

The Court Online Content Moderation: A Constitutional Framework



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ABSTRACT

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This study aims to see and describe the practice of electronic justice in Indonesia based on the digital constitutionalism approach; as a concept that tends to be new, Digital Constitutionalism in its development also accommodates the due process online in scientific discourse. This research is normative legal research using a statutory and conceptual approach. Based on the research results, it is known that the practice of electronic justice in Indonesia still uses procedural law guidelines, which are conventional procedural law and internal judicial regulations. In contrast, the development of electronic justice that utilizes technological advances is insufficient to use conventional procedural law in its implementation because it is annulled. It has not been oriented to the protection of Human Rights as conceptualized in the Digital Constitutionalism discourse, which includes due process online. So the regulation of electronic justice in the future must be based on Digital Constitutionalism, which includes knowing the due process online by prioritizing the protection of human rights in a virtual scope from the provider of electronic judicial technology facilities.



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1. Introduction

The classic adage states, "*ubi societas, ibi ius*", where there is society, there must be law. From this adage, it is read that the law always goes hand in hand with the development of society. Paul Scholten stated that the legal system is an open system; that is, it is unfinished and will not be completed by its original nature because it is the basis of all decisions that add new things to the system.¹ "law is

¹ William Dubinsky, Daniel A. Farber, and Philip P. Frickey, *Law and Public Choice: A Critical Introduction*, *Michigan Law Review*, 1992, xC <https://doi.org/10.2307/1289429>

the same society", so "new community relations will form new regulations."² Thus, the opinion that the law always lags behind the pace of community development (het recht hinkt achter de feiten aan) must be interpreted as limited to written law (rules, statutory regulations), which indeed become a static document once the hammer is ratified. The law as principles and moral values will always move dynamically following the development of society.³

The rate of development of information technology in this civilization certainly affects the practice of justice. Previously, case administration was carried out manually which took a long time and was high in cost, and information technology has accelerated, simplified and reduced the cost of administering cases in the judiciary. If, in the beginning, it was a change from a manual typewriter to a computer, now it has developed further towards digitization in the execution of judicial tasks. For case handling, there is a Case Investigation Information System (SIPP); for personnel administration, there is a Personnel Information System (SIKEP); for supervision, there is a Surveillance Information System (SIWAS); as well as various other information systems developed by the Work Units at the First Level and Appeals such as the Integrated Public Service (Excellent Court Services) developed by various judicial systems, especially in Indonesia.⁴

Information technology for judicial tasks proliferates toward Electronic Courts (e-Court), where information technology is utilized in case administration and implementation of procedural law. In comparison, in Australia, there is already an Online Dispute Resolution, where litigants can settle their disputes online.⁵ In the United States, since 1999, Public Access to Electronic Records (PACER) has been initiated; there is also a Case Management and Electronic Case Files (CM/ECF) system and various uses of information technology to support judicial tasks. In India, The Supreme Court of India, on May 10, 2017, launched the Integrated Case Management Information System (ICMIS), and will soon launch an information system for handling crimes that are integrated with the Indian Police in the form of Crime and Criminal Tracking Network and Systems (CCTNS).⁶

² H Anderson, 'Directors' Liability for Corporate Faults and Defaults International Comparison', *Pacific Rim Law and Policy Journal*, 18.1 (2009), 1–51 <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/518/18PacRimLPolyJ1.pdf?sequence=1>

³ Chris Marsden, Trisha Meyer, and Ian Brown, 'Platform Values and Democratic Elections: How Can the Law Regulate Digital Disinformation?', *Computer Law and Security Review*, 36 (2020), 105373 <https://doi.org/10.1016/j.clsr.2019.105373>

⁴ Vicki Wayne and Ping Xiong, 'The Relationship between Mediation and Judicial Proceedings in China', *Asian Journal of Comparative Law*, 6.1 (2011) <https://doi.org/10.2202/1932-0205.1312>

⁵ Oksana MELENKO, 'Mediation as an Alternative Form of Dispute Resolution: Comparative-Legal Analysis', *European Journal of Law and Public Administration*, 7.2 (2021), 46–63 <https://doi.org/10.18662/eljpa/7.2/126>

⁶ Anggita Anggraeni, 'Penal Mediation As Alternative Dispute Resolution: A Criminal Law Reform In Indonesia', *Journal of Law and Legal Reform*, 1.2 (2020), 369–80 <https://doi.org/https://doi.org/10.15294/jllr.v1i2.35406>

In the Indonesian context, this has indeed emerged and been practised in various judicial practices at the regional court level. The Supreme Court (MA) or the Constitutional Court (MK) and even in several institutions, there are internal regulations that were formed to accommodate this; it is just that there are still some fundamental questions from these provisions, for example, what is the legal basis for the implementation of the digital justice practice? Is it enough just to be regulated at the level of internal regulations of the Supreme Court or the Constitutional Court?⁷ It is essential to question this because talking about the judicial system cannot be separated from the Due Process of Law, which collides itself with human interests or the community's human rights.⁸

Thus the discourse on the technological approach in law is indeed quite fast in tandem with the development of technology itself. In the context of judicial institutions that use an electronic technology approach in carrying out judicial duties, it is said that this approach is instrumental in preventing corruption and maladministration in the judiciary.⁹ For example, the application of the Directory of Decisions, where the Decisions of Judges/High Judges/Supreme Judges, which are published and announced online, have been proven to reduce corruption that is carried out by utilizing decision information. Likewise, the Information and Case Investigation System (SIPP) application is beneficial for judicial officials in completing case administration so that there are no more maladministration complaints such as missing case files, unclear trial dates and events, to very long case minutes.¹⁰

However, that is not enough; today's world has also changed along with technological advances. One of them is the emergence of the Digital Constitutionalism discourse in developing world constitutional law, often referred to as the new constitutionalism.¹¹ The most substantive thing in the discussion about Digital Constitutionalism is the Due Process Online, which is conceptually different from the principle of Due Process of Law in general.¹² The question then is whether the practice of electronic justice regulated in the current internal

⁷ Roger Koppl and Meghan Sacks, 'The Criminal Justice System Creates Incentives for False Convictions', *Criminal Justice Ethics*, 32.2 (2013), 126–62 <https://doi.org/10.1080/0731129X.2013.817070>

⁸ Mokh Najih and Fifik Wiryani, 'Learning the Social Impact of Corruption: A Study of Legal Policy and Corruption Prevention in Indonesia and Malaysia', *Journal of Social Studies Education Research*, 11.4 (2020), 175–89. <https://doi.org/10.1080/0731129X.2013.817070>

⁹ Karmawan, 'Mediation in The Religious Courts of Indonesia', *Ahkam: Jurnal Ilmu Syariah*, 20.1 (2020), 79–96 <https://doi.org/10.15408/ajis.v20i1.13249>

¹⁰ Hilman Syahril Haq and others, 'The Institutionalization of Community Mediation for Resolving Merarik Marriage Disputes in Sasak Community', *Jurnal Media Hukum*, 26.1 (2019), 1–10 <https://doi.org/10.18196/jmh.20190118>

¹¹ Emilio Peluso Neder Meyer, *Digital Constitutionalism, Constitutional Erosion in Brazil*, 2021 <https://doi.org/10.5040/9781509941971.ch-007>

¹² Giovanni De Gregorio, 'Democratising Online Content Moderation: A Constitutional Framework', *Computer Law and Security Review*, 36 (2020), 105374 <https://doi.org/10.1016/j.clsr.2019.105374>

regulations of the judiciary has prioritized and guaranteed Due Process Online as stated in the Digital Constitutionalism discourse.

2. Research Method

This research is normative legal research using a statutory and conceptual approach.¹³ Conceptually referred to in writing, this law is the concept of Digital Constitutionalism which is developing in the global constitutional law community. The concept is dissected in such a way as to see whether the practice of electronic justice in Indonesia currently being carried out is based on the concept of Digital Constitutionalism.¹⁴ By analyzing several related legal products, including: a. Law Number 48 of 2009 concerning Judicial Powers; b. Supreme Court Regulation Number 1 of 2019 concerning Electronic Administration of Cases and Trials in Courts; c. Supreme Court Regulation Number 4 of 2020 concerning Administration and Trial of Criminal Cases in Electronic Courts.

3. Results and Discussion

The Moderation of Court in Indonesia

Article 28D paragraph (1) of the 1945 Constitution states that everyone has the right to fair recognition, guarantees, protection, legal certainty, and equal treatment before the law. This article shows two critical principles: due process of law and the principle of equal treatment before the law.¹⁵ Mardjono Reksodiputro stated that the term due process of law is translated with the term fair legal process. The opposite of the due process of law is an arbitrary process, for example, only based on the power of law enforcement officials. Due process of law is often misinterpreted in its meaning; this is because the meaning and nature of a fair legal process are not only in the form of the application of law or legislation, which is assumed to be formally fair but also contains guarantees of the right to independence of a citizen.¹⁶

To create a due process of law, judicial freedom is fundamental. The judiciary must be completely free from all interests, including the influence of certain castes,

¹³ Rian Saputra and Silaas Oghenemaro Emovwodo, 'Indonesia as Legal Welfare State: The Policy of Indonesian National Economic Law', *Journal of Human Rights, Culture and Legal System*, 2.1 (2022), 1–13 <https://doi.org/https://doi.org/10.53955/jhcls.v2i1.21>

¹⁴ Rian Saputra and others, 'Reform Regulation of Novum in Criminal Judges in An Effort', *JILS (Journal Of Indonesian Legal Studies)*, 6.2 (2021), 437–82 <https://doi.org/https://doi.org/10.15294/jils.v6i2.51371>

¹⁵ Ngesti Prasetyo and others, 'The Politics of Indonesias Decentralization Law Based on Regional Competency', *Brawijaya Law Journal*, 8.2 (2021), 159–84 <https://doi.org/10.21776/ub.blj.2021.008.02.01>

¹⁶ Giovanni De Gregorio, 'Digital Constitutionalism in Europe Reframing Rights and Powers in the Algorithmic Society', *Gastronomía Ecuatoriana y Turismo Local.*, 1.69 (1967), 5–24. <https://doi.org/10.1080/0731129X.2013.817070>

classes, or groups.¹⁷ The absence of judicial freedom causes the due process of law meaningless. Judicial freedom requires a fair and impartial trial; judges do not discriminate between people in their profession.¹⁸ In the context of the Criminal Procedure Code, the implementation of the concept of due process of law, according to Mardjono Reksodiputro, is reflected in the principles of the Criminal Procedure Code, namely general legal principles and specific legal principles.¹⁹

General legal principles include; a) equal treatment in public without any discrimination; b) presumption of innocence; c) the right to obtain compensation (compensation) and rehabilitation; d) the right to obtain legal assistance; e) the right of the defendant's presence in court; f) free trial and carried out quickly and; g) courts that are open to the public. Meanwhile, specific legal principles include: (1) violations of individual rights (arrest, detention, search, and confiscation) must be based on law and carried out with a (written) warrant; (2) the right of a suspect to be informed of his suspicions and charges against him; and (3) the obligation of the court to control the implementation of its decisions.²⁰

The due process of law contains two critical principles: the principle of equal treatment (equality before the law) and the principle of presumption of innocence. The principle of equal treatment before the law means that every citizen, including the suspect/defendant, must be given the same opportunity to exercise the rights that have been determined by law, such as the right to obtain legal assistance and the right to provide information legally: freedom and the right to be tried by an honest and impartial tribunal.²¹ While the principle of presumption of innocence means that every suspect and defendant must be presumed innocent before his guilt is proven in court and stated in a decision with permanent legal force.²² Simply put, the purpose of the due process of law is to minimize the arbitrariness of the state against the community in the judicial process because in the conventional judicial process, especially in the scope of law with a public dimension, the state vis a vis the community.

This is different from the due process online; the principle that was born at the same time as the Digital Constitutionalism discourse states that in a digital society, the state is not the only dominant actor whose power can directly affect individual rights. Private companies creating, managing and selling digital technology

¹⁷ Chuanman You, 'Law and Policy of Platform Economy in China', *Computer Law and Security Review*, 39 (2020), 105493 <https://doi.org/10.1016/j.clsr.2020.105493>

¹⁸ Edy Lisdiyono, 'Improving Legal Argument Critically in the Litigation Mechanism in Indonesia (an Empirical Study of Environmental Verdicts)', *Sriwijaya Law Review*, 1.1 (2017), 64–73 <https://doi.org/10.28946/slrev.Vol1.Iss1.10.pp080-092>

¹⁹ Nathalina Naibaho and others, 'Criministrative Law Developments and Challenges in Indonesia', *Indonesia Law Review*, 11.1 (2021) <https://doi.org/10.15742/ilrev.v11n1.647>

²⁰ Lisdiyono.

²¹ Gregorio.

²² Mahrus Ali and M. Arif Setiawan, 'Penal Proportionality in Environmental Legislation of Indonesia', *Cogent Social Sciences*, 8.1 (2022) <https://doi.org/10.1080/23311886.2021.2009167>

products and services are the new Leviathan of the digital age.²³ Laidlaw, speaking specifically about Internet Service Providers and search engines, aptly defines these actors as 'online gatekeepers'.²⁴ In the case of search engines, their power to control access to information becomes apparent. Removing or simply downgrading search results is tantamount to being condemned to digital non-existence, consequently limiting an individual's right to access publicly available information. More generally, however, Laidlaw's description fits well across categories of tech companies. By controlling access to digital technology, they can shape the way individuals use these instruments. In this way, they have the potential to influence the exercise of our fundamental rights, which are not much different from how nation-states do it.²⁵

In this context, there is a debate about whether, to what extent, and how to apply the existing constitutional standards governing the exercise of state power to these private actors (technology companies).²⁶ As seen in the previous chapter, the constitutional system emerged to limit the power of the dominant actor and protect individuals' fundamental rights. Their historical mission, however, aims to overcome the state's power. Existing constitutional norms do not articulate principles limiting private entities' power. However, given the similarities between how the state and private companies can affect individual rights, one is intellectually tempted to apply these principles to the private sector, especially the private sector, whose performance orientation is towards the basic principles of society.²⁷

From a legal point of view, private actors are not formally bound by international human rights.²⁸ The state must ensure that private entities also protect these rights. In 2008, UN Special Representative John Ruggie issued a document setting out guiding principles on business and human rights, called the 'Ruggie principles. This text not only reaffirms the obligation of the state to prevent human rights violations committed by private actors but also vigorously affirms the responsibility of private entities to protect human rights. Although this

²³ Peter Alexander Earls Davis, 'Decrypting Australia's "Anti-Encryption" Legislation: The Meaning and Effect of the "Systemic Weakness" Limitation', *Computer Law and Security Review*, 44, September 2018 (2022), 105659 <https://doi.org/10.1016/j.clsr.2022.105659>

²⁴ Adiguna Bagas Waskito Aji and others, 'Social Justice on Environmental Law Enforcement in Indonesia: The Contemporary and Controversial Cases', *The Indonesian Journal of International Clinical Legal Education*, 2.1 (2020), 57–72 <https://doi.org/10.15294/ijicle.v2i1.37324>

²⁵ Alex Raskolnikov, 'Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty', *Columbia Law Review*, 106 (2006), 569–642. <https://doi.org/10.1080/0731129X.2013.817070>

²⁶ Randy Pradityo, 'Restorative Justice Dalam Restorative Justice in Juvenile Justice System', *Jurnal Hukum Dan Peradilan*, 5.3 (2016), 319–30 <https://doi.org/10.25216/jhp.5.3.2016.319-330>

²⁷ Siti Malikhatun Badriyah, 'Penemuan Hukum (Rechtsvinding) Dan Penciptaan Hukum (Rechtsschepping) Oleh Hakim Untuk Mewujudkan Keadilan', *Masalah-Masalah Hukum*, 40.3 (2011), 384-392–392 <https://doi.org/10.14710/mmh.40.3.2011.384-392>

²⁸ Whitfield Diffie and Susan Landau, *Privacy on the Line The Politics of Wiretapping and Encryption* (Cambridge, Massachusetts: Massachusetts Institute of Technology Press, 2007). <https://doi.org/10.1080/0731129X.2013.817070>

document is not legally binding and therefore imposes only a moral obligation on private actors, it witnessed the onset of a legal reaction against the power of private entities.

Such is the difference between the principle of due process of law and due process online, where in the due process online, the view is that the private sector is also considered a party that can commit acts of human rights violations through their performance orientation. One of the electronic service providers from the judicial practice is a private party; for example, will these service providers protect the privacy of justice seekers? This is important to discuss because it concerns the human rights of justice seekers.

The Regulation of Electronic Courts Based on Digital Constitutionalism

The practice of electronic justice that is currently being carried out in Indonesia still uses the basis of conventional procedural law. Usually, additional arrangements are formed at the level of internal regulations of each institution which still lacks attention to the concept of due process online which threatens the fundamental rights of justice seekers. . In more general judicial practice, for example, since the issuance of Supreme Court Regulation No. 1 of 2019 concerning the Administration of Cases and Trials in Electronic Courts (Perma No. 1 of 2019), the Perma does not only register cases that can be done online or known e-court, but the trial can also be conducted electronically, namely e-litigation.

Therefore, it is time for the practice of electronic justice in Indonesia to be regulated in rules at the level of separate legislation with content that pays attention to the provisions in the due process online. This can be taken by following the example of electronic justice arrangements in the United States, which have provisions regarding electronic justice through rules at the level of statutory regulations. In the United States the implementation of electronic trials in the United States has been carried out since 1998. The Administrative Office of the United States Courts reports that dozens of courts in various states have used information technology in the form of video teleconferences or electronic trials. The teleconference trial was carried out for various trial agendas, for example: giving testimony, court examinations by judges, and counselling. The terms used regarding electronic justice in the USA are Virtual Courts, Virtual Courtrooms, and Virtual Courthouses.²⁹

Justice development in the United States is influenced by the dissatisfaction of justice seekers with the existing legal system because seeking justice takes a long time and is expensive. Therefore, the Federal Civil Justice Reform Act 1990 carried out judicial reform with the concept of digitization after the creation of computer chips. The use of information technology makes the judiciary continue to proliferate.³⁰ The first state to conduct a cyber court trial was state of Michigan.

²⁹ Gregorio.

³⁰ Anita Afriana, 'A Fast Procedure As an Access To Justice in Order To Realize a Simple, Fast, and Low Cost Principle in Indonesia', *Jurnal Dinamika Hukum*, 16.1 (2016), 99–105 <https://doi.org/10.20884/1.jdh.2016.16.1.489>

Based on House Bill 4140, approved in November 2001 and passed as Public Act 262 of 2001 on January 9, 2002, the cyber court is intended for cases relating to the use of technology and high-tech business, in which cases are more effectively tested. Furthermore, tried through computer media rather than the courtroom examination method. Parties such as jurors, defendants, lawyers and judges do not have to be in the courtroom but can use video conference as a communication medium in the trial examination process.

4. Conclusion

Electronic justice practice in Indonesia still uses procedural law guidelines, which are conventional procedural laws coupled with internal judicial regulations. In contrast, the development of electronic justice that utilizes technological advances is insufficient to use conventional procedural law bases in its implementation because it is annulled and has not been oriented to protecting rights—Human Rights as conceptualized in the Digital Constitutionalism discourse, which includes the due process of online. So the regulation of electronic justice in the future must be based on Digital Constitutionalism, which includes knowing the due process online by prioritizing the protection of human rights in a virtual scope from the provider of electronic judicial technology facilities.

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