on Revision II of Law No 32 Year 2004 on Local Government

A candidate for regional head or vice regional head is a citizen of the Republic of Indonesia who fulfills the following requirement; has never been sentenced to prison based on a decision of a court vested with the appropriate legal power for committing a crime punishable with imprisonment of 5 (five) years or more.

Article 5 letter n in Law No 42 Year 2008 on Elections for President and Vice President

The requirement to become a candidate for President and candidate for Vice President is: has never been sentenced to imprisonment based on a decision of a court vested with the appropriate legal power for committing a crime punishable with imprisonment of 5 (five) years or more.

Article 12 letter g jo Article 11 section (2) Law No 10 Year 2008 on General Elections for the

House of Representatives, Provincial House of Representatives, and District House of Representatives

Article 11

(1) Participants in the General Elections to elect the members of the House of Representatives are individuals

(2) Individuals referred to in section (1) can become Participants in the General Elections after fulfilling the requirements.

Article 12

Requirement referred to in Article 11 section (2):

g. has never been sentenced to prison based on a decision of a court vested with the appropriate legal power for committing a crime punishable with imprisonment for 5 (five) years or more;

Article 50 section (1) letter g Law No 10 Year 2008 on General Elections for Candidates to the House of Representatives, Provincial House of Representatives, and District House of Representatives

Prospective candidates for the DPR, provincial DPRD, and district/city DPRD should fulfill the requirement: has never been sentenced to imprisonment based on the decision of a court vested with the appropriate legal power for committing a crime punishable by imprisonment of 5 (five) years or more;

Article 16 section(1) letter d Law No 24 Year 2003 on the Constitutional Court

In order to be appointed as a constitutional judge, a candidate must fulfill the requirement: has never been sentenced to imprisonment based on a decision of a court vested with the appropriate legal power for committing a crime punishable with imprisonment for 5 (five) years or more;

Article 3 section (1) letter (h) Law No 18 Year 2003 on Advocates

In order to be appointed as Advocate (a candidate) should fulfill the following requirement: has never been imprisoned for committing a crime punishable with imprisonment for 5 (five) years or more

Article 21 section (1) letter g Law No 2 Year 2002 on the Police of RI

In order to be appointed as a member of the police force of the Republic of Indonesia, a candidate should fulfill the requirement of at least the following: has never been imprisoned for committing a crime

Article 23 section (4) letter a Law No 43 Year 1999 on Revisions of LawNo 8 Year 1974 on Main Points for Employees

> Government civil employees can be honorably dismissed not at their own request or
> dishonorably dismissed because: they have been sentenced to prison based on a decision of a court vested with the appropriate authority for committing a crime punishable with imprisonment of four (4) years or more.

120. The above provisions explain how regulations on degradation or defamation in criminal law can very easily be used as a means to take revenge because they are easily used to criminalize someone and at the same time abrogate the civil and political rights of all the people of Indonesia..

121. This tendency of over criminalization and over legislation has already begun to happen in Indonesia, wherein lawmakers, if enabled to do so, will make regulations over everything and criminalize all actions.

122. Legislators are infested with the symptoms of mistrust in the capability of the people themselves to handle their own problems in the case of derogation or defamation. On account of this the crime trap that actually has already been regulated in Chapter XVI WvS on Defamation by legislators has been made more flexible and its penalty has also been made more severe; this matter adds to the conviction among the people of Indonesia that criminal law connected with the crime of defamation can easily be used as a means for revenge.

XIII. Repressive Legal Policies

123. The policies of criminal law in Indonesia in the context of defamation are clearly becoming more and more repressive. The government and the House of Representatives can be said to enjoy making various new offenses on defamation that actually already exist in WvS. It can also be said that the actions of the government and the House of Representatives can be likened to having a car with a broken rear window and what the government and the House of Representatives did was to buy a new vehicle rather than repair what was broken. Although it is highly repressive and not recommended, the regulations on criminal defamation in WvS are clearly still adequate if only utilized to prevent defamation on the Internet. This can be seen from various cases of defamation through the internet that have been charged and resolved using WvS, among others, the case of Ahmad Taufik, in the case of spreading the chronological (account of) the attacks on the office of Tempo by mailing list, and the case of Teguh Santosa, for the defamation of a religion by mailing list through the news website http://rakyatmerdeka.co.id.

124. All cases that involve the world of the internet still use and can still be covered by WvS, and the Supreme Court has never been forced to extend the analogy, in order to investigate cases of defamation through the internet by using WvS. And more importantly, there is not a single modern democratic state in the world that bears the offense of defamation in their various laws.

125. Besides this, the framers of WvS are clearly far wiser because they used various categorizations of offenses and different threats in the case of defamation. Nevertheless, if we look deeper into other laws that contain the offense of defamation, we see that this categorization of offenses has been removed; aside from this, the threat of penalty for them has increased without a philosophical basis to explain why it has been made more severe. In the discussion on the formulation of the Law on EIT, a philosophical reason was not found, except the reasons from the Police of the Republic of Indonesia and the Attorney General of the Republic of Indonesia, referring to the Public Hearings held by the Department of Communications and Information on 21 July 2006, for immediate arrest.

126. An interesting illustration was seen on Thursday, 19 March 2009, when Judge Arief Muliawan, LLB, LLM, Head of the Program for the Compilation of Reports and Evaluations, of the Attorney General of the Republic of Indonesia gave the explanation as a government witness in the session of the Constitutional Court by saying: "*Suppose an agent (defamator) is sentenced to 10 or even 20 years. This is not actually comparable to the effect caused by the action involved*"

127. Besides this, Article 27 section (3) of the Law on EIT also violates several principles of criminal law. One of these principles was acknowledged by the Constitutional Court, namely, in the Decision of the Constitutional Court No 4/PUU-V/2007 on the Petition to Examine Law

No 29 Year 2004 on the Practice of Medicine. The Court declared that "

(i) the threat of punishment cannot be used to achieve a certain end that basically can be reached through other means that are as effective and with a little less suffering and loss,

(ii) the threat of punishment cannot be used if its side effects will be more harmful compared to actions that will decriminalize it,

(iii) the threat of punishment should be rational,

(iv) the threat of punishment should maintain harmony among (the principles of) order, legitimation, and competence.

(iv) the threat of punishment should maintain equality among protection of the public. integrity, fairness, procedural and substantive justice."

128. Aside from this, based on the opinion of Dr. Yenti Ganarsih, LLB, LLM, expert on criminal law from Trisakti University, referring to the opinion of Hoenagels who emphasized the importance of considering various factors to criminalize (an act) while maintaining the proposition of ultimum remedium and prevent over-criminalization, among others : "

(a) Don't use criminal Law emotionally

(b) Don't use criminal law to criminalize an action whose victim or whose loss is not clear

(c) Don't use criminal law if the loss affected by the criminalization will be greater than the loss incurred by the crime that will be formulated

(d) Don't use criminal law if it is not strongly supported by the community

(e) Don't use criminal law if its use is thought to be ineffective
(f) Criminal law in certain cases should especially consider the scale of priorities in the interest of regulation
(g) Criminal law as a repressive tool should be utilized simultaneously with preventive means.

129. Based on the above given reasons, the existence of Law No 11 Year 2008 on Electronic Information and Transactions is like a two-edged sword because
(1) it provides a legal basis for business transactions carried out electronically.
(2) it provides a basis for repressive policies in criminal law.

XIV. Recommendations

1. That freedom of expression is a fundamental freedom that is important for the dignity of the individual for participation, accountability and democracy. Freedom of speech is a human right that is very strategic for the ways and workings of democracy, because democracy does not work without the freedom to express one's opinion, attitude, and expression.

2. That Indonesia has guaranteed freedom of expression and speech in its Constitution, that is, Article 28 F of the 1945 Constitution and in several laws, among them, Law No.39 Year 1999 on Human Rights; the International Covenant on Civil and Political Rights that was ratified by Indonesia with Law No. 12 Year 2005. Because of

this, the rights to freedom of expression and speech are among the strongest fundamental rights in the national legal system because they are clearly protected by the Constitution and several other legal documents. Violation of these rights does not only go against the law but also the constitutional rights of citizens.

3. That Indonesia has ratified the International Covenant on Civil and Political Rights in 2005 such that based on Article 2 of the Covenant, and that Indonesia should:
   a. Promise to honor and guarantee rights that are acknowledged in this Covenant for all persons within its territory and subject to its jurisdiction, without any distinctions based on race, skin color, gender, language, religion, other politics or opinion, national origin, social status, wealth, birth or other status.
   b. If not yet regulated in legal provisions or other existing policies, each State Party to this Covenant promises to take the necessary steps, according to its constitutional processes and other provisions in this Covenant, to enact legal provisions or other policies needed to put into effect rights that are acknowledged in this Covenant.
   c. Guarantee that each person whose rights or freedom as acknowledged in this Covenant are violated, will obtain effective restoration, even though the said violation was done by persons acting in an official capacity.

4. That based on Article 2 of the International Covenant on Civil and Political Rights, Indonesia is obliged to respect and guarantee rights that are acknowledged in this Covenant (including the right to freedom of expression

and of speech) for all persons within its territory and subject to its jurisdiction.: meaning, Indonesia should make changes in all laws and regulations that are in conflict with articles on rights that are guaranteed in the Covenant.

5. That Indonesian laws connected with the right to freedom of expression and of speech, among others, Article 27 section (3) of the Law on EIT, Article 310 WvS and Article 311 WvS are provisions that are in conflict with international provisions on human rights and more specifically in conflict with the guaranteed rights as stated in Article 19 of the International Covenant on Civil and Political Rights . Provisions like those in Article 27 section (3) in the Law on EIT, Article 310 WvS and Article 311 WvS are provisions that are not in line with the intent of Article 19 of the International Covenant on Civil and Political Rights including the regulation on the permissibility of restrictions. The use of these articles are a real threat to the guarantee of the freedom of expression and speech.

6. That the use of Article 27 section (3) Law on EIT, Article 310 WvS and Article 311 WvS to sue Ms. Prita Mulyasari is a charge that is unjust because the said articles are in conflict with Article 19 of the International Covenant on Civil and Political Rights.

7. That even though the Court will admit Article 27 section (3) LAW EIT, Article 310 WvS and Article 311 WvS as a norm that is in effect or that exists, the Court must apply them carefully given the guarantee of the

freedom of expression and of speech as guaranteed in the Constitution, the Law on Human Rights in Law No. 12 Year 2005 on the Ratification of the International Covenant on Civil and Political Rights.

8. That in the matter of the Court having stated that Ms. Prita Mulyasari has been declared innocent, the Court should provide restitution to Ms. Prita because her rights have been violated. This matter is stated in Article 2 of the International Covenant on Civil and Political Rights, namely, to guarantee that each person whose rights or freedom as acknowledged in this Covenant have been violated, shall obtain effective restitution even though the said violation was done by persons acting in their official capacity.

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ELSAM PROFILE

Institute for Policy Research and Advocacy (Lembaga Studi dan Advokasi Masyarakat), abbreviated **ELSAM,** is a policy-advocacy organization in form of Association, established in 1993 in Jakarta. Our objective is to participate in the effort of developing, promoting and protecting civil and political rights, and human rights in general – as mandated in Indonesia Constitution and Universal Declaration of Human Rights.

ELSAM develops four major activities, as follow: (i) policy and legal studies related to human rights; (ii) human rights advocacy; (iii) human rights education and training; and (iv) publication and dissemination of human rights information.

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