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Urgency of Rights Settings to be Forgotten in Electronic Personal Information with Government Regulations

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ABSTRACT

In the internet age, everything that has been recorded and stored will always be accessible again. News about the guilty verdict of a corruptor, for example, can still be found through a search engine even though the corruptor has served his sentence. The internet makes it difficult for people to forget their past. From there comes the desire of people to be free of memories of their past lives, which has the potential to be a bad stigma that looms throughout his life. Article 26 paragraphs (3) and (4) of the ITE Law regulate the concept of a right to be forgotten, which can be interpreted as the right to forget electronic data information. The birth of this concept was due to a concrete event of someone's data information that was already inaccurate, irrelevant or incorrect, thus creating a bad view (stigma) from the community against the person and violating the privacy rights (personal rights) of someone. However, the Government of Indonesia has not yet regulated clearly and in detail, the procedures for filing the deletion of the right to forgetting electronic personal data information in cyberspace. Therefore, this must be immediately regulated in a Government Regulation concerning the right to forgetting electronic personal data information in cyberspace through the courts.

Keywords: *Urgency, Settings, forgotten, data, personal*

1. INTRODUCTION

The 1945 Constitution of the Republic of Indonesia Article 28F states that "everyone has the right to communicate and obtain information to develop personal and social environment, and the right to seek, obtain, possess, store, process and convey information by using all channels available."

Based on that, the government needs to support the development of information technology through legal infrastructure and its regulation, so that the use of information technology is carried out safely, to prevent its misuse by paying attention to the religious and socio-cultural values of the community. The development and use of information, media and communication technology has changed both the behavior of people and human civilization globally [1]

The development of electronic information in society raises various crimes in cyberspace. So from cybercrime, the government has encouraged the birth of a Special Law governing criminal offenses outside the Criminal Code. One of the crimes is violating someone's privacy right, harming one party within the community using social media or being done through the Information and Communication Technology media, then Law Number 19 of 2016 concerning Amendment to Law Number 11 of 2008 concerning Information and Electronic Transactions (UU ITE). The article that the author focuses on is Article 26 paragraph (3) and (4) of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions.

The author is interested in analyzing Article 26 paragraph (3) and paragraph (4) of the ITE Law which does not yet have a technical regulation that specifically regulates the implementation of the *right to be forgotten* in Act Number 19 of 2016 concerning Information and Electronic Transactions.

2. METHODOLOGY

The method used in this paper is a normative juridical method, namely research that places law as a norm building system [2]**.** Normative juridical writing approaches that conceptualize the law as rules, norms, principles or dogmas [3]. This writing shortly g of identifying and analyzing the regulations relating to the protection of personal data information electronically linked to human rights, especially in the field of information technology, namely the right to be forgotten (*rights to be forgotten*). Besides, it uses a comparative approach with European Union regulations, namely the *General Data Protection Regulation*.

3. THE URGENCY OF REGULATING THE RIGHT TO BE FORGOTTEN ABOUT ELECTRONIC PERSONAL DATA INFORMATION WITH GOVERNMENT REGULATIONS

Before discussing the setting right to be forgotten (*rights to be forgotten)*, first discussed the concept of human rights in Indonesia, because the right to be forgotten is one part of human rights.

A. The concept of human rights in the 1945 Constitution

According to Mahfud MD, human rights are interpreted as rights inherent in human dignity as God's creatures, and these rights are brought by humans since birth to the earth so that these rights are holy is not a gift of humans or the State [4].

Responding to the 1945 Constitution on Human Rights, there are diverse views. At least, there are three groups of views, namely; *first*, those who are of the view that the 1945 Constitution does not guarantee human rights comprehensively, *second*, those who hold the 1945 Constitution provide guarantees for human rights comprehensively; and *third*, is of the view that the 1945 Constitution only provides the basic guarantees for human rights.

Mahfud, MD, and Bambang Sutiyoso supported the first view. It is based that the term human rights are not found explicitly in the Preamble, Body, or explanation. According to Sutiyoso in the 1945 Constitution, it was only found the words of the rights and obligations of citizens, and the rights of the DPR [5] explicitly.

According to Mahfud MD, the 1945 Constitution only talks about HAW or citizens' rights (particularistic human rights). Between the two, HAM and HAW are different. The first bases itself on the understanding that human nature, everywhere, has innate rights that cannot be moved, taken, or transferred. Only possible because someone has citizenship status [6]

The *second* view *is* supported by Soedjono Sumobroto, Marwoto, Azhary, and Dahlan Thaib. Sumobroto and Marwoto said the 1945 Constitution raised the phenomenon of human rights that live among the people. On that basis, the human rights implied in the 1945 Constitution stem from the basic philosophy and view of the nation's life, namely Pancasila. The enforcement of human rights in Indonesia is in line with the implementation of the Pancasila values in the life of the nation and nation. In other words, Pancasila is human rights values that live in the nation's personality [6]

The *third* group *was* supported by Kuntjoro Purbopranoto, GJ Wolhoff, and M. Solly Lubis. According to Kuntjoro, the guarantee of the 1945 Constitution against Human Rights is not non-existent, but in its provisions, the 1945 Constitution disrupts him in an unsystematic manner. [6]

All three have different perspectives and benchmarks. Therefore, indeed, in the 1945 Constitution, there was no firm arrangement found. Consequently, various interpretations of the quality of content and guarantees of the 1945 Constitution on human rights emerged. However, one thing that deserves a positive presentation is that the founders of the Indonesian people had succeeded in formulating a national life order along with guarantees for human rights, long before the international community formulated the UN universal declaration of human rights (UDHR), 10 December 1948

In the second amendment, the 1945 Constitution underwent significant changes for the development of human rights protection in Indonesia. The article on human rights lies in a separate chapter, Chapter XA. Although there is only one chapter, the article consists of 26 provisions. Substantially, the regulating rights therein cover the first generation to fourth generation human rights. Human rights in the 1945 Constitution are listed in Article 28A to Article 28J [7]

Article related to the topic in this paper is Article 28F: Right to communicate, obtain information, right to seek, obtain, own, store, process and convey information using all types of available channels. Article 28F is classified as a provision that follows the latest developments in the field of communication and information technology development that is increasingly growing.

The regulation of human rights in the second amendment of the 1945 Constitution is also based on the principle of nonretroactive; that is, the principle cannot be prosecuted for retroactive laws. The emergence of this principle surprised many parties because at that time demands to uncover past human rights violations were being intensively carried out, such as the Tanjung Priok case, cases of violence in Aceh during the enactment of military operational areas (DOM) and other cases classified as *impunity* [7].

However, it must be recognized that the regulation of human rights contained in the 1945 Constitution, especially after the enactment of the fourth amendment to the 1945 Constitution is a success as well as *the starting point* in law enforcement and human rights efforts in Indonesia. The second amendment to the 1945 Constitution, especially in Chapter XA on Human Rights provides a significant basis for the constitutional guarantee of Indonesian Human Rights.

B. Urgency setting Right to be forgotten Electronic Personal Data Information with Government Regulation

In Law No.11 of 2008 on Information and Electronic Transactions (ITE Law), there are 4 (four) problems that have prompted the government, especially the Ministry of Communication and Information Technology (Menkominfo) and the Ministry of Law and Human Rights (Menkumham) to make updates or revision of the ITE Law. Issues that underlie the Government to make revisions as follows:

First, the cancellation of interception procedures that will be regulated using government regulations, the Constitutional Court (MK) Decree Number 5 / PUU-VIII / 2010 which was read in the Plenary Session on Thursday, February 24, 2011, which stated Article 31 paragraph (4) of Law Number 11 of 2008 concerning Information and

Electronic Transactions is contrary to the 1945 Constitution of the Republic of Indonesia, so it does not have binding legal force. The contents of Article 31 paragraph (4) are "Further provisions regarding the procedure for an interception as referred to in paragraph (3) shall be regulated by Government Regulation". According to the Court, the regulation regarding interception should be regulated by law.

The event of the cancellation of interception arrangements with government regulations article 31 paragraph 4 needs to get a policy and juridical response, because the cancellations of the regulation regarding the interception by the Constitutional Court lead to legal consequences, and must be obeyed as a form of fundamental constitutional obedience.

Secondly, the emergence of objections of some people towards Article 27 paragraph (3) regarding defamation and / or insults via the internet which led to *constitutional review of* Article 27 paragraph (3) to the Constitutional Court by two parties, each the first petition by Narliswandi Piliang on November 25, 2008 and the second petition by Eddy Cahyono and friends on January 5, 2009. In a *constitutional review* session at the Constitutional Court it was revealed that the objections of the plaintiffs were against the criminal provisions contained in the Law on ITE, especially the threat of criminal sanctions in Article 45 paragraph (1), namely a maximum imprisonment of 6 (six) years and/or a maximum fine of Rp1,000,000,000.00 (one billion rupiahs). This provision is considered too heavy compared to the threat of sanctions in Article 310 paragraph (1) of the Criminal Code, namely maximum imprisonment of 9 (nine) months or a maximum fine of four thousand five hundred rupiahs. The impact of regulating the threat of imprisonment for 5 (five) years or more, has consequences following the provisions of the Criminal Procedure Code that suspects that the perpetrators of criminal offenses in question can be subject to arrest.

Third, the provisions of ITE article 43 paragraph (3) and (6) cause problems for investigators due to criminal offenses in the field of Information Technology and Electronic Transactions so quickly and perpetrators can easily obscure criminal acts or evidence.

Fourth, Regarding law enforcement in terms of search, seizure, arrest which requires the permission of the head of the court to several authorities of Civil Servant Investigators (PPNS) which slow down the law enforcement process.

Seeing these conditions, there is a contradiction in which the law is not a goal, but a means to achieve goals in both aspects of justice, legal certainty, and legal usefulness. So that regulations can be understood is not as the final achievement of the formation of law. Constitutionality and social aspects or encouragement of growth (*wholesale stimulus*) from outside the law, including variables that will affect the effectiveness of the regulation, are important to be used as the basis for making the right steps in producing a better law.

In the Academic Paper which has been formulated by the Ministry of Law and Human Rights which involves several agencies to go through the process of harmonizing the ITE Bill. President Joko Widodo formally submitted the draft of the Law on Amendments to the Law on Information and Electronic Transactions (the ITE Law Revision Bill) to the House of Representatives (DPR). Through a letter numbered R-79 / Pres / 12/2015 dated December 21, 2015, the President also assigned the Minister of Communication and Information and the Minister of Law and Human Rights to represent the government in the discussion of the Draft ITE Law with the DPR RI.

In the discussion of the ITE Bill on 13 April 2016, several faction representatives from the Indonesian Parliament gave some opinions in the ITE Bill Inventory List (DIM). In the discussion, the faction of the PAN party represented by Budi Youyastri provided input to the government regarding the ITE Bill. According to him, the government still has homework for the ITE Bill, which is as follows:

That this is not only an economic problem, but also a matter of human and social life, we are also citizens, and the following has also been discussed about legal actions, in which there are acts against the law and standard definitions, so I do not agree with the statement of the Minister that the world then the internet is just a *tool* , it doesn't change social behavior and doesn't do any new unlawful acts. Because of the nature of the internet, it is indeed fast, but real-time is also cereble. Besides cereble other characters are in the challenge is about that in immortal. I say that we define the new as a consequence of the attitude of the Government; there must be new articles appear. That Forgotten right must enter. *Forgotten Rights* is the authority of the State to protect the rights of its citizens, and should not be regulated by Google or Yahoo.

The opinions of Budi Youyastri are included in the DIM that has been formulated by the working committee (Panja). The Working Committee discussed DIM in terms of formulation based on the substance decided by the Working Committee and submitted to the Formulation Team, the Synchronization Team to make improvements to the formulation and editorial and discuss general explanations and explanations article by article. The team also synchronize all articles and verses so that it becomes a systematic bill.

Both of team reported their work in a working group meeting on October 17, 2016, which was read to the House of Representatives Commission I Coordination Meeting with the Government on October 20, 2016. In its report, Team added the provisions on the obligation to delete electronic information and or irrelevant electronic documents in article 26, which reads as follows:

"(3) Every Electronic System Operator is obliged to delete irrelevant Electronic Information and/or Electronic Documents under its control at the request of the Person concerned based on a court decision."

"(4) Every Electronic System Operator must provide a mechanism for deleting Electronic Information and/or Electronic Documents that are no longer relevant by statutory provisions."

"(5) Provisions regarding the procedure for deleting electronic information and/or electronic documents as referred to in paragraph (3) and paragraph (4) shall be regulated in a Government Regulation."

In this article, the Government added the concept of the *right to be forgotten,* electronic data information and or electronic documents to restore the names of both perpetrators and victims who felt their privacy rights were impaired. Amendments to this Law anticipate the leakage of personal data that is absolutely undesirable for a person to do. This is a form of state protection for the personal rights of its citizens.

Article 26 paragraph (3) and paragraph (4), regulates the obligation for electronic system operators to delete information and electronic documents because they are no longer relevant or related to court decisions. The word element of the implementation of the electronic system is the organizer of the State, person, business entity, and/or community such as Google, Facebook WhatsApp, etc. (Article 1 paragraph (6) of the ITE Law). This provision is very popularly referred to as *Right to be Forgotten* or the right to forgetting electronic personal data information because it can restore the good name of someone who was said to have been involved in a crime, but the court has found him not guilty. This formulation is in line with the appreciation of the privacy of every citizen protected by the 1945 Constitution article 28 H and I.

Before the author conveys the concept of the procedure for submitting the Right to Forgotten Electronic Personal Data Information in Indonesia, the author will first convey an example of the *Right To Be Forgotten case* in Europe between Mario Costeja Gonzales with Google Inc. located in Spain.

The case of Google Spain SL and Google Inc.

Starting with the La Vanguardia report related to a bankruptcy case that was experienced by a Spanish citizen in 1998, Mario Costeja Gonzalez filed a lawsuit in 2010 to Agencia Española de Proteccion de Datos (AEPD) agency in Spain authorized to handle cases of personal data violations against La Vanguardia and Google Inc. and Google's subsidiary in Spain, Google Spain SL.

Google Inc. and Google Spain SL were also sued because every time an internet user entered the name Gonzalez into the Google search engine, Google displayed a link that directed the user to the La Vanguardia webpage that contained González's bankruptcy news in 1998.

In his lawsuit, González requested (1) La Vanguardia to delete or change web pages that contained news about him and (2) Google Inc. or Google Spain SL to delete or hide information about themselves so that every time an internet user searches, news links about his Gonzalez bankruptcy do not appear in the search results list. Gonzalez filed this lawsuit because the bankruptcy case he experienced was resolved so that the news on him became no longer relevant.

In its decision, although Gonzalez's first request was rejected because La Vanguardia made the news according to the provisions in force in Spain and was carried out to find as many bidders as possible, AEPD granted Gonzalez's second request. Feel disadvantaged by the AEPD ruling, Google Inc. and Google Spain SL filed a legal remedy by filing a lawsuit with the Spanish high court, Audiencia Nacional. However, Audiencia Nacional does not directly serve Google's lawsuit because of the legal aspects that require clarity. As a result, Audiencia Nacional asked the European Union Court as the highest court in the European Union to provide enlightenment related to this case.

On 13 May 2014, the European Union Court finally gave a decision related to the Google case. In connection with *Right To Be Forgotten*, the following are the conclusions of the European Union Court:

1. If data about a person is processed by the search engine operator and it violates that person's *fundamental rights*, then the search engine provider cannot process under the pretext of having *legitimate interests* (for example, seeking profit). As information, processing data in this context means collecting, recording, organizing, compiling, storing, changing, using, announcing and/or other activities concerning a person's data (generally using automation methods);
2. Individuals can ask search engine organizers to delete links to third party web pages that contain information about the individual that appears in search results conducted by internet users through the search engine owned by the organizer, as long as the information is considered (a) *inaccurate* , (b) inadequate *(inadequate)* , (c) no longer relevant *(no longer relevant)* or (d) deviate *(excessive)* from the original purpose of the information is used; and
3. In the case of information about a person it is deemed necessary to be known by the general public or in the public interest (for example: the information referred to relates to people who have an important role or position in a country, so people need to find out information about themselves), the above provisions can distorted and the organizer does not need to delete or do anything.

The *right to be forgotten* rule based on Google's case ruling and Article 17 of the GDPR is not only directed at the data owner. The two legal sources regulate the *right to be forgotten in* such a way that the application is balanced and does not violate or discredit the rights or interests of other parties. Also, the *check and balance* rules are clearly spelled out, thereby reducing the potential for abuse of the *right to be forgotten*. The provisions concerning the *right to be forgotten* in Law Number 19 of 2016 is only focused on granting rights to individuals to demand the deletion of information or data concerning the individual (Article 26 paragraph (3)). The lack of a *right to be forgotten* arrangement has the potential to cause legal uncertainty, and the organizers of electronic systems are likely to be the parties that feel the most impact.

Article 26 paragraph (5) of the ITE Law explains that "Provisions regarding the procedure for deleting Electronic Information and / or Electronic Documents as referred to in paragraph (3) and paragraph (4) are regulated in government regulations". In this case, the government must create a PP to regulate the right to forgetting electronic personal data information. Government

regulations must contain several points so that their implementation is balanced and does not violate or discredit the rights or interests of other parties. In the author's opinion, the important points that need to be included in the Government Regulation are as follows:

1. Detailed and detailed regulation of the *legal standing* of electronic system organizers or parties who have personal data and who have electronic documents, for example: in the European Union, the press does not include electronic system organizers because the press is protected by the Press Law.
2. Detailed and detailed arrangements, regarding exceptions to the right to be forgotten or about anything that is not allowed to be eliminated in an electronic system, for example: in EU regulations that do not include deletion in *search engines* is the right to freedom of expression, in the public interest in the health sector, and to carry out tasks in the public interest.
3. Arrangements regarding sanctions to the petitioners and the respondent concerned in *balance*, for example, sanctions to Google as the respondent who do not heed the rule of law, and witnesses to people or the public as applicants who exercise their rights for personal purposes and refuse to the public interest.
4. Set the procedures for filing the deletion of electronic documents, the procedures required in government regulations as follows:
   a) Applicants or parties who have personal data can apply the electronic system operator to delete irrelevant electronic documents;
   b) If the petition of the applicant is rejected by the electronic system organizer and the applicant objects, the applicant can file a lawsuit to the court.

4. CONCLUSION

A. The urgency of regulating the right to be forgotten *(rights to be forgotten)* in Article 26 of Law Number 19 the Year 2016 concerning Information and Electronic Transactions to Government Regulations. Protection of the *right to be forgotten is* already contained in Article 26 of the ITE Law but has not been further regulated in a Government Regulation regarding the technical implementation of the provisions.

B. The concept of procedures for the submission of the right to obliterate personal information and personal information through an authorized agency

1. Detailed and detailed arrangements regarding *Legal Standing* for electronic system providers or parties that have personal data and who have electronic documents.
2. Detailed and detailed arrangements, regarding exceptions to the right to be forgotten or about anything that is not allowed to be written off in an electronic system
3. Arrangements regarding sanctions to the applicant and the respondent concerned in a *balanced* manner
4. Applicants or parties who have personal data can apply to the organizer of the electronic system to delete irrelevant electronic documents
5. If the petition of the applicant is rejected by the electronic system organizer and the applicant objects, the applicant can file a lawsuit to the court

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